

BALDWIN BRACELET CORP., ET AL.

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

Docket 8316. Complaint, Mar. 14, 1961—Decision, Dec. 18, 1962

Order requiring New York City distributors to cease selling metal expansion watch bands imported from Hong Kong with no marking to indicate their foreign origin ; and advertising watch bands as "guaranteed" or "fully guaranteed" when the guarantee was limited and conditional.

Complaint

61 F.T.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Baldwin Bracelet Corp., a corporation, and Nathan Goodman and Anne Goodman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Baldwin Bracelet Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 22 West 48th Street, New York, N.Y.

Individual respondents Nathan Goodman and Anne Goodman are officers of the corporate respondent. They formulate, direct and control the acts and practices of said corporate respondent, including the acts, policies and practices complained of herein. The place of business of said individual respondents is the same as that of the corporate respondent.

PAR. 2. The respondents are now and for some time last past have been engaged in the sale and distribution of products, including metal expansion watch bands. The respondents cause their said products, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, respondents sell and distribute, to watch manufacturers or assemblers, and to watch band jobbers and dealers, their said products, namely metal expansion watch bands. Said watch bands consist in whole or in substantial part of components which were manufactured in, and imported from, Hong Kong. When offered for sale or sold by respondents, said watch bands do not bear disclosure showing that they are substantially of foreign origin.

PAR. 4. When products consisting in whole, or in substantial part, of imported components are offered for sale and sold in the channels of trade, they are purchased and accepted as, and taken to be, products wholly of domestic manufacture and origin unless the products are labeled or marked in a manner which informs purchasers that the products, or substantial parts thereof, are of foreign origin.

A substantial portion of the purchasing public has a preference for products, including watch bands, which are wholly of domestic manufacture or origin, as distinguished from products which are in substantial part of foreign manufacture or origin.

PAR. 5. The failure of respondents to adequately disclose the foreign country or place of origin of their watch bands or the foreign country or place of origin of substantial components of their watch bands has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public as to the country or place of origin of said watch bands and into the erroneous and mistaken belief that such watch bands are of domestic manufacture, and into the purchase of substantial quantities of said watch bands by reason of said erroneous and mistaken belief.

PAR. 6. In the course and conduct of their business, respondents use the words "guaranteed" or "fully guaranteed" in the advertising of certain of their watch bands, thereby representing that said watch bands are guaranteed by them in every respect.

PAR. 7. Said advertising is false, misleading and deceptive. In truth and in fact, the guarantee is limited and conditional, and the limitations and conditions are not set forth in the advertising.

PAR. 8. Respondents, at all times mentioned herein, have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of watch bands.

PAR. 9. The use by respondents of the false, misleading and deceptive representations and practices hereinabove set forth, and the failure to disclose the foreign origin of their watch bands or of substantial components of their watch bands, had, and now has, the capacity and tendency to mislead and deceive purchasers or members of the buying public in the manner aforesaid, and thereby to induce them to purchase respondents' watch bands. As a consequence thereof, trade in commerce has been unfairly diverted to respondents from their competitors and injury has thereby been done to competition in commerce.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. David J. McKean for the Commission.

Mr. Ben Paul Noble, of Washington, D.C., for respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

By complaint issued March 14, 1961, the Federal Trade Commission charged Baldwin Bracelet Corp., a New York corporation of 22 West 48th Street, New York, New York, and its officers, Nathan Goodman and Anne Goodman, his wife, with violations of the Federal Trade Commission Act resulting from their sale and distribution of metal expansion watch bracelets in commerce without disclosing that they consisted of parts manufactured in Hong Kong, and with representing that they were fully or unconditionally guaranteed when, in fact, a charge was imposed on persons seeking to avail themselves of the guaranty.

Although the case was concerned only with these two simple issues, because of obstructive tactics of the respondents, to which reference will be made below, four days of testimony, plus a preliminary deposition, consisting in all of more than 400 pages of typewritten transcript and more than 40 exhibits were required to complete the hearing.¹

Respondents at first denied all allegations of the complaint except that Baldwin Bracelet Corp. was a corporation doing business in New York and that Nathan Goodman was an officer and directed and controlled its acts and practices and that the business involved the sale and distribution of watch bracelets. During a pretrial conference, it was agreed that the admissions would be extended to the fact that the respondent corporation was engaged in interstate commerce within the meaning of the Federal Trade Commission Act and that it is in substantial competition with others in the sale of watch bracelets.

Because of the manner in which the respondents sought to defend this case, I shall start by setting forth the following which are my conclusory and ultimate

FINDINGS OF FACT

1. Respondent, Baldwin Bracelet Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 22 West 48th Street, New York City, New York.

2. It is a family corporation and its practices and business are controlled and directed by Nathan Goodman, its president and di-

¹ As a matter of fact, respondents even now contend because of their conduct to which reference will be made elsewhere that the hearing is not completed.

rector, and by his wife, Anne Goodman, its secretary-treasurer and director, who also are respondents herein.²

3. Respondents are engaged in the sale and distribution of metal expansion watch bracelets for the manufacture of most of which they are associated with a wholly owned affiliated corporation based in the Virgin Islands, also described by them as a "family" corporation.

4. The watch bracelets so manufactured are sold and distributed by them from their place of business in New York to purchasers in New York and in various other states of the United States and the District of Columbia. They maintain and at all times herein mentioned have maintained a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act. They have been, and now are, in substantial competition, in commerce, with others engaged in the sale of watch bracelets.

5. Respondent Baldwin sells its watch bracelets to watch manufacturers and watch importers for attachment to watches as "original equipment" prior to their original sale of the watches. Respondent also sells watch bracelets to watch and jewelry wholesalers for distribution to consumers or users through retail jewelry outlets.

6. Approximately 20% of respondents' watch bracelets are prepared by them for ultimate direct sale at retail to consumers. For this purpose, they are attached to cards covered or enclosed with a transparent plastic packaging device, which in turn are displayed in retail stores on placards or racks prepared and distributed by respondents on which they have endorsed or caused to be endorsed prominently the eye-catching legends, "*Unconditionally Guaranteed*" or "*Fully Guaranteed*."

7. The said watch bracelets in fact are not unconditionally and are not fully guaranteed because the retail purchaser is required, should he attempt to avail himself of the alleged guaranty, to pay to the respondents a sum of money (25¢ prior to 1960 and 35¢ thereafter). He is informed of this charge only if he reads certain material, printed only on the back of the card on which the watch bracelet is packaged, following its removal from the placard or rack prior, during or after the act of purchase. The so-called guaranty is limited further to one year, by the same material printed on the back of the packaging card.

8. All watch bracelets sold by the respondents are imported into

² Transcript:

Q. Do the two of you [Nathan Goodman and Anne Goodman] control and direct the policies and actions of respondent Baldwin Bracelet Corp.?

A. [Nathan Goodman] Yes, we do.

Q. And no one else has any hand in directing or controlling Baldwin?

A. No.

the United States. Of these, approximately 20% are marked as made in Hong Kong and are not involved in this proceeding. The balance (approximately \$700,000 in 1960 sales of approximately 1,200,000 bands) bear no marking to show where they are made and are sold with the aid of advertising, literature and displays which do not disclose where they are made.

9. In their promotion of the sales of these unmarked bracelets, respondents advertise that they are "made of the highest-grade American steels and gold-fill" and that "only the finest, first-quality American stainless steel and Gold Fill are used in the construction of every Baldwin Band." While they make these representations, they do not disclose that the actual manufacturing is not accomplished in the United States.

10. On the contrary, respondents, by their arrangements with their wholly owned family corporation in the Virgin Islands, cause the metal to be purchased in strips in the United States, cause it to be exported to Hong Kong, cause it to be fabricated into bracelet linkages and other parts in Hong Kong, cause these to be reexported out of Hong Kong to the Virgin Islands, and there cause two tube ends to be "fixed to the skeleton," following which the bracelets are degreased, polished, inspected, wrapped, boxed, crated and shipped to the United States. Other work done in the Virgin Islands, in the case of gold-filled top shell bracelets, consists only of an additional step in the assembly process. Such gold-filled top shell bracelets amount to about 25% of all the bracelets involved in this proceeding.

11. The essential, operative components of the metal expansion watch bracelets involved in this proceeding are fabricated in Hong Kong. In the form in which they are received in the Virgin Islands, even without being degreased and polished, they could serve as bracelets for holding watches on wrists following the clamping onto their ends of the tube ends to be attached to the watch handles made to receive them.

12. Thus the watch bracelets involved herein are substantially of Hong Kong origin.

13. Respondents, when offering these watch bracelets for sale in commerce in the United States, do not disclose that, in substance, they are fabricated in Hong Kong and not in the United States.

14. There is a definite preference on the part of purchasers of watch bracelets for those made in the United States, if price, style and quality factors are not such as to influence the purchase of such articles made elsewhere.

15. There is a reluctance on the part of substantial numbers of persons to buy articles made in Hong Kong.

16. Articles not made in the United States and not marked or otherwise identified as to the place where they are made have a tendency to lead potential purchasers to believe that they were made in the United States and cause them to buy such articles even though they might not have had they known where the articles were made.

17. A substantial portion of the consuming public prefers watch bracelets made in the United States to those substantially fabricated in Hong Kong.

From the beginning respondents took the attitude that the Federal Trade Commission had no right to bring this proceeding. Having taken that attitude, they engaged in every conceivable device to obstruct and defeat the proceeding. It is not necessary, for the purpose of this decision, to set forth in detail all that the respondents did. A few illustrations ought to be sufficient.

From the beginning and despite many warnings of the criminal aspect of his conduct, the respondent Nathan Goodman deliberately and flatly refused to answer proper questions addressed to him both by counsel supporting the complaint and by the hearing examiner. He persisted in this conduct throughout most of the hearing, even after the hearing examiner had read to him from the Federal Trade Commission Act as follows:

Sec. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.³

Respondents adopted their contumacious position because they took the attitude that the Federal Trade Commission never should have commenced this proceeding against them. They took it upon themselves to make their *private* determination that the Federal Trade Commission had no jurisdiction and that they were immune from its process. Such tactics have been attempted before, resulting only in sorry and expensive lessons for those who tried. There is the classic case which went to the United States Supreme Court, involving John L. Lewis and his United Mine Workers. Lewis was fined \$10,000 for his conduct and the Union was fined originally \$3,500,000 which the Supreme Court modified to an immediate payment of \$700,000 with the remain-

³ See *Sinclair v. United States*, 279 U.S. 263, in which a similar but more loosely worded statute was involved. Sinclair went to jail for three months and was fined \$500 for refusal to answer questions even though he claimed he did so "in good faith on the advice of competent counsel."

ing \$2,800,000 to be remitted upon compliance by the Union with the Court's order. In considering the conduct of Lewis and the Union, the Supreme Court said:

The defendants, in making their private determination of the law, acted at their peril.

United States v. Mine Workers, 330 U.S. 258, @ 293.

It continued, quoting from *Howat v. Kansas*, 258 U.S. 181, 189-190:

... an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued.

Respondents took their strange position because they have succeeded in bringing through Customs, free of duty, the bracelets sold by them, under a law which was designed to foster and promote industry in the Virgin Islands.⁴ What they failed to realize was that the law which permitted them to bring in the bracelets, duty free, is only a statute for the collection of duties and that, for the purpose of the parts of the Tariff Act with which they were concerned, the Virgin Islands, though a possession of the United States, are not included within the term "United States." (19 U.S.C.A. 1401(k))

Any contention on the part of an importer that the marking provisions of the Customs laws result in pre-emption of the Federal Trade Commission by the Secretary of the Treasury long ago has been held not to be valid. *L. Heller & Sons, Inc. v. Federal Trade Commission*, 191 F.2d 954 [5 S.&D. 327].

Respondents were able to bring their bracelets into the United States, duty free, because they had succeeded in convincing Customs officers that the bracelets "do not contain foreign materials to the value of more than 50 per centum of their total value" and that they come to the United States from the Virgin Islands. This was accomplished under 19 U.S.C.A. 1301a, Tariff Act of 1930. Assuming that this feat of the respondents is valid, they overlook the fact that Section 1301a is concerned only with the collection of Customs duties and has nothing at all to do with country of origin or deceptive practices which might result from a failure to disclose country of origin.

The manner in which respondents accomplish this exemption from Customs duties is set forth adequately in the record. They, through

⁴ They contested also the decision of the Commission to issue the complaint herein under the first sentence of Section 5(b) of the Act but mere mention of this is sufficient to justify further disregard. *Adams, Sr. v. Federal Trade Commission*, 8 Cir. 296 F. 2d 861 [7 S. & D. 269], November 24, 1961.

their wholly owned affiliate in the Virgin Islands, arrange for the purchase of metal strip in the United States. They cause it to be shipped to Hong Kong. In Hong Kong the metal strip is fabricated into "unfinished linkage sections" (as certified by the government of Hong Kong) prior to re-exportation out of Hong Kong to the Virgin Islands. In the Virgin Islands the linkage sections are completed as marketable watch bracelets. As stated by the respondents in a letter which they wrote to the Commission prior to the filing of the complaint, after their corporation in the Virgin Islands "receives the unfinished bands, they process them according to the steps previously given you at a cost of approximately 84 cents per dozen bands." What the steps were was brought out from a statement filed by respondents pursuant to the pretrial order. It appears from that statement that a Baldwin bracelet consists of "a top shell," "a bottom shell," "a top liner," "two tube ends" and "rivets." The "manufacturing" process in the Virgin Islands (in view of all that was said and all that was not said by respondents in this case) consists only of placing the tube ends "into a precision die, manually adjusted to accommodate an end part of the bracelet's skeleton. The die is activated by a machine operator, some using foot pressure type machinery, others using air pressure operated machines. In this manner, the two tube ends are fixed to the skeleton which is prepared for the accommodation thereof by the dextrous fingers of a trained worker. The plant employs as many as 17 such employees, never fewer than six, depending upon market requirements." There is an abundance of testimony in the record as to the component elements of a bracelet and the manufacturing process. This evidence establishes quite conclusively that the essential part of the bracelet, the "*linkage*," (as certified by the Government of Hong Kong) is fabricated in Hong Kong and that a bracelet simply would not be a bracelet without it.⁵

Counsel supporting the complaint was driven by respondents' obstructive tactics to amass a plethora of evidence to establish this. Even without the reams of expert testimony, since it is permissible to make inferences from known facts, the skimpy information which the respondents provided to the Commission, both *ante litem motam* and in the pretrial statement, justifies the finding that the essential portions of the bracelets sold by them are fabricated in Hong Kong. Although the evidence is not as complete as could be desired, this case is not thereby cast into the mold where there is *no* evidence to support the findings and conclusions. On the contrary, this is the sort of case where respondents, having been present in the courtroom and

⁵ See also any dictionary as to the meaning of the word "*linkage*."

having had the opportunity to explain and show that their bracelets were in fact not fabricated in Hong Kong, as was initially brought out in the *prima facie* case, clinched the case against them by remaining silent and refusing to talk. *Mammoth Oil Co. v. United States*, 275 U.S. 13, 51-53; 48 S. Ct. Rep. 1, 9-10.⁶

Apart from the actual facts which support the decision in this case, if respondents' failure to defeat this case has been the result only of their refusals to testify, their refusal to proceed with the defense, or their contumacious conduct, they consciously made the decision and they must take the consequences of their erroneous decision. *Sinclair v. United States*, 279 U.S. 263. (I cannot emphasize too strongly that the decision herein is not made to punish the respondents for their contumacious conduct. Other procedures are available for that. My decision is based only on the facts in the record.)

In an attempted *coup de grace*, respondents cite 19 CFR 11.10(b)(3). This is a regulation which the Secretary of the Treasury has promulgated pursuant to 19 U.S.C.A. 1304(a)(3). It excepts from the marking provisions of Section 1304 "products of possessions of the United States." This could have no bearing on the matters involved in this case. In the first place, the bracelets are not *products*, as contended by respondents, of the Virgin Islands. At best, there is an assembling job in the Virgin Islands which costs the respondents 84 cents a dozen, as opposed to the cost of fabrication in Hong Kong of \$1.25 per dozen. These are respondents' own cost figures. Let us disregard this for a moment. The marking provisions of 19 U.S.C.A. 1304, expressly require markings for goods from the Virgin Islands because the Virgin Islands are not included in the term "United States." 19 U.S.C.A. 1401(k).⁷ Consequently, the exception in part (b)(3) of Section 11.10 of the Regulations cannot apply to the Virgin Islands because they are not specifically mentioned. Moreover, it may be questioned whether, disregarding the position of the Virgin Islands in the entire picture, the Secretary of the Treasury had any jurisdiction at all to make a regulation that the products of possessions of the United States need not be marked, because that type of exception is not among the exceptions for which provision is made in the statute, subparts A-K, inclusive, of 1304(a)(3). It can be justified only upon a conclusion that it sets out merely in words what

⁶ As an exercise in simple logic, it is quite obvious that the principal work must be done in Hong Kong. Respondents do not ship metal across the United States and then across the Pacific Ocean and then back all the way to the Virgin Islands just for mechanical stamping out of parts. The purpose must be to use the Hong Kong labor to make the bracelets.

⁷ For a better understanding of the rationale for this, see Section 1557 of Title 19 U.S.C.A.

is the fact—that a possession of the United States is a part of the United States. However, as several times noted above, for the purpose of this part of the Tariff Act, the Virgin Islands are not a part of the United States (19 U.S.C.A. 1401(k)).

Now reverting back to the cost of assembling in the Virgin Islands, 84 cents a dozen, as opposed to the cost of fabrication in Hong Kong, \$1.25 a dozen, respondents seem nevertheless to have been successful in having Customs pass their bracelets duty free under the exemption provision of 19 U.S.C.A. 1301(a). They attempted improperly to use papers purporting to be copies of Customs entries as cross-examination following completion of Commission counsel's redirect examination of respondent Nathan Goodman. They renewed this attempt as an offer of defense following my direction that they proceed with their defense. The offer was rejected and the papers were excluded because, on their face, they appeared to be unreliable. The trier of the facts under no circumstances is required to receive in evidence material which, on its face, is unreliable.⁸ The papers, prepared by respondents' agent, recited that the bracelets were a "product of, or was manufactured or produced in St. Thomas V.I." These entry papers variously stated that the *foreign* materials in them were linkage \$1.95 a dozen, parts to finish 80¢ a dozen; linkage \$2.20 a dozen, parts to finish 10¢ a dozen; linkage \$2.45 a dozen, parts to finish 10¢ a dozen; linkage \$1.95 a dozen, parts to finish 70¢ a dozen; linkage \$2.15 a dozen, parts to finish 60¢ a dozen; linkage \$2.05 a dozen, parts to finish 60¢ a dozen. Obviously, since the cost of assembling, fabrication or finishing in the Virgin Islands, as represented by Nathan Goodman in the statement he filed with the Federal Trade Commission in an effort to forestall this proceeding, amounted only to 84¢, even if the alleged United States cost for the domestic raw metal amounted to \$1.25 a dozen, every one of these entries was false because the foreign materials cost in each case exceeded 50% of the total. Also, as pointed out by Commission counsel and as demonstrated above, the alleged determination of Customs and the fact that respondents were able to bring the bracelets in free of duty are entirely irrelevant to this proceeding because we are here concerned with the deceptive practices of the respondents and not with the revenue aspects of their operation. Finally, the claimed determination by a Customs officer (putting aside all the technical reasons why the papers were inadmissible) is not an adjudication sufficient to create an estoppel by judgment against the Federal Trade Commission.

⁸ Federal Trade Commission Rules of Practice, Sec. 4.12(b).

The respondents' failure to mark their bracelets as being either substantially fabricated in Hong Kong or containing essential components fabricated in Hong Kong is a deceptive practice cognizable by the Federal Trade Commission. The record herein is burdened with extensive testimony showing that the consuming public has a preference for American-made bracelets, that it has prejudices against bracelets made abroad, that such prejudices extend to Hong Kong, and that when goods purchased in the United States do not bear marks of foreign origin, they are assumed to have been made in the United States. Respondents themselves recognize and capitalize on this prejudice because they indulge in the half-truth of boasting that their goods are *made* of 100% American metal. To tell a half-truth is as much or more of a deception than to refrain from making any statement at all.

Following the close of the hearing, Commission counsel made a motion that the hearing examiner take official notice of the preferences and prejudices of the buying public. This motion could have and ordinarily would have been granted had it been made prior to the hearing.⁹ The reason Commission counsel's motion was denied, as stated in the order entered, was that to grant it would have required a reopening of the record and in any event the record was replete with evidence of the very facts respecting which official notice was requested.

The deception with respect to the guaranty is perfectly apparent. Respondents advertise that their bracelets are *fully guaranteed* or are *unconditionally guaranteed*. By setting forth these statements in a large, prominent manner on display cards and placards, they thereby seduce the purchaser into forming a decision to buy or to make a purchase only later to find out, by reading fine print on the back of a card within the package, that there is a charge incidental to the performance of the guaranty and that it is limited to one year.¹⁰

After three and one-half days of hearing (plus a prior morning devoted to a deposition) when the record contained all the evidence (and more) that has been recounted above, Commission counsel requested a postponement for the purpose of producing a witness to

⁹ As a matter of fact, I am skeptical that the concept of official notice extends to such a well-known commonplace fact that there are prejudices and preferences as between imported and domestic merchandise. A trier of the facts does not leave all the knowledge he has acquired during his entire lifetime outside the courtroom when he enters the courtroom to hear an ordinary commercial case, nor should the Commission be required to hear again and again days and days of testimony to establish facts which have been repeatedly established in prior hearings.

¹⁰ Respondents say that the charge is not made to dealers and wholesalers and a consumer could turn a bracelet in to one of them. However, there is no advertising or information conveyed to the consumer to apprise him of this.

testify as to the number of employees in the Virgin Islands plant of respondents' wholly-owned corporation. There was some evidence already in the record as to the number of employees.¹¹ Whether the respondents' corporation employs six or sometimes as many as 17 in the Virgin Islands is of no importance in view of the other evidence showing the fabrication of the essential components in Hong Kong.¹² Another reason given by Commission counsel for a postponement was his intention to compel Nathan Goodman's testimony. If a respondent could delay a Federal Trade Commission proceeding merely by refusing to testify subject only to an order directing him to testify (as distinguished from the criminal sanction above cited), Federal Trade Commission cases would be prolonged interminably. Commission counsel's motion for a continuance, accordingly, was denied, under (a) the hearing examiner's power and duty to "regulate the course of the hearing"¹³ and (b) in accordance with the pretrial order and the written and signed agreement of the parties hereto.

Respondents thereupon were directed to proceed with their defense, *also in accordance with the foregoing power, duty, order and agreement of the parties*. Respondents' attorney made a motion to dismiss, which was denied. He then demanded a first continuance of 30 days for the purpose of briefing his motion to dismiss, and, if it was then denied, a further continuance for the purpose of preparing and presenting respondents' defense. In support of the request he pleaded Federal Trade Commission past customs and that he had been surprised by all the testimony as to consumer preference, this latter in a case where it was apparent from the beginning that consumer preference was involved. The motion for a continuance was denied. Respondents were directed to proceed with their defense. This they deliberately refused to do. In a conciliatory gesture and almost pleading with the respondents, I offered to recess the hearing until the following morning so that they might reconsider their decision and proceed with their defense. This offer was rejected by respondents' attorney. He made it clear that it would be futile to recess until the following morning. The parties were then instructed to present requests to find and propose conclusions and order with the admonition that an initial decision would be issued following expiration of the times designated.

¹¹ Pretrial statement: "The plant employs as many as 17 such employees, never fewer than six, depending upon market requirements."

¹² If 17 employees worked a full forty-four week, fifty weeks in 1960, producing a total of 1,200,000 bracelets, a bracelet would have had to be manufactured every two minutes of the time by each employee, or 10 a minute by all.

¹³ Administrative Procedure Act, Section 7(b)(5).

Respondents' attorney has now submitted a 57-page document entitled "Motion for Summary Judgment or in the Alternative for Dismissal of the Complaint." The making of a motion for summary judgment after the closing of the hearing on the merits is clearly improper. It is obviously out of order after a motion to dismiss has been denied. It is additionally out of order because, even if such a motion could be made in a Federal Trade Commission case, the purpose of a motion for summary judgment is to avoid the expense and delay of a trial in a case where there is no triable issue.¹⁴ Whether this document be regarded as a motion for judgment upon the whole record or as a motion to dismiss is immaterial. As a motion to dismiss, it will not be considered and is hereby dismissed because it has been denied already and leave has not been granted for its renewal. Moreover, in view of what has been said above, I have no alternative but to adhere to that original decision. Similarly, regardless of what kind of motion for judgment it may be, for the same reasons, it must be and is denied on the merits. Any other motions made during the course of the hearing and inconsistent with the conclusions and order to be entered herein hereby likewise are denied.

The 57-page document, apart from its repeated references to the alleged defense of Virgin Islands origin, consists, to a large extent, of partial, incomplete, isolated and distorted quotations from the transcript. It is not worthy of further comment.

A complete hearing has been held herein. Respondents, as well as Commission counsel well knew prior to the commencement of the hearing that they would be required to try the entire case, both prosecution and defense, at one session.

The very strongly and frequently announced policy of the Federal Trade Commission is to this effect. The day of the peripatetic, casual and leap-frog hearing, interspersed with rests and revisits, is a thing of the past. A Federal Trade Commission complaint is not the signal for the beginning of a long career on one case nor an invitation to a Cook's tour of the United States.¹⁵

The pretrial order and the agreement which the parties signed provided:

¹⁴ The District Court in *Schneider v. O'Neal*, 145 F. Supp. 120, observed that such a motion during the trial is improper but treated it as a motion under Rule 12(h), F.R.C.P.

¹⁵ At one time respondents' attorney stated that it would be necessary also to hold sessions of the hearing in the Virgin Islands! And see dissenting opinion of Circuit Judge Friendly in *Exposition Press, Inc. v. Federal Trade Commission*, 2nd Cir. 295 F. 2d 869 [7 S. & D. 240], November 6, 1961; also see Address of Honorable Paul Rand Dixon, Chairman, Federal Trade Commission, before the National Industrial Council's Manufacturing Trade Associations Group, New York City, December 5, 1961.

8. The hearing herein shall be held in New York City, commencing on the 25th day of September, 1961, and the entire case on the part of the Commission and of the respondents shall be completed at the session thus commenced.

When I, as the Hearing Examiner in this case, exercised my authority and performed my duty (a) to regulate the course of the hearing and (b) to compel adherence by the parties to their agreement and to the pretrial order that the hearing herein shall consist of only one session, respondents were required, as was Commission counsel, to abide by that determination. Commission counsel, though uncheerfully, did abide by it. Respondents, on the other hand, consistent with their prior conduct in this case, refused to abide by it. They rejected also the opportunity to reconsider their refusal. They have had their day in court and they have made their decision. If it was a wrong decision, as observed in *Sinclair* above (279 U.S. 263), they must take the consequences. As a matter of fact, though it was a wrong decision, I suspect it was a calculated, intentional maneuver. Respondents had no defense. They knew it and, having no defense, they sought to make it appear that unfair advantage was being taken of them. They adopted the position that they were being foreclosed of the right to present a defense so that they might wave the banner of "due process" when what they wanted was not "due process" but *NO* process.

Upon all the foregoing, the findings of fact previously set forth and the entire record, the following are my

CONCLUSIONS

1. The aforesaid acts and practices of respondents were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.
2. The Federal Trade Commission has jurisdiction of this proceeding, of the respondents, and of the acts and practices of the respondents.
3. This proceeding is in the interest of the public.

In determining the form of the order to be entered herein, I have given careful consideration not only to the acts and practices of the respondents but also to the manner in which these acts are committed and to respondents' attitudes. I am of the opinion that the order, as proposed by Commission counsel, is inadequate to achieve effective

enforcement of the law and to provide the remedial measures necessary to make certain that the public will not be deceived. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 [4 S. & D. 476]. The following is my

ORDER

It is ordered, That respondent Baldwin Bracelet Corp., through its officers, directors, agents, representatives, and employees, and respondents Nathan Goodman and Anne Goodman, individually, and as officers of said corporation, directly or through any corporate device in connection with the offering for sale, sale, and distribution of metal expansion watch bands or bracelets or other similar products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that metal expansion watch bands or bracelets or similar products are guaranteed unless the nature, extent and conditions of the guaranty and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed in conjunction with the guaranty representations.

2. Offering for sale or selling metal expansion watch bands or bracelets or similar products which are substantially of foreign origin or fabrication without affirmatively disclosing such foreign origin or fabrication thereon.

3. Offering for sale or selling metal expansion watch bands or bracelets or similar products which are substantially, or contain essential components, of Hong Kong origin or fabrication without affirmatively disclosing such Hong Kong origin or fabrication thereon.

4. Representing, directly or indirectly, or by implication, that respondents' watch bands or bracelets which consist of components or elements made or fabricated outside of the United States are made substantially or wholly of American steels and gold fills without disclosing in immediate conjunction therewith and with equal prominence the place or places in which the said watch bands or bracelets or essential components thereof are fabricated.

5. Offering for sale, selling or distributing watch bands or bracelets not wholly made in the United States in packages or containers in such a manner that the name of the countries or places of fabrication or possession of the United States, if such possession is the Virgin Islands, is concealed without clearly disclosing such countries, places of fabrication or possession in a conspicuous place on the package or container.

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6. Offering for sale, selling or distributing such products mounted or affixed to cards in such manner as to conceal the name of such countries or places of fabrication without disclosing on such cards the fact of fabrication in such countries or places of fabrication.

OPINION OF THE COMMISSION

By Dixon, *Commissioner*:

This is an appeal from a hearing examiner's initial decision holding that respondents, in the sale and distribution of metal expansion watch bands, have violated Section 5 of the Federal Trade Commission Act by (1) representing that the bands were fully or unconditionally guaranteed when, in fact, a charge was imposed on persons seeking to avail themselves of the guarantee, and (2) failing to disclose that the bands were made, in whole or in substantial part, in Hong Kong.

Respondents Nathan and Anne Goodman, husband and wife, do business through two corporations which they own and control: Baldwin Bracelet Corporation, a respondent herein, is incorporated in New York and has its principal place of business in New York City; Janaco Manufacturing Corporation, not a respondent herein, is incorporated in the Virgin Islands, and has its principal place of business in St. Thomas, Virgin Islands.

Respondent Baldwin, from its place of business in New York, sells to customers located in various other states and the District of Columbia. These customers include watch manufacturers and importers (who buy the bands for attachment to watches as "original equipment"), and watch and jewelry wholesalers. The wholesalers, in turn, sell the bands to retail jewelry outlets.

I

Part of the watch bands or bracelets sold by Baldwin move through such retail channels to consumers. These are prepackaged by Baldwin in preparation for retail sale by attaching individual bands to printed "cards," which, in turn, are to be attached to display placards or wire racks similarly prepared by respondents. The placards or racks on which the "carded" bracelets are mounted carry the words "unconditionally guaranteed" or "fully guaranteed." No words of qualification or limitation appear on those placards or racks.

In fact, however, consumers attempting to avail themselves of the guarantee must pay the sum of 35¢ (prior to 1960 the amount was 25¢) to respondents, and the guarantee period is limited to one year. These

limitations, although they do not appear on the display placards or racks, are set out on the reverse side of the cards to which the individual bracelets are attached. They are not visible to the prospective purchaser unless he removes the "carded" bracelet from the placard or rack and examines the back side of the card.

It is well settled that the word "guarantee," unless accompanied by clear and conspicuous words of limitation, negates the idea of any further consideration on the part of the purchaser in his effort to obtain satisfactory performance from the "guaranteed" article, even if the additional sum demanded is only a small handling charge. *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509, 511, 512 [4 S. & D. 597] (7th Cir. 1946); *Clinton Watch Co. v. Federal Trade Commission*, 291 F. 2d 838, 840 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 [7 S. & D. 184].

Respondents do not deny the fact that they prepared and distributed the placards or racks bearing the legends in question, nor do they deny that performance under the "unconditional" guarantee is limited to a one year time period and conditioned upon the payment of a sum of money.¹ In defense they advance two arguments: that the qualifying statements printed on the back of the cards constitute a sufficient disclosure to prevent deception of the consuming public, and that, in any event, the volume of sales from placards or racks bearing the guarantee legends has been *de minimis*.

In support of the first argument, respondents point to the record in this case where the hearing examiner, upon first seeing the bracelet-bearing cards, immediately detected the limiting words on the back. The short answer to this is that the law is designed to "protect the trusting as well as the suspicious." *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 116 [2 S. & D. 429, 432] (1937). In that case, the Court of Appeals had thought the alleged deception involved was so transparent that no person, no matter how "fatuous," could have actually been deceived by it. The Supreme Court said: "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced."

As to respondents' *de minimis* argument, Goodman himself testified that Baldwin buys from its sister corporation in the Virgin Islands and imports to the United States approximately 1,200,000 bands per year, and that about 20% of these are sold on "cards" as described

¹ Respondents say that the consumer could avoid the payment by returning the bracelet to the dealer from whom he bought it. But this fact, if such it be, is not conveyed to the consumer.

above. Respondents' counsel stipulated these facts.² It is now argued, however, that "less than 3000" display "racks" were used, and that "only about 5000 (bracelets) were ever sold attached to the display racks upon which the examiner relied."³ The record contains three different display "placards" admittedly used by respondents, each of which bears the legend "unconditionally guaranteed." Each of these has "slots" into which Baldwin's "carded" bracelets are inserted for display to consumers: Goodman said he had used about 50 of the 6-bracelet placards; about 75 of the 12-bracelet placards; and about 100 of the 14-bracelet placards.⁴

The other display device used by respondents is a wire rack⁵ onto which is mounted (a) at least a dozen bracelets, and (b) a cardboard placard bearing the "fully guaranteed" legend.⁶ Goodman stated that he had bought about 200 of these wire racks.⁷ None of this display material is supplied to Baldwin's customers free of charge; it is all sold for a price.⁸ Since it is obvious that these displays are designed to be used by the retailer again and again, the argument that less than 3000 display racks were used, even if that term is meant to include both the placards and the racks, in no way rebuts the evidence that all Baldwin bracelets sold through retail channels are exhibited to the consumer on either the cardboard placards or the wire racks, both of which carry the misrepresentation of the guarantee. We find no factual support in the record for the contention that only 5000 bracelets were sold from those displays; on the contrary, we think the hearing examiner correctly found that 20% of Baldwin's 1,200,000 bracelets purchased from Janaco were sold in that manner.⁹

This is not *de minimis*. In any event, however, we are not prepared to say that deception is all right if practiced in moderation. This is not a case where a practice has been abandoned; quite the contrary, respondents are here asserting their right to continue the deception. And the very vigor of their insistence illustrates clearly that they do not themselves consider it economically *de minimis*.

² Tr. 20, 21.

³ Respondents' Brief, p. 4.

⁴ CX 4, 2a, and 3.

⁵ CX 6, figure 103; CX 7, figure 106.

⁶ CX 5.

⁷ Tr. 91.

⁸ CX 1 (deposition of Nathan Goodman), p. 49.

⁹ Goodman testified:

"Q. When they were sold, the 80 percent that go into the stream of commerce, are they sold affixed to something similar to Commission's Exhibit 5?"

"A. They are never sold on such or affixed to such a card." Tr. 84.

Commission's Exhibit 5, the cardboard mounting to be set on the wire rack display, bears the legend "fully guaranteed."

II

The hearing examiner also concluded that respondents had violated Section 5 by selling their watch bands in the United States without disclosing that they are wholly or substantially of Hong Kong origin.

It has been proven in numerous cases before the Commission that many American consumers (1) generally prefer American-made products over those imported from foreign countries, and (2) believe they are getting American-made goods unless informed to the contrary. These two facts have been proved so many times, and by such an overwhelming weight of direct consumer testimony, that the Commission now takes official notice of them, subject, of course, to a respondent's right to show the contrary in the particular case. *Manco Watch Strap Co., Inc.*, Dkt. 7785 [60 F.T.C. 495, 511] Opinion of the Commission issued March 13, 1962. As we said in that case: "This is an area of administration that has evolved to a point at which the accumulated experience and knowledge of the Commission may properly be invoked in exercising its fact-finding function."

In the instant case, the hearings pre-dated our *Manco* decision, so counsel supporting the complaint proved once again what has been proved so often before. Respondents claim they were "surprised" by the method of proof employed in this case and did not have a chance to rebut it. Instead of calling consumers as witnesses, counsel supporting the complaint called manufacturers of similar watch bands who testified that their customers, including watch manufacturers, and jewelry wholesalers and retailers, preferred American-made bands, and had a positive prejudice against those made in Hong Kong and Japan. In short, these businessmen testified that it was hard to sell watch bands bearing a mark indicating Hong Kong manufacture. There is no difficulty in selling such bracelets, however, if the Hong Kong marking is left off.

We see no merit in respondents' objection to this method of proof, or in their claim of surprise. These sellers, as prudent businessmen, were simply mirroring the preferences and prejudices of their customers, who in turn had reflected those of the ultimate consumers. As to the matter of surprise, respondents knew that consumer preferences were at issue in the case. The method of proof chosen by counsel supporting the complaint did not restrict them to that approach in presenting their defense; had they been prepared to rebut direct consumer testimony, they would have necessarily been prepared to rebut the manufacturer testimony actually produced. In

fact, however, respondents themselves recognize the preferences in question by advertising that their own bracelets are made of "100% top quality American materials."

Since respondents made no effort to rebut the facts of consumer preference for domestic bracelets, and consumer assumption of domestic manufacture in the absence of a mark affirmatively disclosing foreign origin, the only remaining factual question was whether or not respondents' bracelets were in fact manufactured in Hong Kong as charged in the complaint.

The establishment of the facts on this point should have been a simple matter of putting respondents on the stand and asking them the pertinent questions. But they refused to answer.¹⁰ Counsel supporting the complaint was therefore driven to a somewhat indirect method of proving what part of the manufacturing of the bracelets was done in Hong Kong. In a statement¹¹ submitted pursuant to a pre-trial order, respondents had described their operation as follows: (1) the raw material from which the bracelets are made is purchased in the United States by Janaco, the Virgin Islands corporation; (2) the raw material (stainless steel strip and gold filled sheeting) is shipped to Yuen Sang Hardware Company in Hong Kong; (3) Yuen Sang "processes" that raw material into what respondents call "unfinished bracelet parts"; (4) those "parts" are shipped from Hong Kong to the Virgin Islands, where Janaco allegedly "manufactures" them into bracelets; and (5) the bracelets are shipped to Baldwin in New York for sale and distribution throughout the United States.

Respondents conceded that "there is no argument that some amount in cost of less than 50 percent of the cost of the final product is involved in processing in Hong Kong,"¹² but refused to answer questions as to the details involved in either the Hong Kong or the Virgin Islands' work. But in the pre-trial statement mentioned above, they had disclosed¹³ that the "manufacturing" done in the Virgin Islands consisted of *only* two operations in the case of one type of bracelet, and three operations in the case of another type: (1) "fixing" of "two tube ends" to the bracelet; (2) "polishing" the finished bracelet; and, as to the second type of bracelet, (3) putting gold filled "top shells" on the skeleton. All other work involved in the making of the finished bracelet was thus admittedly performed in Hong Kong.¹⁴

¹⁰ See testimony of respondent Nathan Goodman at Tr. 31-62, 442-446.

¹¹ Statement Pursuant Pre Trial Memorandum and Order, CX 40.

¹² Tr. 29; see also Tr. 23.

¹³ Statement Pursuant Pre Trial Memorandum and Order, CX 40.

¹⁴ Respondents described their Virgin Islands "manufacturing" of their stainless steel bracelets (75% of the Janaco-to-Baldwin sales) as follows:

"In the manufacturing process, the 'tube ends' are placed into a precision dye, manually adjusted to accommodate an end part of the bracelet skeleton. The dye is activated by a

Five expert witnesses—manufacturers of watch bands with many years of experience in the trade—testified that these operations were minor matters amounting to 5% to 25% of the total work involved in making a completed “gold filled” bracelet (which constitute 25% of the bracelets in issue), and only 3% to 10% of the total effort involved in making the stainless steel bracelets (which constitute 75% of the bracelets in issue). None of the “parts” are made in the Virgin Islands—they all come from Hong Kong in a completed form. In the case of the stainless steel bracelets, three “parts” are received from Hong Kong: the bracelet itself (called a “center section”),¹⁵ and two “tube ends.”¹⁶ These two tube ends, which are less than an inch long and smaller in diameter than a pencil, are simply fastened to the ends of the bracelet. In the case of the “gold filled” bracelets, all of the “parts” are similarly received from Hong Kong. The assembly operation in the Virgin Islands is the same as that for the stainless steel bracelets, except that, in addition to the tube ends, the gold filled “top shells” (also received from Hong Kong) are attached. The mere attachment of those pieces and the polishing of the finished bracelets in the Virgin Islands is of no more significance in the making of a completed watch bracelet than the running of a string through imitation pearls, and the joining of the ends of the string together with a clasp, in the “manufacture” of an imitation pearl necklace. *L. Heller & Son, Inc. v. Federal Trade Commission*, 191 F. 2d 954 [5 S.&D. 327] (7th Cir. 1951), affirming 47 F.T.C. 34. Similarly, in *Segal v. Federal Trade Commission*, 142 F. 2d 255 [4 S.&D. 150] (2d Cir. 1944), it was held that imported spectacle lenses, although assembled into spectacles by the addition of domestic frames and the use of domestic labor whereby “petitioner . . . cuts, edges, bevels, bores and fits them (the imported lenses) into their frames,” 142 F. 2d, at 255, nevertheless retained their identity in the spectacles. As the Court said there:

machine operator, some using foot pressure type machinery, others using air pressure operated machines.

“In this manner the two tube ends are fixed to the skeleton

“In a line of production, the machine operation passes the bracelet to a ‘polisher’. . . .” (Statement Pursuant Pre Trial Memorandum and Order CX 40, pp. 4, 5.)

The second type of bracelet—“gold filled”—was described as being “manufactured” in the Virgin Islands in exactly the same manner as the stainless steel bracelets, except for the additional step of putting on the gold filled “top shells.” *Id.*, p. 2.

The fact that this statement describes all operations performed by respondents in the Virgin Islands is established by the terms of the pre-trial order pursuant to which the statement was filed. See Memorandum and Order Following Pretrial Conference, June 23, 1961, par. 1b.

¹⁵ CX 14.

¹⁶ CX 15A and 15B. CX 12 has the “tube ends” attached.

It is of course true, as the petitioner argues, that there comes a point where marking becomes impossible; the identity of a foreign made ingredient may be so lost in manufacture that any marking would be positively misleading, unless indeed it was so qualified as to be ineffective. That is not the case with lenses used in spectacles; the frame is merely the carrier of the lense, which is the only element of importance, and which does not lose its identity either in appearance or in function. 142 F. 2d, at 255-256.

Here, respondents' bracelets began as raw steel purchased in the United States. That steel was cut into some 200 odd pieces of metal in Hong Kong for manufacture into bracelet parts, and assembled into the bracelet skeleton. Expert testimony established that the essential element of an expansion watch band is its "expansibility," a quality which the bands had when they left Hong Kong. The attachment of the "tube ends" and the polishing in the Virgin Islands, on the other hand, was a minor assembly operation that did not affect the functional character of the bands. We have no doubt that respondents' bands were substantially manufactured in Hong Kong.

Nor are we persuaded that the bracelets themselves lose their identity when, after respondent Baldwin sells them to "original equipment" assemblers, they are attached to watches. On this point respondents argue that, even if we find its watch bands were manufactured in Hong Kong, we should require disclosure of that fact only on those bands that reach the consumer as separate items, unattached to watches. It is contended that the bands it sells to watch manufacturers and assemblers for attachment to watches should not be marked to disclose their Hong Kong origin.

The record discloses that, of respondent Baldwin's annual sales of approximately \$700,000, about 20% represent sales of bands imported *directly* from Hong Kong. These, all of which are sold to watch manufacturers and assemblers for use as "original equipment," are properly marked "Made in Hong Kong." The other 80% of Baldwin's sales are of bracelets imported indirectly (through the Virgin Islands) from Hong Kong. Of this 80% (none of which are marked to show their Hong Kong origin), only about 20% are sold to consumers as *bands*; the remaining 80% are sold in "bulk" to watch manufacturers and assemblers, and thus reach the consumer attached to watches.

As far as the record shows, these watch assemblers and manufacturers may well be aware of the Hong Kong origin of the bands, and thus may not be deceived by the absence of affirmative disclosure. But the watch-buying public is entitled to the same truthful disclosures as the band-buying public. When attached to a watch, the band, of course, becomes a "part" of the package, consisting of the

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watch and band; but it is a significant part and completely retains its identity as a useful and ornamental object. It is plainly not just an "ingredient" such as a balance wheel or other component that loses its identity in the "manufacture" of the watch.

As the Court said in the *Segal* case, *supra*, there is doubtless "a point where marking becomes impossible; the identity of a foreign made ingredient may be so lost in manufacture that any marking would be positively misleading, unless indeed it was so qualified as to be ineffective." 142 F. 2d, at 255. But certainly no such point is reached when a watch band is attached to a watch. A quality band, one that is attractive, and, as the evidence herein shows, one that is unmarked as to foreign origin, is plainly a substantial selling feature of a watch.

The instant record amply demonstrates that buyers of watches—as well as buyers of watch bands—react to foreign origin markings on the bands. Several manufacturers of watch bands testified that all of their customers, including watch manufacturers and assemblers, had a marked preference for American made bands and a corresponding prejudice against bands made in Hong Kong or Japan, but that this preference-prejudice was not completely unlimited in degree. "The preference is that they prefer to have American-made watch bands, the price being close. They will not be willing to pay great premium prices for American-made products, but if the price is close they have a definite preference for American-made watch bands, quality being equal, of course They are willing to pay somewhat more, but not a great premium because of the American-made product, again assuming that quality is equal."¹⁷ Several of the witnesses testified that they had lost business to competitors who imported bands from Hong Kong and, without marking them as to origin, sold them to watch manufacturers and assemblers for use as "original equipment." If buyers of watches had no interest in the origin of the bands, it seems extremely unlikely that watch manufacturers would be willing to pay a higher price for the same band in order to keep off the foreign origin mark.

We think it is clear that the consuming public is no less interested in the foreign origin of a watch band attached to a watch than it is in that feature of a band that it buys as a separate item. It is wholly immaterial that the foreign band may be just as good, or even better,

¹⁷ Tr. 216. One competitor-witness testified that respondent Baldwin, at one time, had sold a watch band made in Hong Kong in the United States in both a marked and unmarked state. The band marked "Made in Hong Kong" sold for a lower price. This was because "most watch companies preferred to pay the higher price so that it wouldn't have the stamp 'Hong Kong.'" Tr. 220.

than the domestic product. As the Supreme Court has said: "In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."¹⁸

III

The only defense put forward by respondents is their argument of "collateral estoppel." This matter is so closely related to their charge of bias and prejudice on the part of the hearing examiner that we deem it necessary to discuss them together.

The "collateral estoppel" argument boils down to this: Under Section 301(a) of the Tariff Act,¹⁹ goods imported from insular possessions such as the Virgin Islands are admitted free of duty into the United States if they "do not contain foreign materials to the *value* of more than 50 per centum of their total value"; that under Section 304 of the Tariff Act,²⁰ the Secretary of the Treasury is authorized to exempt goods produced in such possessions from the foreign origin marking requirements of that section; that respondents' bracelets have been permitted to enter the United States from the Virgin Islands free of duty and without markings as to foreign origin; that the Treasury Department, by reason of those statutory provisions, has "primary jurisdiction" to determine the question of where respondents' bracelets are "manufactured"; that this "primary jurisdiction" was exercised when the Treasury Department permitted respondents' bracelets to come into the United States free of duty and unmarked as to foreign origin; that in taking this action the Treasury Department necessarily made an administrative "finding" that respondents' bracelets met the statutory test, i.e., contained foreign materials having a *value* of less than 50% of the total value of the bracelets; and that these so-called "findings" of the Treasury Department have conclusively determined that respondents' bracelets were "manufactured" in the Virgin Islands, rather than in Hong Kong, as charged in the complaint and as found by the hearing examiner. Respondents conclude

¹⁸ *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 78 [2 S.&D. 247, 253] (1934).

¹⁹ "There shall be levied, collected, and paid upon all articles coming into the United States from any of its insular possessions, except Puerto Rico, the rates of duty which are required to be levied, collected and paid upon like articles imported from foreign countries; except that all articles the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product, or manufacture of any such possession of the United States, or of both, *which do not contain foreign materials to the value of more than 50 per centum of their total value . . . shall be admitted free of duty* upon compliance with such regulations as to proof of origin as may be prescribed by the Secretary of the Treasury." (Emphasis added.) 19 U.S.C. 1301(a).

²⁰ 19 U.S.C. 1304.

that the Federal Trade Commission is powerless to inquire into the actual, physical fact of how much "manufacturing" was done in the Virgin Islands, and how much was done in Hong Kong.²¹

This very question was squarely decided, and adversely to respondents, in *L. Heller & Son, Inc. v. Federal Trade Commission*, 191 F. 2d 954 [5 S. & D. 327] (7th Cir. 1951). The respondents there, as do the respondents here, contended that the Federal Trade Commission Act's general prohibition of deceptive practices must yield to the allegedly specific marking requirements of the Tariff Act. The Court, noting that repeals by implication are not favored, said:

The Tariff Act is a limited statute on an entirely different subject—the conditions under which foreign goods shall enter the United States. . . . In our opinion Congress, at the time it was considering the 1938 amendment to the Tariff Act, was concerned solely with the extent to which the Treasury Department, incidentally to its collection of customs duties, should regulate the labeling of imported goods. Our examination of the amended Tariff Act discloses no language expressing an intention on the part of Congress to repeal Sec. 5 of the Federal Trade Commission Act, or to diminish the authority or the power of the Commission to prevent deceptive trade practices, and since there exists no repugnancy between the two Acts, we are impelled to the conclusion that the Commission had jurisdiction and authority to prohibit the practices herein involved.²²

Respondents have maintained throughout this proceeding that the duty free entry and the exemption from marking, provided for by the cited provisions of the Tariff Act, were conferred for the purpose of encouraging the development of industry and growth in the insular possessions. But we do not conclude from this that the Congress or the Treasury Department have thereby licensed or placed their imprimatur upon growth by deception.

Thus any "findings" allegedly made by the Treasury Department as to the place of manufacture of respondents' bracelets are wholly irrelevant to the issues in this proceeding. Whereas the Treasury officials who admitted respondents' bracelets into the United States free of duty were concerned solely with the "value" (i.e., cost) of the foreign materials, as compared with the "value" of the domestic materials contained in them, the Federal Trade Commission is concerned with any deception of the American public as to where they were made, i.e., where the manufacturing *work* was done. In this case, "value" or cost figures would completely distort the picture of where the bulk of the labor was performed because of the great disparity between the cost

²¹ Respondents argue also that marking their goods as required by the hearing examiner's order would violate the Tariff Act and subject them to penalties. Respondents' Brief, p. 21. The Commission's staff has been assured by the Bureau of Customs that this is not a fact.

²² 191 F. 2d, at 957.

of labor in Hong Kong and in the Virgin Islands. Whereas workers in this industry in Hong Kong earn between 35¢ and \$1.00 per day, similar workers in the Virgin Islands earn about 75% as much as United States' workers (over \$12 per day). Thus, even if it is true that only 49% of the total cost of making the bracelets is incurred in Hong Kong, this would be quite consistent with the expert testimony received herein that the work done on these bracelets in the Virgin Islands amounts to no more than 3% to 10% of the total manufacturing labor involved in making one type (the bulk of the bracelets), and no more than 5% to 25% of that involved in making the other type.

Respondents' claim of bias and prejudice on the part of the hearing examiner stems from his insistence upon going into the actual, physical facts of respondents' operation, rather than accepting, as the only proper evidence, the revealed truth respondents believed the Treasury Department had found. Whereas they complain of "the examiner's predetermination of their guilt and announced displeasure with the idea of any defense at all,"²³ and of his failure to accord them a fair hearing, the record is plain that it was not a fair hearing respondents wanted, but no hearing at all.

In his opening statement, counsel for respondents stated that the bracelets in question were "products or manufactures of the Virgin Islands, a possession of the United States; that they are such by virtue of a statute,"²⁴ and that "a readjudication of the questions involved in the Treasury determination would in effect be a review of the actions of another government agency."²⁵ Accordingly, respondent Nathan Goodman, coowner (with his wife) and president of both the New York corporation (respondent Baldwin) and the Virgin Islands company that allegedly "manufactures" the bracelets (nonrespondent Janaco), refused to answer all questions directed to the place—Hong Kong or the Virgin Islands—where the actual, physical labor of making the bracelets was done. His counsel suggested that if the hearing examiner wanted to know what was done to the bracelets in Hong Kong, "We will have to go to Hong Kong."²⁶ Goodman persisted in his refusal to answer all questions going to that vital issue in the case, although directly ordered to do so by the hearing examiner.²⁷ Illustrative of the type of question Goodman refused to answer is this one by the hearing examiner:

²³ Respondents' Brief, p. (iii), Exception 12.

²⁴ Tr. 4.

²⁵ Tr. 5.

²⁶ Tr. 24.

²⁷ See Tr. 31-62; 442-446.

Hearing Examiner Tocker: Does anything happen in Hong Kong upon or with respect to anything contained either in Commission's Exhibit 8 or 9 (Baldwin bracelets) or in both?

Mr. Noble: Objection.

Hearing Examiner Tocker: Objection overruled.

Mr. Noble: Don't answer it.²⁸

Goodman explained his refusal to answer the question as follows:

Well, I feel that I shouldn't answer that question because I have—this thing has already been decided by the Treasury Department through the Bureau of Customs and a great deal of the taxpayer's money has been spent on foreign investigations and domestic investigations et cetera.²⁹

When requested to give facts, Goodman insisted upon telling the examiner what the Treasury Department had done.³⁰ And at one point his counsel pointed out that, since Goodman was not an "expert" on where goods are manufactured, his testimony as to where the goods were actually made could not be used to rebut the Treasury's "adjudication."³¹ Then, having refused to give the examiner the facts, Goodman attempted to give his "expert opinion" that the bracelets, *since they bore no mark as to foreign origin*, were perforce made in the U.S.A!

It was in the face of such sophistry as this that the hearing examiner was moved to comment: "We ought to stop this quibbling, Mr. Noble. We ought to stop this foolishness and get to the merits of the case."³²

Respondents' attitude throughout this proceeding is summed up in their counsel's statement to the hearing examiner that: "Respondents never had a responsibility to prove the government's case."³³ But Goodman, in common with all other citizens of the United States, owed a duty to appear as a witness when properly summoned, and to answer all proper questions. *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 476 (1894). Having taken so lightly this duty he owed to the United States, his cry of unfairness in the conduct of the hearing has a hollow ring.

Respondents contend that the hearing examiner erred in striking Goodman's "expert opinion" testimony that his bracelets, because they had no mark on them to indicate foreign manufacture, were therefore

²⁸ Tr. 31, 32.

²⁹ Tr. 32.

³⁰ At one point, asked about the shipment of raw materials to Hong Kong, Goodman replied: "Baldwin has received certain considerations from Customs in regard to" Tr. 26. Later, asked by the hearing examiner where the last work had been done on a Baldwin bracelet, replied: "Well, under a ruling by the Secretary of the Treasury" Tr. 51.

³¹ ". . . (A) presumption arises from this fact (duty-free entry) which cannot be rebutted by the respondent's own testimony, who was not the expert who made the adjudication the Treasury relied upon." Tr. 272.

³² Tr. 77.

³³ Tr. 255.

made in the U.S.A.³⁴ It is elementary that the offering of weak evidence raises the inference that the better evidence in the possession of that party would have been adverse to him.³⁵ The same principle is applicable to the documents offered by respondents and rejected by the hearing examiner, which they now contend "would have established the principal defense."³⁶ These were "certificate of origin" forms of the Treasury Department, Bureau of Customs, containing information furnished by respondents' agent in the Virgin Islands (similar documents, although not the same ones, appear at pages 35—37 of respondents' brief). Beneath the data supplied by, and the signature of, respondents' Virgin Islands agent, there appears the signature of a Customs' official who certifies that "I have investigated the foregoing statements and am satisfied that they are correct to the best of my knowledge and belief." The documents contain figures purporting to correctly state the "value" of the "foreign materials" contained in the particular shipment of bracelets represented by each such "certificate of origin."

Since we agree with the hearing examiner that the documents are wholly irrelevant to the issues in this case,³⁷ there is no necessity for us to pass on the further question of the accuracy of the information contained in the documents.³⁸ As heretofore noted, even assuming, *arguendo*, the truth of the claim that the Treasury Department has found respondents' bracelets to contain foreign materials of less than 50% of their total "value," we would still be constrained to find that between 75% and 97% of the work involved in making the bracelets was performed in Hong Kong. Hence, even if the documents had been received by the hearing examiner, and even if we accepted the truth of every statement contained in them, they would not establish respondents' alleged defense.

³⁴ "He (the hearing examiner) granted motion after motion of counsel supporting the complaint to strike answers that, though relevant, material and responsive within the scope of cross-examination, would prove the defense if permitted to stand." Respondents' Brief, pp. 6, 7. The citations to the record in support of this claim, Tr. 67-68, and 75, show only the rejection of this "expert opinion" testimony by Goodman.

³⁵ "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character. . . ." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

³⁶ Respondents' Brief, p. 8. See Tr. 447-461 and 481-487.

³⁷ Section 4.12(b) of the Commission's Rules of Practice, Procedures and Organization provides: "Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded. . . ."

³⁸ The hearing examiner found the documents unreliable in that the figures appearing on their face conflicted with statements respondents had already made to the Commission in the instant case. Thus, they had said that the average *domestic* costs in a dozen bracelets were \$2.09; that the average *foreign* (Hong Kong) costs were only \$1.25; and that their bracelets therefore met the Tariff Act's test for duty free entry. CX 42-B, 42-C. However, each of the rejected documents showed, on their face, foreign costs that exceeded the \$2.09 given as average domestic costs.

Respondents contend further that the hearing examiner erred in denying, at the close of the affirmative case of counsel supporting the complaint, their motions to dismiss and for a 30-day continuance in order to have "an opportunity to argue and prepare, after reading the transcript, a motion to dismiss," and to call witnesses who were not "available in New York this week."^{38a} There was no error in these rulings. More than three months prior to the hearing in New York respondents had agreed to a pre-trial order directing that: "The hearing herein shall be held in New York City, commencing the 25th day of September, 1961, and the *entire case on the part of the Commission and of the respondents shall be completed at the session thus commenced.*"³⁹ They thus had ample opportunity to bring in any witnesses they desired.

As we have already noted, there is no merit in the argument that they were "surprised" by the calling of competing watch band manufacturers to prove the fact of consumer preference for domestic made bands. They had plenty of time, prior to the hearing, to arrange for the testimony of either consumer witnesses or other watch band manufacturers. As to the other witnesses respondents claimed they wanted to call in further hearings, including witnesses in San Juan, Puerto Rico, and St. Thomas, Virgin Islands, the record indicates that the only thing respondents proposed to prove by those witnesses was the authenticity of the rejected documents, discussed above, and related activities of the Treasury Department.⁴⁰

The record is plain that respondents had no factual defense, and that the holding of further hearings in Chicago, on the West Coast, and in the Virgin Islands, as suggested by respondents, would accomplish nothing but delay. The hearing examiner correctly applied our policy that, "to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously."⁴¹ At the close of the affirmative case herein the hearing examiner offered to adjourn until the following morning and thus give respondents an extra half day to bring in their witnesses. To this offer respondents' counsel replied: "I never second-guess myself. Continuing it to tomorrow morning is not at my request. I won't be here."⁴²

^{38a} Tr. 433, 480-481, 485-486.

³⁹ Memorandum and Order Following Pretrial Conference, June 23, 1961 (Emphasis added.)

⁴⁰ Tr. 487. It was also intimated that respondents would call the "manager" of their Virgin Islands plant. But since its owner, respondent Nathan Goodman, has refused to answer any factual questions concerning its operations, we see no reason to believe his employee would be any more co-operative. Further, respondents offer no satisfactory reason as to why this witness was not produced at the New York hearing.

⁴¹ Section 4.1, Rules of Practice, Procedures and Organization.

⁴² Tr. 488-489.

Because of the gravity of the charge of bias and prejudice on the part of the hearing examiner, we have carefully searched the record in this case. We find that such impatience as he may have expressed with respondents' contumacious conduct and dilatory tactics was only natural and reasonable in the difficult situation thus created by respondents and their counsel. The record amply demonstrates that the hearing was conducted fairly and without any prejudice whatsoever to respondents' legal rights. While respondents argue that the hearing examiner's rulings were all one way, the record is replete with instances in which he sustained respondents' objections⁴³ and overruled objections by counsel supporting the complaint.⁴⁴ In fact, there were several instances in which the examiner expressed positive solicitude for the rights of respondents.⁴⁵ Most importantly, however, the hearing examiner made it plain from the beginning to the end of the hearing that he was only interested in getting at the facts;⁴⁶ that he had a completely open mind⁴⁷ and was quite willing to give respondents' defense of "collateral estoppel" every consideration it was entitled to as a matter of law;⁴⁸ but that he would not permit them to use it to block all inquiry into the facts⁴⁹ or to seize control of the hearing.⁵⁰

⁴³ Tr. 100, 111, 113, 115, 125-126, 145, 290, 319-320, 385, 468.

⁴⁴ Tr. 134, 159, 299, 325, 327, 426.

⁴⁵ "In that respect, though, it may be advisable for you to object within the details of the questioning." Tr. 104. At one point, when respondent Goodman answered a question although his counsel had objected to it, the hearing examiner said: "It would be the better part of wisdom to at least wait until an objection is ruled on before you answer, Mr. Goodman." Tr. 439.

⁴⁶ "I think what we are interested in in this case and in every case before the Commission, and in all government cases, is to arrive at the truth and at the facts." Tr. 320-321.

⁴⁷ "Supposing I try not to make up my mind with respect to that or what you are going to do until I see what you have with respect to the proceedings about which you talk. At the present time, I am a little in the dark, so I can't talk about it." Tr. 7.

⁴⁸ "But this is a matter of defense. You will have ample opportunity to bring that out. At this time I will allow the question. I am not suggesting that you did not follow the right procedure, Mr. Noble, but if we had had a preliminary motion and possibly a preliminary hearing as to what transpired in Treasury, and I could have ruled that that disposes of the case, that would be one thing. Or if we had had a preliminary proceeding and I had ruled that it didn't, that would be another thing. But at the present time, whatever happened in Treasury is a matter of defense for you to bring out later. So I overrule the objection at this time." Tr. 31.

"That is a question of law which I am willing to consider and I will consider it, and you will have an opportunity within the time which I shall provide to brief it fully and establish it as a defense. If it is a defense, you can be just as sure as you are standing there that this portion of the case will be dismissed." Tr. 486-487.

⁴⁹ "The only evidence in this case that is necessary to defeat the commission's prima facie case is evidence that the exhibits which are in evidence were not manufactured in Hong Kong. It is a very simple and neat little issue. It can be testified to and proved probably in ten minutes." Tr. 485.

⁵⁰ "Your client refused to answer very material questions on the manufacture of a bracelet yesterday. He was given his opportunity. He rejected it. I am sure and I trust that appropriate proceedings will be taken to compel his answers. In the meantime, we are going to get on with this case and you are not going to dictate the manner in which the case is tried." Tr. 197-198.

IV

As to the scope of the cease and desist order entered by the hearing examiner, we have already discussed and found wanting respondents' argument that the order should be modified to apply only to the bands sold to consumers as separate units, and thus to exempt from the requirement of disclosure of Hong Kong origin the bands that are sold to watch assemblers or manufacturers for attachment to watches as "original equipment" and ultimate sale to consumers as part of the watch-and-band combination. As we pointed out in that discussion, the fact that the watch assemblers or manufacturers are willing to pay a premium or higher price for a band that bears no mark as to foreign origin, even though it is the same in quality or even the very same band as the one bearing such a foreign origin mark, amply demonstrates that the American consumer has an interest in the origin of the band he finds on his new watch.

Other portions of the hearing examiner's order, although not separately argued by respondents, require modification. With regard to those provisions requiring affirmative disclosure of foreign origin on the bracelets themselves and on the packages, containers, or displays, we deem it necessary to make certain revisions that will insure both permanency and conspicuousness in the required disclosures. We do not agree, however, that respondents should be required to affirmatively state the fact that some of the work of assembling the bracelets is performed in the Virgin Islands. The amount of work done there is, by any standard, an insubstantial part of the total effort involved in making a finished bracelet. Hence, statements on the bands relating to the Virgin Islands assembly are unnecessary for the protection of the consuming public and might, as noted in the *Segal* case, *supra*, "be positively misleading, unless indeed it was so qualified as to be ineffective."

The hearing examiner's order would also require respondents to cease representing in any manner, including representations in advertisements, that their bracelets are made of American raw materials without disclosing, in conjunction therewith, the fact of Hong Kong manufacture or fabrication. While the record supports the finding of fact on this point (Finding No. 9, p. 1350, Initial Decision), the complaint does not charge this kind of affirmative misrepresentation. We are constrained to hold, therefore, that this provision in the order is outside the scope of the complaint.

Respondents' exceptions are denied. Their motions for leave to file a reply brief after expiration of time, and for further oral argument,

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Final Order

are also denied. The initial decision and order as supplemented and modified to conform to the views expressed in this opinion will be adopted as the decision of the Commission.

FINAL ORDER

The Commission on October 2, 1962, having issued and thereafter served on the respondents its order affording the respondents an opportunity to file objections to a final order proposed by the Commission in modification of the order to cease and desist contained in the hearing examiner's initial decision filed December 13, 1961, and having thereafter extended to November 13, 1962, the date by which such objections may be filed; and

The respondents not having filed any objections to said proposed order within the time provided; and

The Commission having determined that its proposed order should be adopted as the final order of the Commission:

It is ordered, That the order to cease and desist contained in the hearing examiner's initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondent Baldwin Bracelet Corp., its officers, directors, agents, representatives, and employees, and respondents Nathan Goodman and Anne Goodman, individually, and as officers of said corporation, directly or through any corporate device, in connection with the offering for sale, sale, and distribution of metal expansion watch bands or bracelets or other similar products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that metal expansion watch bands or bracelets or similar products are guaranteed unless the nature, extent and conditions of the guaranty and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed in conjunction with the guaranty representations.

2. Offering for sale or selling metal expansion watch bands or bracelets or similar products which are substantially, or which contain a substantial part or parts, of foreign origin or fabrication without affirmatively disclosing the country or place of foreign origin or fabrication thereof on the products themselves, by marking or stamping on an exposed surface, or on a label or tag affixed thereto, of such degree of permanency as to remain thereon until consummation of consumer sale of the products, and of such conspicuousness as to be likely observed and read

by purchasers and prospective purchasers making casual inspection of the products.

3. Offering for sale, selling, or distributing any such product packaged, or mounted in a container, or on a display card, without disclosing the country or place of foreign origin of the product, or substantial part or parts thereof, on the front or face of such packaging, container, or display card, so positioned as to clearly have application to the product so packaged or mounted, and of such degree of permanency as to remain thereon until consummation of consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

It is further ordered, That the initial decision as so modified be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents, Baldwin Bracelet Corp., Nathan Goodman and Anne Goodman, 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 as set forth herein.

By the Commission, Commissioner Higginbotham not participating.