

Under the circumstances, and solely for the purpose of complying with the above-noted order of the District Court:

It is ordered, That the Commission's complaint in this proceeding be, and it hereby is, dismissed, without prejudice to the right of the Commission to reopen the matter and take such further action therein as the public interest may require if the aforesaid order of the District Court becomes ineffective as a matter of law.

IN THE MATTER OF

SAVOY WATCH CO., INCORPORATED, ET AL.

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

Docket 8080. Complaint, Aug. 11, 1960—Decision, Aug. 14, 1963

Order requiring New York City importers of watch movements from Switzerland which they assembled with watchcases either domestically manufactured or imported from Hong Kong, to cease furnishing display cards to dealer purchasers which stated falsely that the watches were fully guaranteed by the manufacturers and were water resistant, and represented falsely by the arrangement of the printing that they had been "nationally advertised in Life—Readers Digest"; and to cease selling the watches with the words "Swiss" or "Swiss Made" on the faces without disclosing that the cases came from Hong Kong.

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 Savoy Watch Co., Incorporated, a corporation, and Arthur Miller and Isadore S. Miller, 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 complaints, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Savoy Watch Co., Incorporated, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its principal place of business located at 62-67 West 47th Street, New York, New York.

Individual respondents Arthur Miller and Isadore S. Miller 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 herein complained of. The place of

Complaint

63 F.T.C.

business of said individual respondents is the same as that of respondent Savoy Watch Co., Incorporated.

PAR. 2. Respondents are now, and for some time last past have been, engaged in importing watch movements from Switzerland, and assembling said watch movements with watchcases either domestically manufactured or imported from Hong Kong. Respondents then distribute the assembled watches through retail and wholesale jewelers located throughout the United States.

PAR. 3. In the course and conduct of their business, respondents now cause, and for more than two years last past have caused, their watches, when sold, to be transported from their place of business in the State of New York to the purchasers thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said watches in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents at all times mentioned herein have been, and now are, in substantial competition, in commerce, with individuals, firms and corporations engaged in the sale of watches.

PAR. 5. Respondents in the course and conduct of their business, and for the purpose of inducing the sale of their watches, furnish display cards to dealers purchasing their watches, for use in displaying said watches for sale to the public, upon which, among other things, the following words, terms and expressions are printed.

Sold with a Factory Guarantee

Water Resistant. (These words are also stamped on the watches themselves.)

PAR. 6. By means of the aforesaid statements respondents represented, directly and by implication, that:

1. Their said watches are fully guaranteed by the manufacturers thereof.

2. Their watches are water resistant.

PAR. 7. Said statements and representations were false, misleading and deceptive. In truth and in fact:

1. Respondents' watches were not fully guaranteed as the guarantee furnished in connection therewith was a limited one.

2. Said watches were not water resistant.

PAR. 8. The following statement is also printed on the aforesaid display cards — " * With the feature that is nationally advertised in Life — Readers Digest". The asterisk is carried to the center of the card, far removed from the aforesaid statement in the following fashion — "Jeweled * Watch". While the jeweled lever used in
Lever

respondents' watches may have been advertised in Life and Readers Digest, the arrangement of the printing on said card is such that the

public may be led to believe, contrary to the fact, that respondents' watches, in their entirety, had been advertised in said publications.

PAR. 9. Respondents import watchcases from Hong Kong, and after assembling said cases together with watch movements imported from Switzerland, sell and distribute the assembled watch without disclosing the country of origin of said watchcase except on the inside of the bezel which cannot be seen by prospective purchasers. The faces of said assembled watches bear the words "Swiss" or "Swiss made".

In the absence of a disclosure of the country of origin of said watchcases, the public understands and is led to believe that the said cases are either of domestic or Swiss origin.

There is a preference on the part of many persons in this country for watchcases of domestic and Swiss origin over watchcases manufactured in Hong Kong.

PAR. 10. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices and their failure to adequately disclose the country of origin of their watchcases have had, and now have, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public as to the country of origin of said watchcases and into the erroneous and mistaken belief that the statements and representations are true, and into the purchase of substantial quantities of said watches by reason of said erroneous and mistaken belief.

As a consequence thereof, substantial trade, in commerce, has been and is being unfairly diverted to respondents from their competitors and substantial injury has thereby been and is being done to competition in commerce.

PAR. 11. 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.

Noble & Moyle, Washington, D.C., for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

FEBRUARY 26, 1962

Respondents are charged in the Commission's complaint, issued on August 11, 1960, with practices alleged to be misleading and deceptive

Initial Decision

63 F.T.C.

in violation of the Federal Trade Commission Act. Succinctly stated, the alleged deceptive practices are as follows:

1. The use of display and promotional material claiming that respondents' watches are guaranteed, without setting forth the terms and extent of the guarantee in full.
2. The use of display cards arranged and printed in such a manner as to mislead consumers into believing that respondents' watches had been advertised in certain well-known magazines of national circulation, when it was only a component which had been so advertised, and respondents' watches had not been so advertised.
3. The use of the representation, "water resistant" on display and promotional material, and on the backs and dials of respondents' watches, when in fact respondents' watches are not water resistant.
4. The sale of watches assembled from watchcases manufactured in Hong Kong, without disclosure of the fact of the foreign origin of the watchcases.

Three prehearing conferences were held in this matter on December 7, 1960, January 10, 1961, and January 24, 1961. Thereafter the Commission's case-in-chief was presented in three days of hearings during May and June of 1961, and at the close of the Commission's case-in-chief, respondents moved to dismiss the complaint in its entirety. The motion was denied by the hearing examiner and respondents' defense was presented in three days of hearings during September and December of 1961.

During the course of the hearings General Time Corporation made application to appear as an intervenor in this case. The application was opposed by respondents and by counsel supporting the complaint, and was denied; however, Cummings and Sellers, by David N. Barus, counsel for General Time Corporation were allowed to appear in a status comparable to that of an amicus curiae for the purpose of filing advisory briefs and memoranda. Hearings were concluded and the record on this case closed on December 12, 1961.

Proposed findings of fact and conclusions of law were filed by counsel for the parties. The hearing examiner has carefully reviewed and considered same. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent Savoy Watch Co., Incorporated, sometimes hereinafter referred to as Savoy, is a corporation organized, existing and

doing business under and by virtue of the laws of the State of New York with principal offices and place of business located at 62-67 West 47th Street, New York, New York.

2. Respondent Arthur Miller is the president of, and is a stockholder in, respondent Savoy.

3. Respondent Isadore S. Miller is an officer of, and is a stockholder in, respondent Savoy.

4. Respondents Arthur Miller and Isadore S. Miller are the sole stockholders of respondent Savoy, and they exercise sole control and direction over the policies of respondent Savoy.

5. Respondents are engaged in importing watch movements from Switzerland and assembling said watch movements with watchcases either domestically manufactured or imported from Hong Kong. Respondents then distribute such assembled watches to retail and wholesale jewelers located throughout the United States.

6. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in watches in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents at all times mentioned herein have been, and are, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of watches.

7. Respondent Savoy furnishes display cards to dealers for use in displaying respondents' watches for sale to the public. These display cards bear the representation "sold with a factory guarantee".

8. Guarantee certificates used by respondents in connection with the sale of their watches contain the following guarantee provisions: "This certifies that your MILOS watch is therefore fully guaranteed against any original mechanical defects".

9. Respondents collect service charges on watches returned for repairs, and sometimes impose a charge covering postage for such watches returned for repair. Thus, respondents' performance under their guarantee is at times limited and made conditional upon the payment of a fee.

10. The imposition of these service charges is nowhere set forth in the guarantee representations, and hence the nature and extent of the guarantee and the manner in which the guarantor would perform thereunder is not clearly disclosed. The guarantee representations made by respondents are misleading and deceptive.

11. Respondents use display cards which are arranged and printed in such a manner as to mislead consumers into believing that respondents' watches have been advertised in certain well-known magazines in national circulation, when only a component has been so advertised.

Initial Decision

63 F.T.C.

12. Savoy's watches were never advertised in "Life" magazine, "Reader's Digest", "Saturday Evening Post", or in any of the other nationally circulated magazines mentioned on the face of the display cards.

13. Respondents represent to the public that their watches are "water resistant". This representation is made through the medium of display cards, and is also made in the case of individual watches, by having the legend "water resistant" stamped on the back of the watchcase.

14. A total of eight watches manufactured by respondent Savoy were purchased by the Commission's staff from various jewelry retailers in New York, New Jersey, and Massachusetts. All eight of these watches were subjected, by an independent testing agency to the test for "water resistance" as prescribed in the Trade Practice Rules for the Watch Industry. Only one of these eight watches successfully passed the test for water resistance. The remaining seven were not "water resistant" according to the meaning of that term as specified in the Trade Practice Rules of the Watch Industry.

15. Watches sold by respondents, bearing the representation "water resistant", are not tested with a reasonable degree of accuracy before the offering of the watches for sale to the general public. Mr. Irving Bloch, foreman and factory manager of the Savoy factory, testified that one-half of the watches which Savoy sells were not cased or assembled in their own factory, but were cased or assembled by a number of other outside watch assemblers doing work for Savoy. No one from Savoy supervises the actual assembly of Savoy's watches in these outside assembly shops, and, according to Mr. Bloch, the only quality control exercised is a visual inspection of the cased watches when they are returned to Savoy. However, defects which destroy a watch's "water resistance are not apparent on visual inspection.

16. Watches sold by respondents and claimed by respondents to be "water resistant" were not in fact "water resistant".

17. During 1958, 1959 and the first half of 1960, respondents imported watch movements from Switzerland. About two-thirds of the watchcases used by Savoy in casing these movements were purchased from the W. M. R. Watch Case Company, and from Conde Watch Case Company, and these watchcases, purchased by Savoy from W. M. R. and from Conde, were imported by those companies from Hong Kong.

18. None of the watchcases originating in Hong Kong and used by respondents in casing their watches bear markings on the outside showing the fact of their Hong Kong origin in such a way that it is disclosed to purchasers of the watches. The origin however is

indicated on the inside of the casing and may be ascertained by removing the back of the case. This can be accomplished with facility.

19. In the absence of a reasonable disclosure that a product, including watchcases, is of foreign origin, the public believes and understands that it is of domestic origin.

20. There are, among members of the purchasing public, a substantial number who have a preference for products originating in the United States over products originating in foreign countries or in foreign places, including watchcases originating in Hong Kong. There are also, among the members of the purchasing public, substantial numbers of potential purchasers who are not concerned with the country of origin of watchcases if such watchcases are used by well-known brand watch manufacturers.

CONCLUSIONS

1. Respondents' use of display and promotional material claiming that respondents' watches are guaranteed, without setting forth the terms and extent of the guarantee in full, is a deceptive practice within the purview of the Federal Trade Commission Act.

The testimony of respondent Arthur Miller, president of respondent Savoy, is that Savoy makes service charges on watches returned for repair, and that Savoy sometimes makes charges for postage on such watches returned for repair. The guarantee representation on respondents' display cards makes no mention of the fact, and the guarantee representation on the guarantee certificate supplied by respondents for sale in connection with their watches likewise makes no mention of this fact. The guarantees given by respondents appear on their face to be full and unqualified guarantees, although respondents' performance under these guarantees is limited and made conditional on the payment of a fee.

In *Clinton Watch Company* case, Docket No. 7434 [57 F.T.C. 222,231], involving similar facts, the Commission states:

Respondents contend that this ruling is in error since the repairing and replacing of parts is done without charge, the \$1.00 charge being made only to reimburse respondents, in part, for postage, insurance and other expenses incurred in returning the watch to the buyer. This argument is rejected on the authority of *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509 (7th Cir., 1946). In that case, the court in considering this same point with reference to the respondents' advertised "lifetime guarantee" on its pens, concluded that a guarantee *per se* negatives the idea of a further consideration on the part of a purchaser in his effort to obtain satisfactory performance with the article guaranteed.¹

¹ See also *Hathaway Watch Co.*, Docket No. 6357, 52 F.T.C. 246; *Cimier Watch Corp.*, Docket No. 6703, 54 F.T.C. 542; *Roseman Enterprises Co.*, Docket No. 6358, 52 F.T.C. 467; *Maryland Distributors*, Docket No. 6065, 49 F.T.C. 1229.

2. Respondents' use of display cards arranged and printed in such a manner as may reasonably tend to mislead consumers into believing that respondents' watches had been advertised in certain well-known magazines of national circulation, when it was only a component which had been so advertised, and respondents' watches had not been so advertised, is a deceptive practice within the purview of the Federal Trade Commission Act.²

Paragraph 8 of the complaint charges that the display cards which respondents have used are arranged and printed in a misleading and deceptive manner. In the absence of scrutiny beyond that which might normally and reasonably be expected, a viewer of the cards would be led to believe that it was the "Surfside" or "Milos" watches³ which had been advertised in the national magazines, when in fact only certain components or construction features of the movements had been so advertised.

Two examples of these display cards are in evidence. The testimony of Mr. Miller indicates these cards were distributed by Savoy to their customers to help sell watches. Savoy's watches were never advertised in "Life", "Reader's Digest", "Saturday Evening Post", or in any of the nationally circulated magazines mentioned on the face of the display cards.

3. Respondents' use of the representation "water resistant" on display and promotional material, and on the backs and dials of respondents' watches, when in fact respondents' watches are not water resistant, is a deceptive practice within the purview of the Federal Trade Commission Act.

The charge made by Paragraphs 5, 6 and 7 of the complaint, relating to water resistance, states that respondents held out their watches to the public as being "water resistant" and that this was false and deceptive because respondents' watches are not always water resistant. The evidence supporting this allegation is persuasive. It discloses that a number of respondents' watches bearing the water resistant legend on their dials, or on their backs, were purchased by the Commission's investigational staff from retail outlets located in various States, and the watches so purchased were tested for water resistance. All but one watchcase failed the test.

Two of the foregoing watches were purchased by Mr. T. Whitehead, a member of the Commission's investigational staff, from the regular stock of a retail jewelry store in New Bedford, Massachusetts, during August 1959. The third watch was purchased in the

² See the Commission's order in *Fry King Corporation*, Docket No. 7029.

³ "Surfside" and "Milos" are trademarked trade names used by respondent Savoy Watch Co.

same way by Mr. Whitehead from the regular stock of a retail jeweler in Newark, New Jersey, in July 1959. All three watches are marked with respondents' trademarked trade names, "Surfside" or "Milos", on their dials. All three bear the legend "water resistant" on their backs, and two bear it on their dials.

Subsequent to their purchase these watches were in Mr. Whitehead's custody until they were turned over to a testing laboratory, Lucius Pitkin, Inc., for the water resistance test. The watches were then tested for water resistance according to the rules for test number 2 (the water resistance test), as set forth in the Trade Practice Rules for the watch industry (16 CFR, part 170.2(c)). These tests were performed by Mr. Frederick H. Wright, an official of Lucius Pitkin, Inc., on September 21, 1961. As Mr. Wright's testimony reflects, all three watches failed the test for water resistance.

After the issuance of the complaint, five more watches were purchased by Mr. Whitehead, during April 1961, from the regular stock of retail jewelers located in Roselle Park, New Jersey, Newark, New Jersey, and Hempstead, New York. All five of the watches bear respondents' trademarked trade names on their faces, and all bear the representation "water resistant" on their backs. After their purchase, the five watches were kept in Mr. Whitehead's custody and were delivered to him by Mr. Wright, of Lucius Pitkin, Inc., for testing.

Mr. Wright's testimony and his written report of the tests reflect that four of these five watches failed to pass the test, and that only one watch passed the test. There is no reliable evidence that these tests do not typically reflect the water resistant qualities of respondents' watches.

Furthermore, the evidence of respondents' testing procedures for water resistance are not demonstrative of their efficiency. A substantial number of respondents' watches are cased at the plants of two or three other watch manufacturers. Respondents therefore have no control over the quality of the work done at these other plants. It would seem from the testimony of Mr. Bloch, respondents' plant manager, that respondents perform only a cursory visual inspection of cased watches returned from these "outside" assembly plants. The adequacy of the testing, however, is not a primary issue. Of ultimate importance is the fact that a preponderant number purchased are not water resistant, although claimed to be.

Respondents' contention that the five watches purchased and tested after issuance of the complaint "are not material or relevant to the issues raised by the pleading" because they came into the Commission's possession after the complaint was issued is without merit since presumptively, in the absence of evidence to the contrary, they

Initial Decision

63 F.T.C.

or other watches proved to have like defects, were on the market during the period contemplated by the complaint and their quality, which is in issue, involves a continuing deceptive practice before and after the filing of the complaint, concerning which relief is properly sought.

There also appears to be in issue the question as to whether or not the watches comprising the first group purchased are the products of Savoy Watch Co., Incorporated. The evidence, however, is abundantly clear in the affirmative. All three of these watches bear respondents' trademark. Commission's Exhibit 9 is marked "Surfside" on the dial. Commission's Exhibit 10 is also marked "Surfside" on the dial, and Commission's Exhibit 11 is marked "Milos" on the dial. As evidenced, "Surfside" and "Milos" are trademarked trade names, the property of, and used only by, respondent Savoy Watch Co., Incorporated.

Corroborative of the foregoing, the symbols are also a mode of identification. Nevertheless, Mr. Miller in examining Commission's Exhibit 9, found the symbol QZX not EXM, and expressed inability to identify the watch as a Savoy product for that reason. He also failed to identify Commission's Exhibit 10. Although his attention was invited to the fact that these watches had Savoy's trade name "Surfside" on their dials, and that the phrase "Surfside Watch Company" was stamped on the movement in both of these watches, Mr. Miller opinioned that perhaps certain parts of the watch movement (the "balance bridges") had been switched by some person or persons unknown. However, he was certain that the QZX symbol was not Savoy's. The official records of the U.S. Bureau of Customs, however, resolves this conjecture.⁴ These records reflect that watch import symbol QZX was assigned to the "Surfside Watch Co.", of 62 West 47th Street, New York, New York, on the 22nd day of June 1957. "Surfside" was a trademarked trade name of Savoy Watch Co., Incorporated. Respondents began using the trade name "Surfside" in "1956 or 1957", which corresponds with the time that QZX was assigned to the "Surfside Watch Co." Significantly also, the address given for the "Surfside Watch Co." is the same as Savoy's address, 62 West 47th Street, New York, New York.

The aforesaid acts and practices of respondents, hereinabove identified as 1, 2 and 3, are all to the prejudice and injury of the public and of respondents' competitors and 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.

⁴ See Commission's Exhibit 17, Tr. 328-329.

4. The sale of watches assembled from watchcases manufactured in Hong Kong without disclosure of the foreign origin of the watchcases is not deceptive *per se* or in the instant case violative of the Federal Trade Commission Act.

It is a well established principle of law, that in the case of most products imported in their entirety and sold in commerce, failure to disclose the country of origin constitutes an unfair or deceptive act or practice which the Commission is fully empowered to enjoin by cease and desist order. See, for example, *Rene D. Lyon Co., Inc., et al.*, 48 F.T.C. 313 (Docket No. 5859, 1951) (imported metal watchbands), and *Duo-Tint Bulb & Battery Co., Inc., et al.*, 36 F.T.C. 749 (Docket No. 4814, 1943) (imported electric light bulbs). There are exceptions, however, hereinafter discussed.

This principle has been authoritatively extended to apply similarly in many cases where, although the product in question was not imported in its entirety, the major component thereof was imported and its country of origin was not disclosed. The leading cases of this type are *L. Heller & Son, Inc., et al.*, 47 F.T.C. 34 (Docket No. 5358, 1950), *aff'd sub nom. Heller v. Federal Trade Commission*, 191 F. 2d 954 (C.A. 7, 1951) and *Lucian V. Segal, trading as Segal Optical Company*, 34 F.T.C. 218 (Docket No. 4181, 1941), *aff'd sub nom. Segal v. Federal Trade Commission*, 142 F. 2d 255 (C.A. 2, 1944).

In the *Heller* case, the Commission ordered disclosure of the foreign origin of imported imitation pearls, which respondents mounted on domestically produced ear clips and necklace strings. The reviewing court upheld this order, and quoted with approval the following language from the opinion of the Commission (47 F.T.C. 34, 45; 191 F. 2d 954, 956) :

"When such imitation pearls are used in necklaces they represent the principal component and the part which makes the necklaces valuable to the consumer. The consumer purchases an imitation pearl necklace not because of the string which holds the pearls together or the clasp which joins its ends, but because of the imitation pearls which are thus assembled and made useful as ornaments * * *. Failure to disclose foreign origin, under previous decisions of the Commission, constitutes misrepresentation and an unfair and deceptive practice."

In the foregoing case, the Commission treats and compares different types of imported products and product components. The country of origin of imported genuine pearls, it was held, need not be disclosed. This is an exception to the general rule stated above. Moreover, in considering certain imported alabaster or glass beads, used as the cores for imitation pearls manufactured in the United States, the Commission found that failure to disclose the foreign origin of these beads in the sale of the imitation pearls was not mis-

Initial Decision

63 F.T.C.

leading to the public. Thus, in contrast with the finished imported imitation pearls domestically mounted, the imported cores were regarded, in effect, as product components having insufficient significance to justify a required disclosure of their origin to prevent public deception in any material respect.

The concept enunciated in the *Heller* case appears to be that the "particular circumstances" of each merchandising situation involving a product containing an imported component, must be considered to determine whether the public has a sufficient interest incident to purchase in the characteristics of the imported component, in its relationship to other components, or the product as a whole. It is quite apparent therefore that disclosure of the foreign origin of an imported component, is not a *per se* requirement. The Commission only recently adhered to this theory in *Swiss Watch Case Corp., et al.*, (Docket No. 7040, 1959) [56 F.T.C. 87], the only previous Commission decision involving imported watchcases. The hearing examiner had held that the public is entitled to disclosure of the foreign origin of an imported product as a matter of law, and accordingly proposed an order requiring the respondents to disclose the foreign origin of their watchcases. In reversing the initial decision of the hearing examiner and dismissing the complaint, the Commission held (p. 4) [56 F.T.C. 87, 90]:

* * * [The] concept that failure to disclose foreign origin is unlawful in all merchandising situations similarly lacks sound legal basis.

However the Commission has ordered disclosure of the country of origin of major components of a product.⁵

The hearing examiner has taken official notice of a preference for American products over foreign products including watchcases. However, this is insufficient to establish a deception as to unmarked foreign component parts unless the component may be reasonably considered a material factor incident to the purchase of the assembled

⁵ In *Swift & Anderson, Inc., et al.*, (FTC Docket No. 6818) the Commission ordered disclosure of the foreign origin of the imported movements (not the cases) of weather instruments, and the imported lenses (not the frames, holders or cases) of reading glasses, magnifiers and binoculars.

Other proceedings resulting in similar orders are many, but the following are typical of those in which a product component was imported and its foreign origin was not disclosed:

Propper Manufacturing Company, Inc., et al., 53 F.T.C. 852 (Docket No. 6665, 1957): imported glass barrels and plungers for domestic hypodermic needles (consent order), *Mercury Machine Importing Corp., et al.*, 51 F.T.C. 534 (Docket No. 6011, 1955) (consent order) and *Sewing Machine Sales Corporation, et al.*, (FTC Docket No. 6149): imported sewing machine heads (works) for domestic cabinets.

William Adams, Inc., et al., 53 F.T.C. 1164 (Docket No. 6575, 1957) and *Lifetime Cutlery Corp., et al.*, (FTC Docket No. 7292, 1959): imported cutlery handles for domestic (or English) blades and tines.

Windsor Pen Corporation, et al., 48 F.T.C. 811 (Docket No. 5829, 1952): imported automatic pencil mechanisms for domestic barrels.

product or is of a quality inferior to an American component a purchaser presumes he is getting the absence of disclosure. Regardless of the quality of product components, it is common knowledge that the public has fixed ideas about the overall better quality of American products generally as compared to foreign products. In this connection, with regard to many products, the public relies upon the American manufacturer in assembling a product (e.g., watches), to provide component parts, if foreign, that are not of quality inferior to those which can be obtained in the American domestic market.⁶ It is inconceivable that a reasonably minded purchaser would be interested in knowing the origin of every component part of every type of machinery he might purchase unless the particular parts, concerning which he is knowledgeable, have a material relationship to the quality of the product as a whole after assembly (e.g., the operating unit of a watch as a part of the entire watch, a motor as a part of an automobile, a transistor as a part of a radio, etc.) or unless a foreign component is inferior to the American component, the purchaser presumes he is buying in the absence of foreign origin identification.

As emphasized by the Federal Trade Commission in the *Swiss Watch* case, *supra*, each merchandising situation must be considered on its own merits. It would appear to be a logical deduction from this concept that a disclosure of the national origin of a component part is mandatory only in those cases where a failure to disclose would be of sufficient materiality to induce a sale which otherwise might not have been consummated. It is difficult to believe that a reasonably minded purchaser would refuse to purchase a watch with which he was otherwise satisfied, because the watchcase was manufactured in a foreign country including Hong Kong, unless such component was of quality inferior to that usually manufactured in the domestic market in the United States for a comparable type watch. In the *within* case, there is no evidence of such inferiority. Furthermore, the evidence herein does not adequately establish in other respects the materiality of the disclosure of the national origin of respondents' watchcases or that such watchcases represent the principal component and the part which makes respondents' watches valuable to the consumer.⁷

Even if the national origin of a watchcase should be of some materiality to a purchaser under unusual circumstances, it would seem reasonable to expect that the purchaser's special interest would induce him to seek identification of its origin by removal of the back of the case in the absence of disclosure on the outside.

⁶ This is particularly applicable to name brand manufacturers.

⁷ See *Heller v. Federal Trade Commission*, 47 F.T.C. 34, 45; 191 F. 2d 954, 956.

Initial Decision

63 F.T.C.

Accordingly, since the Federal Trade Commission has jurisdiction and this proceeding is in the public interest, the following order shall issue:

ORDER

It is ordered, That respondent Savoy Watch Co., Incorporated, a corporation, through its officers, directors, agents, representatives and employees, and respondents Arthur Miller and Isadore S. Miller, individually and as officers of said corporation, directly or through any corporate device in connection with the offering for sale, sale, and distribution of watches 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 watches are guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

2. Representing directly, indirectly, or by implication, that their merchandise has been advertised in Life Magazine, Reader's Digest, Saturday Evening Post Magazine, or in any other magazine or publication, unless such is the fact.

3. Representing through the use of deceptively arranged and printed advertising or promotional material, that their merchandise has been advertised in Life Magazine, Reader's Digest, Saturday Evening Post Magazine, or in any other magazine or publication, unless such is the fact.

4. Offering for sale or selling watches represented to be "water resistant" unless such watches are in fact water resistant.

5. Offering for sale or selling watches represented to be "water resistant" unless such watches are so constructed, and are of such a composition, as to provide protection against water or moisture to the extent of meeting the test designated test number 2 of the Trade Practice Conference Rules for the watch industry, as set forth in the Code of Federal Regulations, Title 16, Chapter 1, part 170.2(c); (16 CFR 170.2(c)).

6. Offering for sale or selling watches represented to be "water resistant" unless such watches are so constructed, and are of such composition as to be capable of immersion for at least three minutes in water at a pressure equivalent to a depth of 26 feet of water under normal atmospheric pressure of 15 pounds per square inch, without admitting or showing any evidence of capacity to admit any moisture or water, and it is

473

Order

Further ordered, That the charge relating to the offering for sale or selling watches containing watchcases manufactured in Hong Kong combined with other parts made in the United States and Switzerland, without clearly disclosing the Hong Kong origin of the watchcases, is herein and hereby dismissed.

ORDER MODIFYING AND ADOPTING INITIAL DECISION AND PROVIDING
FOR THE FILING OF OBJECTIONS TO PROPOSED FINAL ORDER AND REPLY

JUNE 19, 1963

This matter having been heard by the Commission upon the exceptions to the hearing examiner's initial decision filed by counsel supporting the complaint, and upon briefs and oral argument in support thereof and in opposition thereto; and

It appearing that the only question raised concerns the examiner's dismissal of the charge of the failure to disclose the foreign country of origin of watchcases in violation of the Federal Trade Commission Act; and

The Commission having determined that the findings and conclusions in the initial decision are appropriate in all respects except as to certain findings and conclusions on the foreign origin issue; that the initial decision should be modified (a) in connection with the foreign origin issue and (b) in connection with various paragraphs of the order for clarification; and that the initial decision as so modified should be adopted as the decision of the Commission:

It is ordered, That the portion of the initial decision under the heading "Conclusions" numbered 4, beginning with the last paragraph on page 484 and ending with the second full paragraph on page 485, be, and it hereby is, stricken.

It is further ordered, That the following new findings be, and they hereby are, included in the initial decision following finding numbered 20:

21. The record shows that many people care where a watchcase is from and prefer a watch with an American-made case. A number of witnesses testified to this effect. The following are excerpts from pertinent testimony:

Witness Robert Dolan

Q. Now, in purchasing a wristwatch, would you prefer one with an American made watchcase, or perhaps a Swiss made watchcase over one of the watchcases made in Hong Kong?

A. I would prefer either one that's either made—a Swiss-made watch or an American-made watch.

Order

63 F.T.C.

Q. One with a watchcase made in America?

A. Yes. (R. 60.)

Witness Irving Gerber

Q. Does knowledge of the national origins of the component parts of a watch affect your opinion of the watch's quality?

A. Yes.

Q. Do you prefer American made goods over those made in Hong Kong?

A. Yes. (R. 206.)

Witness Ann Marie Girven

Q. Would knowledge of the national origin of the components of the watch affect your opinion of its quality?

A. Yes. (R. 101.)

Mr. Arthur Nathanson, part owner of Conde Watch Case Company, a large importer and seller of Hong Kong watchcases, when asked why he did not stamp "Made in Hong Kong" on the outside of his cases, testified in part:

"In short, an importer of Swiss watches who has a Swiss movement which costs him seven or eight dollars and puts it into a Hong Kong case which costs him 25, 50 cents or even a dollar doesn't want the inference there that the entire product is manufactured in Hong Kong.

"So, were we to stamp it on the outside 'Made in Hong Kong' there would definitely be no sale of the item." (R. 189-190.)

In this there is the clear implication that many consumers are interested in the place of origin of watchcases and that they prefer American-made cases over watchcases made in Hong Kong.

It is further ordered, That the following be, and it hereby is, included in the initial decision in part 4 of the conclusions following the last full paragraph on page 484, as follows:

The watchcase is a component of the completed watch. It is, however, a substantial and important component. It protects the watch movement from moisture, dirt and other foreign substances. The watchcase is also identifiable. It serves not only a specific and important function of protecting the movement but, as it is the part the customer mainly sees, adds to the appeal of the product by its style and appearance. In the circumstances, the watchcase does not lose its identity in the manufacture of the watch, but retains its essential characteristics as a foreign-made product. See *L. Heller & Sons, Inc., et al. v. Federal Trade Commission*, 191 F. 2d 954, 956 (7th Cir. 1951). Moreover, many members of the purchasing public prefer United States-

473

Order

made watchcases over watchcases made in Hong Kong and, in the absence of a reasonable disclosure of foreign origin, would believe the watchcases to be of domestic origin.

It is concluded, therefore, that respondents' failure to mark the foreign place of origin on their watchcases has the capacity and tendency to mislead and deceive purchasers and prospective purchasers into the false and erroneous belief that such watchcases are of domestic origin. The aforesaid practice constitutes an unfair and deceptive act or practice in violation of the Federal Trade Commission Act.

It is further ordered, That respondents may, within twenty (20) days after service upon them of this order, file with the Commission their objections to the changes in the order to cease and desist contained in the initial decision, as shown by the following proposed order of the Commission, together with a statement of the reasons in support of their objections and a proposed alternative form of order appropriate to the Commission's decision:

PROPOSED ORDER

It is ordered, That respondent Savoy Watch Co., Incorporated, a corporation, and its agents, representatives and employees, and respondents Arthur Miller and Isadore S. Miller, individually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That their products are guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

(b) That their watches or other products are advertised in *Life*, *Reader's Digest*, *Saturday Evening Post*, or in any other national publication, when they are not in fact so advertised.

(c) That their watches are "water resistant," it being understood that respondents may successfully defend the use of such representation with respect to any watch, the case of which respondents can show will provide protection against water or moisture to the extent of meeting the test designated test No. 2 of the Trade Practice Conference Rules for the

Final Order

63 F.T.C.

Federal Regulations, Title 16, Chapter 1, Part 170.2(c) (16 CFR 170.2(c)).

2. Offering for sale or selling watches, the cases of which are in whole or in part of foreign origin, without affirmatively disclosing the country or place of foreign origin thereof on the exterior of the cases of such watches 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 watches and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers.

It is further ordered, That counsel supporting the complaint may, within ten (10) days after service upon him of respondents' objections, file a statement in reply thereto.

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

By the Commission, Commissioner Higginbotham not participating by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

FINAL ORDER

Pursuant to §4.22(c) of the Commission's Rules of Practice, respondents were served with the Commission's decision and afforded the opportunity to file exceptions to the form of order which the Commission contemplates entering; and

Respondents having not availed themselves of the opportunity to except to the form of the proposed order to cease and desist, said order is hereby entered as the final order of the Commission:

It is ordered, that respondent Savoy Watch Co., Incorporated, a corporation, and its agents, representatives and employees, and respondents Arthur Miller and Isadore S. Miller, individually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That their products are guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

(b) That their watches or other products are advertised in *Life*, *Reader's Digest*, *Saturday Evening Post*, or in any

other national publication, when they are not in fact so advertised.

(c) That their watches are "water resistant," it being understood that respondents may successfully defend the use of such representation with respect to any watch, the case of which respondents can show will provide protection against water or moisture to the extent of meeting the test designated test No. 2 of the Trade Practice Conference Rules for the Watch Industry, as set forth in the Code of Federal Regulations, Title 16, Chapter 1, Part 170.2(c) (16 CFR 170.2(c)).

2. Offering for sale or selling watches, the cases of which are in whole or in part of foreign origin, without affirmatively disclosing the country or place of foreign origin thereof on the exterior of the cases of such watches 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 watches and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers.

It is further ordered, That the initial decision as modified by the Commission's order of June 19, 1963, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents 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 set forth herein.

By the Commission, Commissioner Higginbotham not participating by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

IN THE MATTER OF

DELAWARE WATCH COMPANY, INC., ET AL.

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

Docket 8411. Complaint, June 1, 1961—Decision, Aug. 15, 1963

Order requiring New York City distributors of watches to wholesalers, retailers and premium users, to cease attaching price tickets to their products and disseminating price lists, catalogs, newspaper and magazine advertisements, etc., which showed excessive amounts as usual retail prices; falsely representing their watches as "fully guaranteed" and "water re-

Complaint

63 F.T.C.

sistant"; failing to disclose that watch bezels finished in a color simulating silver, gold or stainless steel were actually composed of base metal; and failing to disclose that watches having the word "Swiss" on the dial were imported from Hong Kong.

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 the Delaware Watch Company, Inc., a corporation, A. Schwarcz & Sons, Inc., a corporation, and Steven Vogel and Leslie Shaw, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of the 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. The corporate respondents Delaware Watch Company and A. Schwarcz & Sons, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal office and place of business located at 580-5th Avenue, in the city of New York, State of New York.

Steven Vogel and Leslie Shaw are officers of the corporate respondents. They formulate direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

Respondents are now and for some time last past have been engaged in the advertising, offering for sale, and selling of watches to wholesalers, retailers and premium users, for distribution to the public.

PAR. 2. In the course and conduct of their business, respondents are now and for some time last past, have caused their said products when sold to be shipped from their place of business in the State of New York to purchasers thereof located in various States of the United States and the District of Columbia and 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. 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 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.

PAR. 4. Respondents use such words and expressions as "guaranteed" and "fully guaranteed" in the advertising of their said products, thereby representing that said products are guaranteed by them in every respect.

PAR. 5. Said statements and representations were and are false, misleading and deceptive. In truth and in fact, the guarantee provided was limited as to time and extent, moreover a service charge is made for repairs or adjustments which fact is not disclosed in respondents' advertisements.

PAR. 6. Certain of the watches offered for sale and sold by respondents are in cases which consist of two parts, that is, a back and bezel. The back part has the appearance of stainless steel and is marked "stainless steel back". The bezel is composed of base metal other than stainless steel which has been treated or processed to simulate or have the appearance of precious metal or stainless steel. Some of the bezels are finished in a color which simulates silver or silver alloy or stainless steel. Some of the bezels are finished in a color simulating gold or gold alloy. Said watchcases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel.

The practice of respondents in offering for sale and selling watches, the cases of which incorporate bezels composed of base metal which have been treated or processed to simulate or have the appearance of precious metal or stainless steel as aforesaid, without disclosing the true metal composition of said bezels, is misleading and deceptive and has a substantial tendency and capacity to mislead members of the purchasing public to believe that said bezels are composed of precious metal or stainless steel.

PAR. 7. Respondents in the course and conduct of their business for the purpose of inducing the sale of their said watches have caused and now cause to have marked upon their watchcases the words "water resistant" and have advertised certain of their watches as "water resistant". In truth and in fact said watchcases are not water resistant.

PAR. 8. Certain of the watches offered for sale and sold by respondents are in cases imported from Hong Kong. When delivered to respondents' customers for resale said watches have the word "Swiss" on the dial. There is no disclosure of the fact that the watchcases are imported from Hong Kong.

Initial Decision

63 F.T.C.

The practice of respondents in offering for sale and selling watches, the cases of which are imported from Hong Kong, as aforesaid without disclosing the country or place of origin of said watchcases is misleading and deceptive. In the absence of a disclosure of the country of origin of said watchcases, the public understands and is led to believe that the said cases are either of domestic or Swiss origin.

There is a preference on the part of many persons in this country for watchcases of domestic and Swiss origin over watchcases manufactured in Hong Kong.

PAR. 9. Through the use of the practices hereinabove set forth respondents place in the hands of watch dealers and retailers a means and instrumentality whereby such dealers and retailers may mislead and deceive the purchasing public as to the regular and usual retail prices of their watches; the source or origin of their watches, the metal composition and the capacity to resist moisture of watches sold by them.

PAR. 10. The use by respondents of the false, misleading and deceptive practices hereinabove set forth and the failure to disclose the true origin and metal composition of their watchcases had and now have the capacity and tendency to mislead and deceive members of the purchasing public in the manner aforesaid and thereby to induce them to purchase respondents' watches. 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. 11. 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. Harry E. Middleton, Jr., supporting the complaint.

Mr. Harvey M. Lewin, of *New York, N.Y.*, for respondents.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

APRIL 27, 1962

The complaint herein, issued on June 1, 1961, charges the above-named respondents, wholesalers of watches, with certain acts and practices in violation of Section 5 of Federal Trade Commission Act. More specifically, the complaint charges the respondents with the following illegal acts and practices: (1) Showing prices on both the price tags which respondents attach to their watches prior to sale

and on advertising material on such watches in excess of the usual and regular retail prices of said watches; (2) Representing in their advertisements through the use of such expressions as "guaranteed" and "fully guaranteed" that their watches are guaranteed in every respect, whereas the guarantee provided was limited as to time and extent and also made subject to a charge for repairs or adjustments not disclosed in respondents' advertisements; (3) Misleading the purchasing public into believing that the bezel [*i.e.*, fronts] of certain watchcases in which respondents' watches are incased are composed of precious metal or stainless steel whereas they are made of base metals which have been treated or processed to simulate precious metal or stainless steel; (4) Representing that certain of their watches are "water resistant", whereas they are not in fact water resistant; (5) Misleading and deceiving the purchasing public into believing that certain of the watchcases in which they enclose their watches are made in either Switzerland or the United States because the dial of the watch movement put in such cases carries the word "Swiss" and because the watchcase carries no disclosure of the country of origin of the watchcases.

Respondents in their joint answer take issue with the above-described charges.

Hearing was held in New York, New York, over a period of six days between October 31, 1961, and February 1, 1962. Thereafter proposed findings of fact and conclusions of law, together with reasons or brief in support of the proposed findings of fact and conclusions of law, were filed by the parties. These have been carefully reviewed and considered and such proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters. The facts hereinafter set forth are based on the entire record.

*General Background Facts and Special Facts
Re Delaware Watch Company, Inc.*

Respondents, Delaware Watch Company, Inc., and A. Schwarcz & Sons, Inc., hereinafter sometimes called DWC and Schwarcz, respectively, are corporations, organized and doing business by virtue of the laws of the State of New York with their office and principal place of business located at 580 Fifth Avenue in the city of New York, State of New York. Respondents, Steven Vogel and Leslie Shaw, hereinafter sometimes called Vogel and Shaw, respectively, are officers of the corporate respondents. They formulate, direct, and control the acts and practices hereinafter set forth and their address

is the same as that of the corporate respondents. Vogel and Shaw are responsible, individually and as officers, for the acts and practices of the corporate respondents.

Respondents are now and for some time last past have been offering for sale and selling watches to wholesalers and retailers for distribution to the public. In the course and conduct of their business, respondents are now, and for some time last past have caused their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various States of the United States and 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.

Respondent A. Schwarcz & Sons, Inc., which as noted is sometimes herein referred to as Schwarcz, was organized as a New York corporation in or about the year 1948 as a successor to a partnership which had operated under the name of A. Schwarcz & Sons. Respondent Delaware Watch Company, Inc., which as noted is sometimes herein referred to as DWC, was organized as a New York corporation on November 30, 1960. It is not a successor to any prior firm. Not to be confused with respondent DWC, the Delaware Watch Company is a New York partnership organized in about the year 1948; it is not a respondent in this proceeding. Not to be confused with either the said partnership or DWC, the Delaware Watch Company of the Virgin Islands, Inc., hereinafter called Virgin Islands Company, is a corporation organized under the laws of the Virgin Islands in the early part of 1960. The Virgin Islands Company is also not a respondent in this proceeding. The Virgin Islands Company, like Schwarcz, DWC, and Delaware Watch Company (the partnership), is under the direction and control of Vogel and Shaw.

Schwarcz owns all of the outstanding shares of stock of DWC and the Virgin Islands Company. The partners in Delaware Watch Company are the aforementioned Steven Vogel and Leslie Shaw who as seen direct and control Schwarcz. The business address and place of business of DWC and the Delaware Watch Company (partnership) is the same as that of Schwarcz.

The Virgin Islands Company is engaged in the business of assembling and selling watch movements. No trade name is stamped or printed on the dials of the watch movements it assembles and the movements are sold without watchcases. It sells about one-half of its production to Schwarcz and the other half directly to other customers in the United States.

DWC, in the joint answer of the respondents herein, prepared by respondents' counsel of record who has had long familiarity with the

business affairs of respondents Steven Vogel and Leslie Shaw, admits that it is "now and for some time last past have [has] been engaged in the advertising, offering for sale, and selling of watches to wholesalers, retailers and premium users, for distribution to the public." Notwithstanding this admission, the uncontradicted testimony of Leslie Shaw, officer and principal stockholder of DWC, shows that the sole business function or operation of DWC since the date of its incorporation has been and is to clear such merchandise through customs as has been and is being shipped by the Virgin Islands Company to the United States and to forward such merchandise to their consignees in the United States as designated by the Virgin Islands Company and that DWC has not at any time engaged in the sale or offering for sale of watches. By virtue of the findings made in the paragraph next below, it is not necessary to resolve this conflict of evidentiary fact in the record.

No evidence has been presented by counsel supporting the complaint and no evidence otherwise appears of record to support the charges made in the complaint against DWC. It is accordingly found that there is a complete failure of proof with respect to the charges made against respondent DWC in the complaint in this proceeding. A motion by respondents' counsel to dismiss the complaint with respect to DWC will be disposed of below.

Schwarcz sells watches with various trade names imprinted on the dial of the watch, one of these being "Delaware". The only connection of the partnership Delaware Watch Company (as seen not a respondent herein) with the issues in this matter is that the written guarantees given by Schwarcz on its watches bearing the imprint "Delaware" are issued under the name of the said partnership. The reason for this is the desire on the part of respondents Vogel and Shaw, the individual respondents who control corporate Schwarcz, to have it appear for "aesthetic" reasons that watches marked "Delaware" are guaranteed by a company bearing the same name. Schwarcz commenced the use of the name "Delaware" on watch dials in about the year 1948.

Dismissal As To DWC

At the conclusion of the hearing herein, DWC moved for a dismissal of the complaint with respect to it on the ground that no evidence was presented to show that it was engaged in any of the illegal practices and acts charged in the complaint. A finding having been made above that there is a complete failure of proof with respect to the charges made against respondent DWC in the complaint, the motion

Initial Decision

63 F.T.C.

is hereby granted and the dismissal of the complaint against DWC will be further reflected in the order below.

Hereinafter all collective references to "respondents" will mean all respondents except DWC.

Preticketing Issue

It is established by the stipulation of the parties that the respondents have for many years attached tags to watches sold by them to their dealer-customers, showing a printed retail price intended to be exhibited to the ultimate consumer-customer and to remain attached to the watch at the time of sale to said customers. More particularly, the evidence shows that the price tags are inserted by respondents in a conspicuous position in the decorative boxes in which the watches are sold by respondents. This practice of inserting price tags with respondents' merchandise will hereinafter be referenced to as "preticketing".

One of respondents' numerous customers of its preticketed watches is Alben Jewelers of Newark, New Jersey, a retail jewelry store located in the downtown or loop area of Newark. Newark with a population of about 400,000, together with adjacent or nearly adjacent suburban towns, constitutes an independent trade area.

Alben Jewelers under an invoice dated March 30, 1958, purchased 19 watches from Schwarcz. The invoice shows that the purchase included a watchbox for each of the watches invoiced on the invoice. The invoice also shows that the merchandise was delivered "Via P U" (Tr. 737) which is found to mean that the merchandise was picked up in person at Schwarcz' place of business in New York City by a representative of Alben Jewelers and that it was not sent by mail or by public or private conveyance by respondents to Alben's place of business in Newark. The fact of delivery in person of these watches by Schwarcz at its place of business in New York City to a representative of Alben Jewelers is also shown by oral evidence.

Included in the aforementioned 19 watches were a "Delaware" 17-jewel ladies' wristwatch and a "Delaware" 7-jewel wristwatch, billed to Alben Jewelry at a cost of \$10.50 and \$6.50, respectively. The two watches in the order named were received in evidence as CXs 1-A and 2-A. Alben sold both of these watches at its place of business in Newark to a representative of the Commission on September 5, 1958. At the time of the sale of the 17-jewel watch to the Commission's representative, it bore Schwarcz's preticketed price tag of \$39.95, including Federal tax; this watch was sold by Alben to the representative for a price of \$17, exclusive of Federal tax. At the time of

the sale of the 7-jewel watch to the Commission's representative, it bore Schwarcz's preticketed price tag of \$19.95, with no indication as to whether Federal tax was included; this watch was sold by Alben to the representative for a price of \$12.48, exclusive of Federal tax. No Federal tax was charged by Alben on the two wristwatches as the sale was to an agency of the Federal government. The oral evidence establishes that Alben's normal markup on watches above their cost is substantially less than the markup reflected on the two Schwarcz preticketed price tags described above.

No evidence was presented by counsel supporting the complaint as to the "usual and regular retail prices" of the two watches under consideration, or watches of similar grade and quality, in Newark or elsewhere. The record is also otherwise barren of any evidence of the usual and regular retail prices on the watches in question or watches of similar grade and quality in the city of Newark. As part of its defense, respondents sought to show through dealers of its watches in the cities of Passaic, Paterson, and New Brunswick, New Jersey, the usual and regular prices of the described watches in those communities. This evidence, although showing in part that respondents' preticketed price tag of \$39.95 on the described 17-jewel watch reflects a price in excess of the usual and regular retail price on said watch in one of the above specified cities, is not deemed relevant on the issue under consideration because each of these cities are fairly large towns located considerable distances from Newark and each constitutes a trade area in itself. It is accordingly found that the cities of Passaic, Paterson, and New Brunswick are not part of the trade area of Newark.

Discussion and Conclusions

The issue here under consideration is the first count of the complaint charging respondents with preticketing its merchandise with fictitious retail prices. Counsel supporting the complaint has based his case on this issue on the sale of the two described preticketed Schwarcz watches to a Newark retail jewelry store at retail prices substantially less than the preticketed prices. Under Section 5 of the Act one of the required elements of proof is the establishment of the jurisdictional fact that the two watches in question were initially in "commerce" within the meaning of the Act.¹

¹ Section 4 of the Act reads: "'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any States or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

Initial Decision

63 F.T.C.

Respondents in their joint answer have admitted the following "commerce" allegation of the complaint:

In the course and conduct of their business, respondents are now and for some time last past, have caused their said products when sold to be shipped from their place of business in the State of New York to purchasers thereof located in various states of the United States and the District of Columbia and 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.

Respondents are wholesalers, and wholesalers more often than not are engaged in both intrastate and interstate commerce. Respondents' general admission that they are engaged in interstate commerce (actually, as seen, the pleadings properly use the statutory term "commerce") does not relieve counsel supporting the complaint from the necessity of proving that the specific instances of the acts and practices he is relying on to establish his case are acts and practices in interstate commerce.

In the instant case the "commerce" evidence relating to the two wristwatches fails to show that "respondents have caused their said products [the two watches in question] when sold to be shipped from their place of business in the State of New York to purchasers [here Alben Jewelers] thereof located in various States of the United States" [in this instance the State of New Jersey].

On the contrary it has been found and the evidence shows that the two watches were picked up in person by a representative of the Newark dealer at respondents' place of business. This in our opinion constitutes intrastate commerce as distinguished from "commerce" as defined in the Act. Accordingly it is our conclusion that the two watches here under consideration were never in "commerce" within the meaning of the Act. It, therefore, follows that the complaint on the count here under consideration must be dismissed due to the fatal lack of proof of the jurisdictional requirement of "commerce".

Although the aforementioned jurisdictional defect disposes of the charge here under consideration, it is our opinion that the case-in-chief presented in support of the complaint suffers a second defect which in itself would also require a dismissal of the charge here involved. One of the essential elements of proof required under the complaint and applicable law is proof that respondents' preticketed prices on the two involved watches were not "the usual and regular retail prices of said products" but were, on the contrary, in the language of the complaint, "In truth and in fact * * * fictitious and in excess of the usual and regular retail prices of said products." The phrase "usual and regular retail price" of a commodity has been in-

491.

Initial Decision

terpreted to mean the usual and regular retail price of the commodity *within the trade area or areas where the representation is made.* *The Baltimore Luggage Company v. Federal Trade Commission*, 296 F. 2d 608 (4th Cir. 1961) [7 S.&D. 251] *cert. denied* April 23, 1962. The Court in this opinion cites and indicates approval of Commission orders in other cases requiring certain named defendants therein to cease and desist from preticketing their merchandise with a retail price “in excess of the price at which such product is usually and customarily sold at retail *in the trade area or areas where the representation is made.*” (The emphasis here shown was supplied by the Court.)

In the instant case the record is completely barren of any evidence as to the “usual and regular retail prices” of the two watches in question or of watches of similar grade and quality in the trade area of Newark, New Jersey where the preticketed merchandise was being offered for sale. The only evidence of record with respect to the prices at which the watches were being sold in Newark were the prices at which they were sold by a single Newark dealer, Alben Jewelers. Since the city of Newark with a population of over 400,000 must have many retail jewelry stores selling watches similar, if not identical, to those involved here, it follows that the selling prices of only one retail store on the two involved watches is incompetent for the purpose of establishing the “usual and regular retail prices” of the said watches in the Newark trade area. Thus, if for no other reason, the charge of the complaint here under consideration must be dismissed for failure of proof of the “usual and regular retail prices” of the two involved preticketed watches or their equivalents in the Newark, New Jersey trading area.

Although the record suggests that respondents have been engaged in the prevalent practice of a substantial portion of the industry, of preticketing watches with fictitious retail prices (see statement as to the prevalence of this practice by petitioner-watch company in *The Clinton Watch Company v. Federal Trade Commission*, 291 F. 2d 838, (5th Cir. 1961) [7 S. & D. 184] *cert. denied* July 18, 1961, due process requires that this be proved by competent evidence.

Guarantee Issue

Since on this issue respondents in their proposed findings and brief in effect admit the charges of the complaint and since no defense on the issue was presented at the hearing the findings of fact thereon will follow the language of the complaint.

Respondents use such words and expressions as “guaranteed” and “fully guaranteed” in the advertising of their products, thereby rep-

representing that said products are guaranteed by them in every respect. Said statements and representations were and are false, misleading and deceptive. In truth and in fact, the guarantee provided was limited as to time and extent, moreover a service charge is made for repairs or adjustments which fact is not disclosed in respondents' advertisements.

The oral evidence also establishes, as heretofore noted, that the written guarantees issued by Schwarcz on the watches sold by it bearing the trade name "Delaware" are issued under the name of the partnership, Delaware Watch Company, a related company. Similarly watches sold by Schwarcz under the trade names of "Delgard" and "Genoveva" are also guaranteed under the name of Delaware Watch Company. The guarantees referred to in this paragraph are the "guarantees" described in the complaint and described in the paragraph next above. As mentioned earlier the Delaware Watch Company, the partnership, is not a respondent in this proceeding, but the partners thereof, Steven Vogel and Leslie Shaw, are respondents herein individually as well as in their capacities as officers of the two corporate respondents herein.

Respondents in their brief concede that an order may be entered on the guarantee issue as follows: "It is ordered that A. Schwarcz & Son, Inc., and Leslie Shaw and Stephen Vogel, as officers and directors, do forthwith cease and desist from representing, directly or indirectly, that the watches it offers for sale or sells are guaranteed unless and until the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed * * *."

The only substantial difference between the foregoing proposed cease and desist order and the proposed order of counsel supporting the complaint on the issue here under discussion is that the former excludes DWC from its operation, whereas the latter is made to run against DWC as well as all other respondents named in the complaint.

The order to be entered herein on the guarantee issue will be issued against all respondents named in the complaint except DWC. DWC will be excluded from the order because, as heretofore noted, the complaint will be dismissed against DWC because of lack of proof that it was engaged in any of the illegal practices and acts charged in the complaint.

Bezel Metal Content Issue

Under this issue the complaint charges respondents with misleading and deceiving the purchasing public into believing that the bezels (i.e., the rim holding a watch crystal in its setting) of certain of their

watchcases are composed of precious metal or stainless steel, whereas they are in fact made of base metals which have been treated or processed to simulate precious metal or stainless steel.

The facts as admitted by respondents in their joint answer are as follows. Certain of the watches offered for sale and sold by respondents are in cases which consist of two parts, that is, a back and bezel. The back part has the appearance of stainless steel and is marked "stainless steel back". The bezel is composed of base metal other than stainless steel which has been treated or processed to simulate or have the appearance of precious metal or stainless steel. Some of the bezels are finished in a color which simulates silver or silver alloy or stainless steel. Some of the bezels are finished in a color simulating gold or gold alloy. Said watchcases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel.

"Commerce" with respect to the practice by respondents shown in the above paragraph is admitted by respondents in their joint answer.

Sample watches in evidence on the issue here under discussion are CXs 2-A, 8-A, and 9-A. CX 2-A has a base metal bezel which is finished in a color simulating gold or gold alloy. CXs 8-A and 9-A have base metal bezels which simulate silver or silver alloy or stainless steel. Although the issue of "commerce" with respect to each of these sample watches is not deemed particularly pertinent for the reasons set forth in the "Discussion and Conclusions" below, the facts with reference to the "commerce" of each of the said sample watches may have some value on review and as an aid in following the discussion and accordingly a finding with respect to the "commerce" of each of said watches are noted below. As seen, CX 2-A has heretofore been found to be not in "commerce". CX 8-A, being part of the same group of 19 watches purchased under a single invoice which were picked up in person by a Newark jeweler at respondents' place of business in New York City, is also found not to be in "commerce". CX 9-A, on the other hand, is found to be in "commerce". (Tr. 21-29, 736-737; CXs 11 and 13.)

Official notice was taken at the hearing herein of certain facts pertinent to the issue here under consideration. Pursuant to this official notice, it is found that an examination by an unskilled consumer of the watchcases described in the paragraph next above as having the appearance of gold or gold alloy, as typified by CX 2-A, would not disclose whether the watch case bezels are composed of rolled gold plate, gold filled, gold electroplate, 20 or 10 microns of gold, anodized aluminum, or polished brass. Similarly pursuant to the said official notice, it is found that an examination by an unskilled consumer of the watchcases described in the paragraph next above as having the

appearance of silver, silver alloy or stainless steel, as typified by CXs 8-A and 9-A, would not disclose whether they are composed of white gold, silver, stainless steel, chromium plated metal, polished aluminum, or any other metal. In accordance with the same mentioned official notice, it is also found with respect to the watches described in the sentence next above that a substantial portion of the purchasing public would be led to believe that such watchcases are white gold, silver or stainless steel.

In addition the evidence shows that an ordinary consumer, a journeyman painter in the employment of the State of New York, was misled and deceived from an examination of respondents' watches at the hearing herein into believing that the bezel of one of the watches, with the appearance of gold but actually without any gold content (CX 2-A), was made of rolled gold or gold plating, and that the bezels of two other watches, with the appearance of stainless steel but actually without any stainless steel content (CXs 8-A and 9-A), were made of stainless steel.

The only rebuttal offered by respondents with respect to the aforementioned official notice and consumer testimony was the testimony of a number of respondents' retail jeweler-dealers to the effect that in their experience consumers were not misled by the appearance of the described base metal bezels into believing that the said bezels were made of something other than their actual metal contents. This testimony, being largely self-serving, is rejected as not having substantial probative value.

Independently of the aforementioned consumer testimony in support of the complaint and the above-described official notice which under the Commission's Rules of Practice for Adjudicative Proceedings requires that opportunity be given the party adversely affected by the official notice to present rebuttal evidence, the examiner finds from his own examination of the bezels here under consideration that the bezels *per se* sufficiently demonstrate their capacity to deceive.

Discussion and Conclusions

On the basis of all the evidence of record, it is found that the practice of respondents in offering for sale and selling watches, the cases of which incorporate bezels composed of base metal which have been treated or processed to simulate or have the appearance of precious metal or stainless steel as aforesaid, without disclosing the true metal composition of said bezels, is misleading and deceptive and has a substantial tendency and capacity to mislead members of the purchasing public to believe that said bezels are composed of precious metal or stainless steel.

The above ultimate finding of fact and law is in accord with the decision and opinion of the Commission in the *Theodore Kagen Corp.*, No. 6893, F.T.C., Nov. 19, 1959, *aff'd per curiam*, 283 F. 2d 371 [6 S. & D. 837] (D.C. Cir. 1960), in a matter involving the same issue here under consideration and under a set of facts substantially similar to that involved in the instant case. The practice here involved was so comprehensively discussed by the Commission in the *Kagen* case as to require but little more than a reference to it here. The following quotation from the opinion of the Commission in the *Kagen* case is significant here:

* * * Where the exhibits themselves sufficiently demonstrate their capacity to deceive, neither customers who have actually been misled nor experts need be called to testify. *Zenith Radio Corporation v. Federal Trade Commission*, 143 F. 2d 29 (7 Cir., 1944); *Royal Oil Corporation v. Federal Trade Commission*, 262 F. 2d 741 (4 Cir., 1959).

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

Although our conclusion in the instant matter that the practice under consideration is misleading and deceptive is based on all of the evidence of record on the issue, the same conclusion could be reached solely on the basis of the facts as established by the pleadings which leave for decision only the conclusion to be drawn therefrom.

Notwithstanding the fact that the evidence under the metal content issue and the fictitious price preticketing issue (dealt with in an earlier section) involves two watch exhibits which have been found *not* to be in "commerce", the finding of "commerce" with respect to the metal content issue and the finding of *no* "commerce" with respect to the fictitious price issue, although seemingly inconsistent, are not in fact inconsistent. The two watches referred to are CXs 2-A and 8-A. Commission's CX 2-A is in evidence under both issues; CX 8-A is in evidence only under the metal content issue; but both of these watch-exhibits have been found to be not in "commerce". However, on the metal content issue, the evidence, in addition to CX 2-A, includes a watch received in evidence as CX 9-A. Since the latter was specifically found to be in "commerce", it sufficiently supplies the jurisdictional "commerce" element required under the metal content issue to sustain the cease and desist order rendered thereunder as set forth in the final portion of the instant initial decision.

Initial Decision

63 F.T.C.

But it will be noted that our findings also contain another basis for the finding of "commerce" with respect to the practice involved in the metal content issue. This other basis consists of certain admissions by respondents in their pleadings heretofore stated but again indicated below for the convenience of the reader. While neither of the two bases are necessarily entitled to priority, our treatment of the findings of fact above gives priority of mention, and greater emphasis, to respondents' said admissions because they are in our opinion capable of disposing of the issue of "commerce" without any necessity for reliance on physical watch exhibits and transportation documents thereon for the establishment of "commerce". For this reason the one watch exhibit (CX 9-A) received in evidence under the metal content issue has been mentioned almost parenthetically on the issue of "commerce" in the findings of fact above.

The aforementioned admissions by respondents are two in number. The first is the general admission of "commerce" made in respondents' joint answer. The second is the admission of the practice involved under the metal content issue. The most significant sentences in the latter are the following: "The bezel is composed of base metal other than stainless steel which has been treated or processed to *simulate or have the appearance of precious metal or stainless steel*. Some of the bezels are finished in a color which *simulates silver or silver alloy* or stainless steel. Some of the bezels are finished in a color *simulating gold or gold alloy*. Said watchcases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel." (Emphasis supplied.) It is obvious that the general admission of "commerce" in the joint answer must necessarily relate to the "practices" admitted and set forth in the above sentences as there is nothing in the answer to indicate a contrary intention. Accordingly no physical exhibits (watches) are really required to prove "commerce" under the metal content issue. Moreover, the pleadings as revealed above set forth the facts so completely that the issue thereunder could have been submitted solely on the basis of the pleadings. Under the circumstances, the true function of the watches (physical exhibits) in evidence under the metal content issue is merely to serve as supplementary evidence of a visual character from which conclusions can be and were drawn by the examiner and the one consumer witness testifying in support of the complaint on the question of whether the involved practice is "misleading and deceptive and has a substantial tendency and capacity to mislead members of the purchasing public to believe that said bezels are composed of precious metal or stainless steel."

On the other hand the situation in the fictitious price preticketing issue with respect to the "commerce" element is quite different. The distinction between the situation in the metal content issue and that in the fictitious price preticketing issue is that in the latter we do not have admissions of the challenged practice as we do in the former. All we have under the fictitious price preticketing issue is a general admission of "commerce" plus an admission by stipulation that respondents have been engaged in the practice of preticketing their merchandise. It should be noted that there is a vast difference between mere preticketing and fictitious price preticketing. Preticketing in and of itself is not violative of the Act. To be so the preticketing must be of a particular kind, namely, preticketing with fictitious retail prices. The burden of the complaint is that respondents are charged with *fictitious* retail price preticketing, not mere preticketing. Respondents have nowhere in the record admitted the charge of fictitious price preticketing and "commerce" in connection with such practice. The most they have admitted is that they have preticketed their watches and placed them in "commerce"; these two elements, each being lawful, in combination are not violative of the Act. Consequently the double burden of proof on counsel supporting the complaint is to show (a) fictitious price preticketing and (b) "commerce" with respect to such practice. But on the metal content issue, as seen, both the challenged practice and the "commerce" were conceded by respondents in their pleadings.

Water Resistant Issue

On this issue, the complaint charges that respondents in the course and conduct of their business for the purpose of inducing the sale of their watches have caused and now cause to have marked upon their watchcases the words "water resistant" and have advertized certain of their watches as "water resistant", whereas in truth and in fact the watches so marked are not water resistant.

Respondents by their answer admit that they have sold and the record shows that they sell watches inscribed with the phrase "water resistant". The record also shows that respondents supply advertising mats in which many of their watches are described as "water resistant". The phrase "water resistant" will be shown in quotations hereinafter wherever necessary to indicate that our inquiry is as to the truth of the representation indicated by the phrase.

The evidence shows that on October 10, 1960, a representative of the Federal Trade Commission purchased a ladies' white metal wrist-watch from the aforementioned Albens Jewelers, of Newark, New

Initial Decision

63 F.T.C.

Jersey, for a price of \$20, exclusive of Federal tax. This watch was received in evidence as CX 9-A. The back of the watchcase of the watch carries the inscription "Water-Resistant", among other inscriptions not here material. Albens had acquired this watch by purchase in "commerce" as heretofore indicated from Schwarcz.

After purchase from Albens, the same Commission representative, preparatory to taking the watch to a testing company for testing its "Water-Resistant" quality, took the watch to Jean Felber, a watch expert whose specific experience in watchmaking will hereinafter be set forth, for the purpose of having him inspect the watch, by opening and closing it, to make certain that the watch was properly put together "in the way and manner it would be closed and done in a factory", so that the watch could then be submitted for test of its water-resistant quality. Having made this inspection (in the presence of Commission's representative) to his satisfaction that the watch was in the condition it should ordinarily have been when it left the factory, Felber returned the watch to the Commission representative who immediately thereafter took the watch to an independent testing laboratory with instructions for testing pursuant to "Test No. 2—For Water Resistance or Water Repellancy" as set forth in the Commission's "Trade Practice Rules" as promulgated on April 24, 1947.

The test was made by the testing company and the watch, CX 9-A, failed to meet the test.

It is established from the testimony of watch expert Felber that it is very difficult to make a watchcase of the type of construction used in CX 9-A water-resistant. Felber testified in part as follows: " * * * the crown tube [of CX 9-A] is made so [the construction of the crown tube of CX 9-A is described below] that it can hardly be * * * water resistant. The lodging of the water resistant gasket is made so that it is very difficult for the case back to fit properly on it and make it water resistant." Felber's experience as a watch expert includes four years as a student at a watchmaking school in Switzerland, four years experience as assistant to the head technician at a large watch movement factory in Switzerland, four years as head watchmaker in New York City for the Vulcan Cricket Alarm Wristwatches of Switzerland after six months of preliminary training in the Vulcan factory in Switzerland, three years as a head watchmaker in New York City for the agency office of the Mido Watch Company of Switzerland and its successor, the Mido Watch Corporation of America, and approximately the past five years in the operation of his own watch service, primarily for various Swiss watch companies in connection with guarantees issued by them on their watches. His work for the Vulcan firm involved the casing of Vulcan movements in this country and repairs

of Vulcan watches under guarantees issued by Vulcan. In connection with his job for Mido, Felber spent two months in training at the Mido factory in Switzerland in which the emphasis was primarily on the waterproofing of cases. Mido features a waterproof watch. The general principles for the construction of a waterproof watchcase is the same as that for a water resistant watchcase, except that the former has a much higher standard of detail, accuracy and quality. (Tr. 541)

Schwarcz purchases about 40,000 "water resistant" watchcases annually for use in assembling watches which it sells at wholesale. From the record as a whole, it is found that the said 40,000 "water resistant" watchcases are manufactured in Hong Kong and purchased from importer-suppliers. (Tr. 678-679) Three of Schwarcz's importer-suppliers are Swiss Watch Case Company, Simon Spira, and WMR which stands for "Water and Moisture Resistant". Schwarcz regards WMR as its principal supplier of Hong Kong "water resistant" watchcases. Its actual purchases from WMR are between 8,000 and 12,000 such watchcases annually. The only Hong Kong watch importer called by respondents to testify in their behalf on the "water resistant" issue was Sheldon Parker, a partner of WMR. No other importer or manufacturer of "water resistant" watchcases was called upon to testify by either party.

The annual imports of Hong Kong watchcases into the United States totals about one million cases. The largest single importer of such watchcases is WMR which alone is responsible for more than one-half of the total imports. About 80 percent of WMR's Hong Kong imports consist of watchcases inscribed "Water-Resistant". The watchcases imported by WMR are manufactured in Hong Kong by Danemann Watch Case Factory, Limited. Although there are a number of such watchcase manufacturers in Hong Kong, Danemann is the largest. WMR has an exclusive contract with Danemann for the importation of its watchcases into the United States.

The watchcase of the aforementioned CX9-A (which as above indicated failed to meet Test No. 2 of the Commission's Trade Practice Rules) was manufactured in Hong Kong by Rays Metal Manufactory, a competitor of Danemann and sold to Schwarcz by one of the aforementioned suppliers, Swiss Watch Case Company or Simon Spira, competitors of WMR. Although the testimony of respondent Leslie Shaw establishes that the watchcase in CX 9-A was purchased from one or the other of the two mentioned watchcase importer-suppliers, Shaw was unable to pinpoint the supplier as between the two.

There are two methods of construction of "water resistant" watchcases, hereinafter described and designated as Type A and Type B, respectively. Type A is a watchcase in which a separate friction fitting tube is pressed by machinery into a previously drilled hole in the bezel part of the case, very much like a cork is pressed into a wine bottle. This is referred to in the trade as a "friction fit" water resistant case. Type B is a watchcase in which the tube is an integral part of the bezel and not a separate tube manufactured independently of the bezel and then inserted in a hole in the bezel as in Type A. Type B is known in the trade as a "one piece bezel".

The described tubes in both Types A and B are designed to receive the watch stem (which is part of the watch movement) and the watch crown when the case is assembled with a movement. These tubes will hereinafter be generally described as "crown tubes".

The water resistant quality of the Type B case is substantially superior to that of the Type A case. The Type A watchcase, due to the two-piece construction of its bezel, is vulnerable to water seepage at the site of its friction fitting crown tube because of the possibility that the crown tube was not inserted in the bezel hole with sufficient tightness at the factory to make for "water resistance". This source of vulnerability to water seepage is avoided in the Type B watchcase because the crown tube in that construction is an integral part of the bezel. WMR's representative, Sheldon Parker, concedes that the one-piece construction of the bezel in the Type B watchcase "helps quite a bit" to give it water-resistant superiority over the Type A case. The Hong Kong watch manufacturers disfavor the manufacture of the Type B watchcase because such production involves a large proportion of factory rejects due to service imperfections in the completed one-piece bezel. The predominant production in Hong Kong is of the Type A construction.

CX 18¹ and CX 25 are Hong Kong empty watchcases sold by WMR to Schwarcz. CX 18 bears the inscription "WATER RESISTANT" and CX 25 is inscribed "DUSTPROTECTED". The evidence establishes that CX 25, although marked "dust protected"

¹ Although the index of the official transcript of the proceedings in this matter does not show the identification of CX 18 as a physical exhibit or its receipt in evidence, the said CX 18 is deemed to be a part of the record herein by virtue of the following colloquy between the Hearing Examiner and witness Sheldon Parker, partner in WMR:

Hearing Examiner BUSH. Let the record show here again that this watchcase, as I understand it, as represented by Exhibit 18 was one sold by your firm. Isn't that so, Mr. Parker?

The Witness. That is correct.

Hearing Examiner BUSH. To the respondent Schwarcz & Son?

The Witness. It was picked up at Schwarcz, yes.

Hearing Examiner BUSH. Very well. In any event, it is your case,

The Witness. Yes, yes. (Tr. 598-599)

and not "water resistant", has the same "water resistant" construction as CX 18 and that for business reasons, in order to meet the various demands of the trade, watchcases which have the construction of CX 25 are sometimes inscribed "water resistant" and sometimes "dust protected". CXs 18 and 25 have the same kind of "friction fit" construction described above as Type A.

CX 9-A (the watch which failed to pass the Commission's Test No. 2 for water resistance) is also cased in a Type A "water resistant" watchcase. (Tr. 424 at lines 10 through 12, and Tr. 678-679 and compare with Tr. 598 at lines 12 through 19 and Tr. 603 at lines 4 through 10). Thus the watchcase of CX 9-A, of which the supplier was either the Swiss Watch Case Company or Simon Spira, and CXs 18 and 25, of which the supplier was WMR, are all Type A "water resistant" friction fit watchcases.

WMR sells its Hong Kong Type A watchcases at prices ranging from 20¢ to 25¢ each. It also sells Hong Kong Type B watchcases; these are sold at 10¢ more than the Type A case. The Type A case is also manufactured in the United States but Type B is not. Comparable Type A watchcases manufactured domestically from the same metals as the Hong Kong case sell at 60¢ to 75¢ each. Except for purchase of some 200 Type B cases annually, the evidence shows that Schwarcz buys its Type A cases at 20¢ each. From this and the record generally it is concluded that substantially all of Schwarcz's overall annual purchases of 40,000 "water resistant" watchcases are of Type A.

The relationship of the cost of the Type A metal watchcase in Schwarcz's assembled watch, CX 9-A, to Schwarcz's total cost of the assembled watch, is as follows: watchcase, 20¢; total watch cost, \$8.58. Included in the latter is a cost of 31¢ for a decorative hinged display box in which the watch is sold to the retailer.

The Type A watchcases handled by respondents are subjected to a certain amount of testing for compliance with the aforementioned Commission's Test No. 2 for watch resistance. As to the testing procedures of the many Hong Kong watchcase factories which manufacture Type A cases, the record contains evidence only as to the procedures of Danemann and this was supplied, not by a representative of Danemann, but by WMR, its sole customer in the United States, through the testimony of WMR's aforementioned part owner, Sheldon Parker. Danemann spot checks about 10 percent of its total production for WMR of Type A watchcases for compliance with the said Test No. 2 before releasing the production for shipment. Upon receipt of the watchcases in this country, WMR also random test checks about 10 percent of the empty watchcases for compliance

with Test No. 2 before releasing shipments thereof to customers. For purposes of these tests, both Danemann and WMR plug the crown tubes in the bezels with plastic stoppers; in the completely assembled watch the crown tube is filled with the stem of the movement and covered with the watch crown. Schwarcz upon receipt of shipments of the watchcases spot checks about 10 percent of the cases both before and after they are assembled into watches for compliance with Test No. 2 before releasing or selling the watches to its customers.

One of the respondents' defenses to the charge here under consideration is that all of the watches they sell as "water resistant" should be deemed to have passed Test No. 2 because of the aforementioned spot testing procedure for compliance with Test No. 2. The validity of this defense will be discussed below.

Discussion and Conclusion

From the foregoing evidentiary findings of fact it is concluded that the watches sold by respondent Schwarcz which are marked "water resistant" are not always in fact water resistant. This conclusion is based on a number of factors. It is based in part on the fact that a random selected Schwarcz wristwatch, CX 9-A, marked "WATERRESISTANT", with a construction identical with that of thousands so marked and handled by Schwarcz, failed to pass the Commission's Test No. 2 for water resistance. More fundamentally the conclusion is based on the inherent imprecision, for purposes of water resistance, of the construction of the type of the watchcase in question as typified by CX 9-A. This imprecision is at points particularly vulnerable to water leakage, namely, the crown tube and the lodging of the water resistant gasket in the case back. Thirdly, the conclusion is based on the expert opinion of an expert watchmaker that the watchcase under consideration, due to its construction as described in the findings, is very difficult to make water resistant.

Fourthly, the conclusion is based on the disbelief that any of the persons involved in the manufacturing, importing, or assembling of the involved Hong Kong "water resistant" watchcases would or could afford to exert the required effort to make such watchcases truly water resistant where the completed unit as here has so little economic value that it can be sold to assemblers in the United States after transoceanic carriage at the delivered price of 20¢ each.

The final basis for our conclusion is related to respondents' defense that their "water resistant" watches are spot checked for compliance with the Commission's "Test No. 2" for water resistance before they are released for sale. This test, it will be recalled, is set forth in the Commission's Trade Practice Rules as promulgated April 24, 1947,

respecting the term "waterproof" and related designations, as applied to watches, watchcases and watch movements.

"Test No. 2" is a part of Rule 2 of said Trade Practice Rules. Rule 2 is made up of parts (a), (b), and (c), the full text of which is set forth in the appendix hereto [p. 519 herein]. Part (a) is a general proscription against the improper use of the term "Water Resistant". This portion of the Rule states in effect that it shall be improper to apply the term "water resistant" to a watch or watchcase where the watch or watchcase is not in fact water resistant. Part (b) sets forth certain conditions under which watches and watchcases may be sold as "water resistant" without danger of being construed as coming within the prohibited use of the term "water resistant". The provisions of part (b) of this Rule are elective, not mandatory, but those who seek its protective coverage must meet its qualifying conditions. Among these conditions is the requirement that *each* watch and watchcase must pass "Test No. 2" pursuant to the following requirement of part (b) of Rule 2: "* * * when [the watch and case], before being placed upon the market by manufacturers, assemblers, importers, or other marketers, *the watch and the case* have undergone such test ; * * * ". (Emphasis supplied.) The provisions of Test No. 2 are set forth under part (c) of Rule 2 and are designed to give the watch trade an easy, practical, inexpensive, and acceptable method of testing for "water resistance". But our immediate concern here is not the detail of Test No. 2 but the requirement under part (b) of Rule 2 that each and every watch and case must undergo and pass Test No. 2 before it may be sold as "water resistant".

In the instant case, the evidence shows that respondents subjected only 10 percent of their watches inscribed "water resistant" to Test No. 2 for water resistance prior to marketing and not each and every such watch to the test as required by part (b) of Rule 2. Failing in this latter requirement, the protective coverage provisions of Rule 2(b) are not available to respondents.

The conclusion stated above that Schwarcz' "water resistant" watches are not in fact water resistant is based upon the entire record of this proceeding.

Country of Origin on Issue Watch Cases

The final charge of the complaint is that respondents are misleading and deceiving the purchasing public into believing that certain of the watchcases housing the watches they sell are made in either Switzerland or the United States due to the fact that the watch movement in such watches is inscribed with the word "Swiss" and to the further fact that the watch does not otherwise carry a disclosure

Initial Decision

63 F.T.C.

of the country of origin of the watchcase. The complaint further alleges that there is a preference on the part of many persons in this country for watchcases of domestic and Swiss origin over watchcases manufactured in Hong Kong.

The complaint does not specify whether the charge of failure of disclosure of country of origin relates to the interior or exterior of the involved watch cases or both.

The answer admits that respondents have sold and the record shows that they are selling watches encased in watchcases imported from Hong Kong and that the dials of the watch movements of such watches bear the inscription "Swiss". The word "Swiss" on the dial indicates that the watch movement was imported from Switzerland. By stipulation of the parties, it is established that under appropriate law or regulation all watch movements imported from Switzerland must be inscribed with the word "Swiss" on their dials. The watches in evidence in this proceeding exhibit the word "Swiss" on the outer circumference of the dial in quite small print beneath the hour figure "6" which is the usual position and size of the word "Swiss" on most Swiss watches. The size and the position of the word "Swiss" occupied on the dial of the watches in evidence are inconspicuous in comparison with the size of the trademark name and other printed matter shown on more central and visible locations on the dials of respondents' watches.

As heretofore noted, respondents buy at least 40,000 Hong Kong watchcases annually through importers. These are purchased as indicated at a price of 20¢ each, which bears a nominal relationship to respondents' average selling price of \$10 for the fully assembled watch to their dealer-customers. The Hong Kong watchcases here under consideration if manufactured domestically would sell at a price between 60¢ and 75¢ each.

WMR, it will be recalled, is the principal importer in the United States of Hong Kong watchcases, imports the backs and bezels of such watches separately, although both are made by the same Hong Kong manufacturer and the two parts are designed in various sizes to be assembled together in one unit. The reason for this practice is that the charges imposed by law in connection with the importation of such commodities is less when the backs and bezels are brought into this country separately than when they are imported as assembled units.

CXs 18 and 25, as heretofore shown, are empty wristwatch cases purchased by respondent Schwarcz from WMR. The bezels of these watchcases bear the engraving "WMR Hong Kong" which reflects the name of the importer and the place of origin. The engraving

is on the inside rim surface of the bezel which will be completely obscured when a watch movement is inserted in the case. The bezel of a man's wristwatch could be inscribed with the country of origin on the outside portion of the bezel between the lugs (*i.e.*, the projections of the bezel which hold the pins designed to take the watchband) without defacing the outward appearance of the bezel that meets the eye, but on some small ladies' wristwatches, as in CX 1-A, the bezel could not be marked anywhere on its outer surface without defacement of the outward appearance of the bezel. Neither the interiors or exteriors of the back covers of the two wristwatches here under consideration show the country of origin.

It is found pursuant to stipulation of the parties that some consumers would have a prejudice against watches housed in watchcases manufactured in Hong Kong and that some would not.

Under the Tariff Act of 1930, Title 1, Par. 367 (f) and (g), all watchcases imported *as fully assembled units* from a foreign country into the United States are required to "have cut, engraved, or die sunk, conspicuously and indelibly on the inside of the back cover, the name in full of the manufacturer or purchaser and the name of the country of manufacture."

Until recently the Bureau of Customs, by a process of exemption or waiver, did not require bezels or back covers *when imported separately by importers* to be individually inscribed with the name of the country of origin.

Effective as of January 18, 1962, the Bureau of Customs abolished the exemptions from country of origin markings formerly applicable to bezels and covers when imported separately and from and after the said date required all bezels and covers when imported separately to be marked with the name of country of origin. The marking on the cover must now show on its inside not only the country of origin but also the phrase "Case made in", followed by the country of origin. (Tr. 627-630.)

Testimony was received from WMR's Sheldon Parker on the economic consequences he believes would result from the order sought in this matter requiring in effect that all watchcases manufactured in Hong Kong be marked "Hong Kong" on the exterior of their backs. From this testimony, it is found that such an order would place the respondents as users of Hong Kong watchcases and their suppliers at a competitive disadvantage with competitors and their suppliers handling watchcases manufactured in France, Germany, and Switzerland because the latter are not currently under similar obligations to impress their watchcases with their respective countries of origin. It is also found from Mr. Parker's testimony that an order requiring

Initial Decision

63 F.T.C.

disclosure of the country of origin on the exterior of back covers would have a tendency to adversely affect sales on the consumer level. This is because people generally prefer to buy watches with Swiss movements but there will be some persons who will be misled into believing that a watch containing a genuine Swiss movement but enclosed in a case conspicuously marked Hong Kong on its exterior was made entirely in Hong Kong and therefore reject the watch.

Discussion and Conclusions

Based on the foregoing facts, it is our conclusion that a substantial number of consumers would be misled and deceived into believing that the watchcases of certain of respondents' watches assembled with Swiss watch movements and Hong Kong cases were either of domestic or Swiss origin because of the absence of any disclosure on the watchcase as to its country of origin. From this, it is our further conclusion that an appropriate cease and desist order should be issued on the count of the complaint here under consideration.

As to what would constitute an appropriate order, the first difficulty encountered on the "country of origin" issue is that although the complaint alleges that the practice of selling Swiss movements in Hong Kong cases "is misleading and deceptive", the complaint does not state whether the relief sought is an order requiring the disclosure of the country of origin on the inside or outside of the watchcase. Under these circumstances, the complaint is construed to mean that it would be satisfied with having the inscription of the country of origin placed on any part of the case which could be deemed to give the public reasonably adequate notice of the place of origin under all the facts and circumstances of record in this proceeding.

It is our conclusion that a marking on the inside of a watchcase back which shows the country of origin preceded by the words "Case made in" would be reasonably adequate notice and disclosure to the public of the origin of the two involved parts of a watchcase, the bezel and back. We refrain from requiring that the bezels be individually marked with their country of origin, not only because the aforementioned marking on the back of the case would put the consumer on notice as to the country of origin of the bezel as well as the back but also because a marking of the country of origin on some small ladies' wristwatch cases could not be accomplished without defacing the outward appearance of the case.

There are a number of reasons for the above conclusion. One is that it is in line with long established custom, as the Tariff Act of 1930 has for many years required the back of imported cases, when they are imported as a unit, to be marked on their inside surface with the

country of origin. Our conclusion is also in line with the Bureau of Custom's recent extension of the requirements of the Tariff Act of 1930 as to the marking of watchcases imported as a unit to bezels and backs when imported separately. In view of this history of country of origins markings as required by the Bureau of Customs, it is a fair assumption that prospective watch consumer-purchasers who are interested in the country of origin of the watchcase would look for such markings on the inside of the case back. Another consideration for our conclusion is that a contrary order requiring that the exterior of the case be made to show the country of origin might well lead many prospective consumers to believe that watches displayed to them having Swiss movements and Hong Kong cases were made in their entirety in Hong Kong and lead to the rejection of the watch because Switzerland is associated in the public mind with the manufacturing of watches and Hong Kong is not. Consequently, such exterior markings of the country of origin could have a more mischievous and misleading effect on the consumer than a total nondisclosure of the country of origin on the Hong Kong made watchcases.

There are also other reasons for our conclusion that the public would be given adequate notice of the country of origin of respondents' imported watchcases if they carried the marking of the country of origin on the inside of the watchcase back. One of these factors is that the watchcases here involved sell at only 20¢ each and accordingly represent an insignificant component part of the assembled watch from a cost point of view. This notation of the low cost of the watchcase unit is not intended to be a denigration of the watchcases under consideration. They perform the function they are designed for and watchcases of similar construction and metal content, if made domestically, even though they sell at about 60¢ each, would have no greater functional utility than the 20¢ Hong Kong watchcase.

The President of the United States in his message on January 25, 1962, to the Congress on the subject of the "Reciprocal Trade Agreements Program" stated: "American imports, in short, have generally strengthened rather than weakened our economy." The public interest under Section 5 of the Act does not, in our opinion, require more than a marking of the country of origin on the inside of the watchcase back. A requirement for the marking of the country of origin on the exteriors of the watchcase back for the purpose of pandering to the stipulated prejudice of some consumers against watchcases made in Hong Kong would be inconsistent with the larger interests of the consuming public in having our economy strengthened by American imports.

Initial Decision

63 F.T.C.

Although it is realized that the order to be entered in this proceeding will in effect be a duplication of the current requirements on respondents' importer-suppliers by the Bureau of Customs that they mark or cause to be marked watchcase backs (even when imported separately) with the name of the country of origin, the order will nevertheless be issued since the Federal Trade Commission operates under its own statutes and also because there is a possibility that the said new requirements of the Bureau of Customs may be challenged in the courts. A further reason for issuing a cease and desist order in this matter is that respondents in all probability still have on hand substantial quantities of unmarked (as to country of origin) Hong Kong watchcases which were imported prior to January 18, 1962, when the new requirements of the Bureau of Customs with respect to markings of country of origin became effective.

Overall Findings of Ultimate Fact

Through the use of the practices hereinabove set forth, the respondents, except DWC, place in the hands of watch dealers and retailers a means and instrumentality whereby such dealers and retailers may mislead and deceive the purchasing public (1) as to the guaranties they issue on their watches, (2) as to the metal composition of their watchcase bezels, (3) as to the ability of their watches marked "water resistant" to actually resist moisture, and (4) as to the country of origin of their imported watchcases.

The use by the respondents, except DWC, of the false, misleading and deceptive practices hereinabove set forth and the failure to disclose the true origin and metal composition of their watchcases had, and now have, the capacity and tendency to mislead and deceive members of the purchasing public in the manner aforesaid and thereby to induce them to purchase said respondents' watches. As a consequence thereof, trade in commerce has been unfairly diverted to said respondents from their competitors and injury has thereby been done to competition in commerce.

The aforesaid acts and practices of the respondents, except DWC, as set forth above, were and are all to the prejudice and injury of the public and of said respondents' competitors and constitute 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.

ORDER

It is ordered, That respondents A. Schwarcz & Sons, Inc., a corporation, and its officers and Steven Vogel and Leslie Shaw, individually

and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the sale and distribution of watches or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that their watches are guaranteed, unless the nature, and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

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

3. Representing that their watches are water resistant or water protected.

4. Offering for sale, or selling watches, the cases of which are of foreign origin without clearly and conspicuously disclosing on the interior of the watchcase back the name of the foreign country of origin, preceded by the words "Case made in."

5. Placing in the hands of dealers and retailers a means or instrumentality whereby they may mislead and deceive the purchasing public as to the character and quality of their products.

It is further ordered, That the charge of the complaint relating to fictitious price preticketing as contained in Paragraph 3 of the complaint be, and the same hereby is, dismissed.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to the Delaware Watch Company, Inc., a corporation.

APPENDIX

Trade Practice Rules of Federal Trade Commission

Re: Terms "Waterproof and Related Designations, as Applied to Watches, Watchcases, and Watch-movements

RULE 2.

(a) *Improper Use of the Terms "Water Resistant," "Water Repellent," Etc.* It is an unfair trade practice to use the term "water resistant" or "water repellent," or any word, expression, depiction, or representation of like import, as descriptive of a watch or watchcase under any false, misleading, or deceptive circumstances or conditions, or in any manner which has the capacity and tendency, or effect of misleading or deceiving the purchasing or consuming public, or of

aiding, abetting, or causing salesmen, dealers, or other marketers to mislead, deceive, or confuse the purchasing or consuming public.

(b) *Use of Term "Water Resistant" or "Water Repellent" in Relation to Test, Etc.* Nothing in this rule shall be construed as prohibiting use of the terms "water resistant" or "water repellent" as descriptive of a watchcase or watch under the following conditions and limitations, namely, when the watchcase or watch has been so constructed and is of such composition as to provide protection against water or moisture to the extent of meeting the following test, designated as "Test No. 2," or a more severe test, and when, before being placed upon the market by manufacturers, assemblers, importers, or other marketers, the watch and the case have undergone such test: *Provided, however,* That subsequent to undergoing such test and before sale of the product to the purchasing public as and for a water resistant or water repellent watchcase, the water resistant condition thereof has not been impaired or destroyed by opening the case, or otherwise: *And provided further,* That no representation is made which is deceptive in implication, or otherwise, by reason of concealment of material fact or by way of guarantee, warranty, advertisement, label, or other means indicating or tending to indicate that the water resistant condition of the watch or watchcase will remain unaffected throughout the life thereof, or that it will not be affected by opening of the case for repairs or adjustment, or will not be affected by wear or other condition when such is not the fact.

NOTE. In the interest of avoiding possibilities of misunderstanding and deception of purchasers, members of the industry or marketers of watches or watchcases offered for sale or sold as and for "water repellent" or "water resistant" products should disclose to and inform the purchasing public, when such is the fact, that the water repellent and water resistant condition of the watch or case will be or may be destroyed or impaired by, or will not or may not continue after, having been opened for repairs, adjustment, or for other purpose, or because of other contingency encountered in the customary use or wear of the watch, unless the case is again serviced or treated by competent experts or by other methods adequate to renew or restore its condition of water resistance or water repellency.

(c) *Test No. 2—For Water Resistance or Water Repellency.* For purposes of this Rule 2, the following is deemed an acceptable test for water resistance or water repellency of a watch or watchcase, namely, complete immersion of the case or watch for at least 3 minutes in water at a pressure equivalent to a depth of 26 feet of water under normal atmospheric pressure of 15 pounds per square inch, without admitting, or showing any evidence of capacity to admit, any moisture or water. The so-called vacuum test of complete immersion in water under a vacuum sufficient to be productive of conditions of equivalent or great-

491

Opinion

er severity may be used as an alternate or additional test for purposes of this Rule 2. (Neither test is to be accepted, however, as showing or indicating the durability of such water resistant or water repellent condition or any time or period during which such condition may continue.)

OPINION OF THE COMMISSION

JUNE 19, 1963

By DIXON, *Commissioner*:

The complaint in this matter charges respondents with violation of Section 5 of the Federal Trade Commission Act through alleged misrepresentations concerning regular retail prices, guarantees, metal composition, place of origin and water resistant qualities of certain of their watches and watchcases. The case is before the Commission upon the cross-appeals of the parties from the hearing examiner's initial decision.

Complaint counsel takes exception to the hearing examiner's dismissal of the charge of preticketing and also to the form of the order as to disclosing foreign origin. He also appears to take exception to the examiner's dismissal of the charges as to respondent Delaware Watch Company, Inc. Respondents except to the examiner's holdings with respect to the charges on the metal content of watchcases and the use of the term "water resistant."

Dismissal As To Delaware Watch Company, Inc.

Respondents, Delaware Watch Company, Inc., and A. Schwarcz & Sons, Inc. (sometimes referred to hereafter as Delaware and Schwarcz, respectively), are New York corporations with their office and principal place of business at 580 Fifth Avenue, New York City. Respondents Steven Vogel and Leslie Shaw are officers of the corporations and they formulate, direct and control the acts and practices involved in this proceeding. The sole management of the corporate respondents rests in the individual respondents Shaw and Vogel. The individual respondents have also formed a partnership which is known as the Delaware Watch Company.

The president and majority stockholder of Schwarcz is respondent Leslie Shaw. The stock of Delaware Watch Company, Inc., is wholly owned by A. Schwarcz & Sons, Inc. Schwarcz also wholly owns the stock of a third corporation, Delaware Watch Company of the Virgin Islands, Inc., a corporation organized under the laws of the Virgin Islands.

The hearing examiner dismissed the complaint as to respondent Delaware Watch Company, Inc., on the ground that no evidence

was presented to show that it was engaged in any of the illegal practices and acts charged. According to the testimony, the Delaware Watch Company of the Virgin Islands, Inc., ships merchandise to respondent Delaware Watch Company, Inc., and the latter corporation then clears this merchandise through Customs and sees that it gets to the destination to which it was originally shipped. This assertedly is its sole function. Respondent Shaw testified that the New York corporation (Delaware) does not buy or sell any merchandise. It is noted, however, that respondents in their joint answer herein, including respondent Delaware, admitted that they now and for some time have engaged in the advertising, offering for sale, and selling of watches to wholesalers, retailers and premium users, for distribution to the public. As the examiner noted, this answer was prepared by respondents' counsel of record who has had long familiarity with the business affairs of respondents Steven Vogel and Leslie Shaw. In view of such admission, it is not readily apparent why the hearing examiner dismissed the complaint as to respondent Delaware Watch Company, Inc. He was clearly in error in so doing.

Furthermore, even without the admission, there is a sufficient showing to hold Delaware along with the other respondents responsible for the acts and practices charged. The individual respondents, Vogel and Shaw, were the sole managers of both corporations. The businesses of the two corporations were operated out of the same premises, and each corporation apparently was assigned different complementary functions in connection with the overall business. The business was essentially an individually owned and operated affair. This is emphasized by the fact that some of the business was conducted through a partnership composed of the individual respondents. In all the circumstances, we believe that the business affairs of the two corporations were so conducted and so interwoven as to make both responsible for the acts and practices herein charged and proved. See *Lifetime, Inc., et al.*, Docket No. 7616 (Decision of the Commission, December 1, 1961) [59 F.T.C. 1231].

Preticketing

The complaint charges that 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 products upon which certain amounts are printed and that they have also disseminated advertising literature upon which certain amounts are shown as retail prices of their products. Respondents thereby represent, according to the complaint, that said amounts are the usual and regular retail prices of the products, whereas, in truth, the amounts

shown are not the usual and regular prices of the products but are in excess thereof. It is also charged that through the use of such practices, as well as others, respondents have supplied to dealers and retailers a means and instrumentality whereby they may mislead and deceive the purchasing public.

The hearing examiner dismissed this preticketing charge and we concur in his action. The record lacks substantial evidence as to the usual and regular retail prices of respondents' watches in any market area.

Counsel supporting the complaint adduced evidence of preticketing for only one market, namely, Newark, New Jersey. It appears that there is but one dealer (in this market) who distributes respondents' watches of the type involved. The dealer referred to is the Alben Jewelry Company, also known as Alben Jewelers, 206 Washington Street, Newark, New Jersey. The theory of complaint counsel appears to be that the prices charged by this single dealer are the usual and regular prices at which respondents' watches are sold at retail in that market. The further contention is that these prices are substantially less than the alleged preticketed prices.

The evidence as to the regular prices at which Alben Jewelers sold watches obtained from respondents included some testimony as to this dealer's usual markup over its costs. This evidence, however, is very inconclusive. Marvin Silverstein, associated with Alben Jewelers, testified that the markup on respondents' watches varied and would be "Any place, I imagine, from 25 percent over cost to two and a half times cost or two times cost." However, even if it were certain that Alben Jewelers' markup was a fixed percentage over its costs, such a fact would prove very little. On this record it could be related at most only to two watch exhibits allegedly falsely preticketed.

These two watches were purchased from Alben Jewelers by a Government investigator. One of the watches was a 17-jewel ladies' wrist watch sold by A. Schwarcz & Sons, Inc., to Alben Jewelers for \$9.95. When purchased by the investigator, it had attached to it a ticket which read: "39.95 fed. tax inc., Delaware." The other was a 7-jewel ladies' wristwatch sold to Alben Jewelers by A. Schwarcz & Sons, Inc., for \$6.50. The latter watch had the word "Delgard" printed on its face. In the box in which it was enclosed was a price tag or ticket with the printed figures "\$19.95." These watches were purchased by the Government investigator for the amounts of \$17.00 and \$12.48 respectively. The contention is that such prices were the usual and regular prices of these watches in the Newark market. This is not necessarily so. Evidence of one or two isolated sales at less than the

Opinion

63 F.T.C.

preticketed price is as equally probative of a valid "sale" on the part of the dealer involved as it is of a deceptive practice. *Rayex Corp. v. Federal Trade Commission*, 317 F. 2d 290 (2d Cir. 1963) [7 S.&D. 696]. In the circumstances, the evidence is insufficient to prove the usual and regular retail prices of respondents' watches in this market. For this reason, the charge in the complaint that respondents have preticketed their watches at fictitious retail prices was properly dismissed, and the exceptions to this part of the initial decision will be denied.

Country of Origin

Another charge in the complaint is that respondents have misled the public as to the origin of certain of the watchcases housing their watches by failing to mark such cases to show that they were made in Hong Kong. In connection with this charge, the examiner found and concluded that in the absence of any disclosure on the watchcases as to the country of their origin a substantial number of consumers would be misled and deceived into believing that the watchcases of certain of respondents' watches assembled with Swiss watch movements, with the word "Swiss" inscribed on the dials, and Hong Kong cases, were made either in the United States or in Switzerland. On this finding, he entered an order which would prohibit the offering for sale or the selling of watches, the cases of which are of foreign origin, without clearly and conspicuously disclosing on the *interior of the watchcase back* the name of the foreign country of origin, preceded by the words "Case made in."

The record shows that respondents receive substantial quantities of Hong Kong watchcases through importers. The backs and bezels (or fronts) are imported separately, but they are made by the same manufacturer and are designed to be assembled together into one unit in the United States. Separate shipments of these parts are made only because of a savings in import duty. Thus, the backs and bezels are, in reality, a watchcase unit. The significance of these case parts and the unit into which they are assembled in the composition of a watch is clearly apparent. As a unit they will play the entire role in providing protection to the watch movement. If the watch is a "water resistant" type, for instance, the watchcase parts will provide this form of protection. While the case becomes a component of the assembled watch, it is a principal and observable component. Its appearance and quality are factors of prime importance in the salability of the watch. The watch case does not lose its identity in the manufacture of the watch, but retains its essential characteristics as a foreign made product. Moreover, the record supports the

conclusion that many consumers are interested in the place of origin of watchcases and that they prefer American-made cases over watchcases made in Hong Kong. In these circumstances, a requirement in the order for appropriate disclosure of the country of origin is clearly justified. The only question before us is the form the order should take. See *L. Heller & Son, Inc. v. Federal Trade Commission*, 191 F.2d 954, 956 (7th Cir. 1951); *Segal v. Federal Trade Commission*, 142 F.2d 255 (2d Cir. 1944); *Manco Watch Strap Co., Inc.*, Docket No. 7785 (March 13, 1962) [60 F.T.C. 495]; *Baldwin Bracelet Corp.*, Docket No. 8316 [61 F.T.C. 1345]; *Hilton Watch & Clock Co., Inc.*, Docket No. 8402 [61 F.T.C. 742]; *William Adams, Inc.*, 53 F.T.C. 1164.

It seems obvious to us that the order entered by the examiner would be singularly ineffective in preventing the deception which he found. Prospective purchasers rarely have an opportunity to see inside the back of a watch before purchase; hence, a marking on the interior of the case would be little better than no marking at all.

The argument has been made that the marking of the country of origin on some small watches cannot be accomplished without defacement. The solution is to provide that the information may be placed on a tag securely attached to the watch. Another argument advanced is that the use of Hong Kong on the part may mislead consumers to believe that the whole watch is made in Hong Kong. There should be no great difficulty, however, in marking so as to make clear that only the part is of Hong Kong origin. This might be accomplished by use of the phrase "Case made in."

We therefore conclude that the order in the initial decision should be modified to require proper disclosure of the country of origin on the exterior of watchcases or parts with the provision that the disclosure may be made by means of a label or a tag affixed to the watch with a degree of permanency sufficient to assure that it will remain there until the watch is sold to a consumer.

Composition of Bezels (watchcase fronts)

The complaint charges respondents with misleading and deceiving the purchasing public into believing that the bezels of certain of their watchcases are composed of precious metals or stainless steel whereas they are in fact made of base metals which have been treated or processed to simulate precious metal or stainless steel. The hearing examiner found this allegation to have been sustained and entered an order requiring disclosure of the true metal composition of base metal parts which have been so treated or processed. Respondents have taken exception to his findings and order on this issue. Their

Opinion

63 F.T.C.

main contention appears to be that the finding as to metal content of the bezels was unsupported by reliable, substantial and competent evidence.

Respondents are not now in a position to make this contention. In their answer to the complaint, they expressly admitted the first paragraph of Paragraph 6 thereof, which reads as follows:

Certain of the watches offered for sale and sold by respondents are in cases which consist of two parts, that is, a back and bezel. The back part has the appearance of stainless steel and is marked "stainless steel back". The bezel is composed of base metal other than stainless steel which has been treated or processed to simulate or have the appearance of precious metal or stainless steel. Some of the bezels are finished in a color which simulates silver or silver alloy or stainless steel. Some of the bezels are finished in a color simulating gold or gold alloy. Said watchcases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel.

Thus, the practice of simulating precious metal or stainless steel and the failure to mark so as to disclose that the parts are composed of metal other than that mentioned is admitted. Moreover, there is evidence in the record, and the examiner found, that purchasers would be deceived by the appearance of the bezels. This evidence includes the testimony of a consumer witness and the exhibits themselves. In the circumstances, the record clearly supports the finding that respondents' failure to properly mark the bezels has the tendency and capacity to mislead and deceive the purchasing public as to the metal content of such bezels. See *Theodore Kagen Corp. v. Federal Trade Commission*, 283 F. 2d 371 (D.C. Cir. 1960) [6 S.&D. 837], *cert. denied*, 365 U.S. 843.

Water Resistance

Respondents concede that they have marked and advertised their watches as "water resistant," but contend that the record fails to prove the falsity of this claim.

First, one of respondents' watches failed to pass the "water resistance" test described in Rule 2 of this Commission's Trade Practice Rules for the watch industry, April 24, 1947, 16 CFR 170.2 (text at CX 20, and appendix, initial decision [p. 519 herein]). The substance of that Rule is that a claim of water resistance shall not be deemed false and deceptive, and hence not violative of Section 5 of the Federal Trade Commission Act, *Helbros Watch Co.*, Docket No. 6807 (December 26, 1961), *aff'd*, 310 F. 2d 868 (D.C. Cir. 1962) [7 S.&D. 596], if, after "complete immersion of the case or watch for at least 3 minutes in water at a pressure equivalent to a depth of 26 feet of water under normal atmospheric pressure of 15 pounds per square inch," the watch is not then "admitting, or showing any

evidence of capacity to admit, any moisture or water." Rule 2(c), Test No. 2. (A watch represented as "waterproof," as contrasted with merely "water resistant," is tested by severer standards. See Rule 1(d), Test No. 1.)

Respondents' watch, which bore on the back of its case the engraved term "WATERRESISTANT" (CX 9-A), was tested by an independent testing company, Lucius Pitkin, Inc., of New York City. The technician who administered the test, Mr. F. H. Wright, an official of the company, testified that he conducted the test as follows: "The watch was immersed in one inch of distilled water in a strong glass flask, and pressure applied for three minutes, then released. The pressure was measured as 22.95 inches on a Mercury Manometer, and was equivalent to a depth of 26 feet of water under normal atmospheric pressure." He stated that "water entered the watch, and when the required pressure was released at the end of the test, bubbles of air were seen to escape from the watch into the water above." His written report (CX 21-A) corroborated his oral testimony: "Moisture condensed on inside of crystal. Air bubbles came from stem when pressure was released. Watch had been running, but stopped during pressure test."

Respondents have not challenged the reasonableness of the testing standards described in the Rules. *Helbros Watch Co., supra*, opinion of the Commission. Nor do we understand that they challenge the technical skill and competence with which the test was administered. Their objections are (1) that the watch had been damaged, and its water-resisting properties thus impaired, prior to its delivery to the testing laboratory, (2) that more than one watch (respondents suggest at least four) should have been tested, and (3) that there is no proof the watch tested had been sold in interstate commerce.

We see no merit in any of these contentions. In support of the first, respondents point to the fact that they found the back of the tested watch "loose" at the hearing, and found microscopic scratch marks on it. As to the latter, there was no showing that this so-called "damage" to the watch was the proximate cause of the leakage disclosed by the test. Expert testimony indicated that the watch leaked because of its particular type of construction, *i.e.*, that it would have been "very difficult to make this case water resistant." And as to the "looseness" of the case at the time of the hearing, a highly qualified watch expert, a man with special training and experience with water resistant watches, testified that he had examined and "tightened" the watch immediately before it was tested. The custody of the exhibit (CX 9-A) was fully accounted for from the time of its purchase by a Commission attorney until the test was completed.

Immediately after purchase it was hand carried to the watch expert, Mr. Jean Felber, who made a routine opening and closing of the case to be sure it *was* in a proper condition for taking a water resistance test. He testified that he opened and closed the case "the way any watch-maker would do this in servicing" it, that he had used the proper tool, that he had performed the opening and closing carefully, and that he had returned it to the Commission's attorney "in the same condition" as he had received it. The Commission's attorney then hand carried the watch to the testing laboratory, where the test was performed in the attorney's presence. The technician that administered the test stated that he had "handled the watch very gently throughout the testing, without doing anything mechanical to it." Since the condition of the watch at the time it was tested (November 1960) has thus been thoroughly established, the unexplained "looseness" of the case found at the hearing more than a year later does not affect the validity of the test. If respondents are arguing that the "water resistant" properties possessed by their watches are so delicate that they cannot survive a routine opening and closing of the case by a specially trained expert using an ordinary jeweler's tool, then respondents should qualify their "water resistant" claim so as to inform purchasing customers that the claim is valid only until the watch's first trip to the jeweler for a routine cleaning or repairing. See "Note," Rule 2(b) (CX 20).

As to respondents' contention that several watches should have been tested in order to present some kind of statistical sample, it should be noted first that, since the watch tested had been purchased at random from the shelf of a retail store, it can hardly be considered a hand-picked specimen. More importantly, however, respondents' own testimony confirmed the fact that a substantial percentage of their watches cannot pass the water resistant test. According to this testimony, the watchcases they buy are merely "spot-checked." First, 10% of them, selected at random, are given the test described in Rule 2(c) in Hong Kong, by the manufacturer. Then, upon their arrival in this country, the importer selects another random 10% for testing. Finally, respondents themselves, after purchase from the importer, "spot check" 20 out of each 100 watches received. Delaware's president described the results of these tests: "Usually, what happens is that out of 20, two or three are dissatisfactory, which then will be adjusted by either changing the rubber gasket or changing the crystal or making any necessary repairs or adjustments that may be required." It is a fair inference that, of the 80 *untested* watches, the same percentage would be found "dissatisfactory," *i.e.*, 8 to 12 of those 80 watches (or about 10%) are leakers. As to each of these,

respondents' "water resistant" claim was false and misleading, and in violation of Section 5 of the Federal Trade Commission Act. (Respondents cannot claim for this "spot checking" procedure the protection of Rule 2(c); its benefits can only be claimed where there has been a "complete immersion of *the* case or watch," *i.e.*, a testing of each and every watch represented as "water resistant.")

It need not be shown that *all* of respondents' watches would fail to meet a reasonable test of "water resistance." As we said in *Helbros Watch Co., supra*, "the showing that several watches selected at random were not water resistant was sufficient to sustain the charge even though another group of watches might be found to be water resistant. We [agree] that since respondents have undertaken to make an affirmative representation concerning their watches, they must bear the responsibility if this representation is not true with respect to a portion of the watches." Here, respondents' own testimony establishes that some 10% of the approximately 40,000 "water resistant" watches they sell annually (or some 4,000 watches sold per year) would not pass the water resistance test. Therefore, we do not see how respondents would have benefited in this case by our testing 3 more watches. Even if the other 3 had successfully passed the test—indeed, if we had tested another 9 and all 9 of them had passed the test—we would still be constrained to find, on the basis of the fact that 1 out of a total of 10 had failed, and on the basis of respondents' own testimony that 1 out of 10 fails to pass the test they administer themselves, that respondents had misrepresented the "water resistant" properties of a substantial portion of their watches.

As to respondents' further contention on the matter of interstate commerce, the hearing examiner expressly found that Commission Exhibit 9-A, the watch tested for water resistance, was sold in interstate commerce. This exhibit is a watch identified by the respondents with the number W-865. A watch of this type was sold to Alben Jewelers on an invoice dated January 5, 1960, identified on Commission Exhibit 11. The watches specified on this invoice were mailed to Alben Jewelers in Newark and, therefore, were transported in interstate commerce. It appears likely that the watch identified on Commission Exhibit 11 and the physical exhibit (CX 9-A) are one and the same, and the examiner in effect so found. Thus, at least one of respondents' watches marked with the term "water resistant," a representation found to be false, was sold in interstate commerce.

However, apart from this specific exhibit, the charge of misrepresentation in connection with the use of the term "water resistant" is proved. Respondents have admitted a substantial course of trade in their products in interstate commerce and the examiner found, as

Order

63 F.T.C.

the evidence shows, that substantially all of respondents' purchases of water resistant watchcases were of a type so constructed as to make them vulnerable to water leakage. Also, as pointed out above, a large number of respondents' watches failed to be water resistant under the minimum standard set out in Rule 2(c) of the Trade Practice Rules promulgated April 24, 1947.

We hold that charges on use of the term "water resistant" are sustained. The hearing examiner's order will be modified so as to permit the use of the term "water resistant" where respondents' watches in fact meet the standards for a water resistant watch.

The exceptions of complaint counsel and the exceptions of the respondents are, respectively, sustained to the extent above indicated and otherwise rejected. It is ordered that the initial decision be modified in accordance with the views expressed in this opinion and that as modified adopted as the decision of the Commission. An appropriate order will be entered.

ORDER MODIFYING AND ADOPTING INITIAL DECISION AND PROVIDING
FOR THE FILING OF OBJECTIONS TO PROPOSED FINAL ORDER AND REPLY

JUNE 19, 1963

This matter having been heard by the Commission upon the exceptions of counsel supporting the complaint and the respondents to the hearing examiner's initial decision and upon briefs and oral argument in support of and in opposition to the exceptions respectively taken; and

The Commission, for the reasons stated in the accompanying opinion, having sustained in part and rejected in part the exceptions of complaint counsel and of respondents, and having further ordered that the initial decision be modified in accordance with the views therein expressed and as so modified adopted as the decision of the Commission:

It is ordered, That all of the words beginning with the last sentence in the continued paragraph, line 6, on page 499 and ending with the second full paragraph on page 501 of the initial decision be, and they hereby are, stricken, and that the following be substituted therefor:

The record contains no substantial probative evidence as to the usual and regular retail prices for respondents' watches in the Newark, New Jersey, market or in any other market. The record is further deficient on this issue in that it is not clear that the respondents were responsible for placing the price tickets on the watches which were put in evidence to show the practice of

491

Order

preticketing. It is therefore concluded that complaint counsel has not sustained the burden of proof on the preticketing issue and that the complaint on such issue should be dismissed.

It is further ordered, That the paragraphs beginning with the third full paragraph on page 512 and ending with the second full paragraph on page 513 of the initial decision be, and they hereby are, stricken and that the following be substituted therefor:

Finally, the conclusion is based upon the showing that a substantial number of respondents' watches fail the tests provided for in Rule 2(c) of the Commission's Trade Practice Rules for the watch industry promulgated April 24, 1947. Respondent Shaw testified that out of every test group (20 watches selected from each 100 assembled watches), there would be 2 or 3 watch-cases which would not meet the tests. While these would be repaired before sale, it is apparent that statistically, at least, a substantial number of watches in the untested group would fail the tests, *i.e.*, 10% or more. The watch tested (Commission Exhibit 9-A) was a random selection in that it was purchased off a dealer's shelf, and the failure of this watch to pass a test provided in Rule 2(c) confirms the showing that a large number of respondents' watches would fail such tests.

The tests set forth in the aforementioned Rules for the watch industry were worked out in close cooperation with the watch industry and, in the circumstances, may be accepted as establishing a reasonable minimum standard. It is significant that respondents themselves by using a test prescribed in the Rules in their own testing procedures seem to accept such test as a reasonable standard for determining "water resistant" qualities. The tests in Rule 2(c), it should be pointed out, are not the only tests, which would be acceptable to show "water resistant" capability. A more severe test might be used. These tests, however, establish a minimum performance standard. Since large numbers of respondents' watches failed or would fail such tests, it is found that such watches are not "water resistant".

It is further ordered, That on page 498 of the initial decision in the last paragraph thereof the price of \$9.95 be, and it hereby is, substituted for the price of \$10.50.

It is further ordered, That on page 503 of the initial decision in the third full paragraph the portion beginning with the words "Although the issue" to the end of the paragraph be stricken and the following substituted therefor: "CX 9-A is found to be in 'commerce'".

Final Order

63 F.T.C.

It is further ordered, That the following paragraphs or portions thereof contained in the initial decision be, and they hereby are, stricken:

1. Page 497, the words in the continued paragraph, line 5, beginning with the line "Notwithstanding this admission, the uncontradicted" to the end of that paragraph and all of the first full paragraph.
2. Page 497, the heading "Dismissal as to DWC" and the two paragraphs under this heading.
3. Page 502, the third and fourth full paragraphs.
4. Page 505, the last paragraph.
5. Page 507, the first paragraph.
6. Pages 515 through 518, all paragraphs beginning with the last paragraph at the bottom of page 515 and ending with the first paragraph on page 518, inclusive, except for the first full paragraph on page 516.

It is further ordered, That the phrase "except DWC" be, and it hereby is, stricken in each of the three paragraphs in which it appears under the heading "Overall Findings of Ultimate Fact" in the initial decision.

It is further ordered, That respondents may, within twenty (20) days after service upon them of this order, file with the Commission their objections to the changes in the order to cease and desist contained in the initial decision, as shown by the following proposed order* of the Commission, together with a statement of the reasons in support of their objections and a proposed alternative form of order appropriate to the Commission's decision.

FINAL ORDER

AUGUST 15, 1963

Pursuant to § 4.22(c) of the Commission's Rules of Practice, respondents were served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of order which the Commission contemplates entering; and

Respondents having made timely filing of their exceptions to the order proposed which were opposed by counsel supporting the complaint, and the Commission, upon review of these pleadings, having determined that respondents' exceptions constitute reargument of

*The proposed order to cease and desist is omitted, entered as the final order of the Commission.

matters thoroughly considered by the Commission upon its review of the initial decision and do not constitute a showing that the proposed order to cease and desist is inappropriate in any way; and

The Commission having concluded, therefore, that respondents' exceptions should be disallowed and that the order as proposed should be entered as the final order of the Commission:

It is ordered, That respondents Delaware Watch Company, Inc., a corporation, A. Schwarcz & Sons, Inc., a corporation, and their officers, Steven Vogel and Leslie Shaw, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That their products are guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

(b) That their watches are "water resistant," it being understood that respondents may successfully defend the use of such representation with respect to any watch, the case of which respondents can show will provide protection against water or moisture to the extent of meeting the test designated test No. 2 of the Trade Practice Conference Rules for the Watch Industry, as set forth in the Code of Federal Regulations, Title 16, Chapter 1, Part 170.2(c) (16 CFR 170.2(c)).

2. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated to simulate precious metal or stainless steel, without clearly and conspicuously disclosing on such cases the true metal composition of such treated cases or parts.

3. Offering for sale or selling watches, the cases of which are in whole or in part of foreign origin, without affirmatively disclosing the country or place of foreign origin thereof on the exterior of the cases of such watches 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 watches and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers.

Complaint

63 F.T.C.

4. Supplying to, or placing in the hands of, any dealer or other purchaser, means or instrumentalities by and through which they may deceive and mislead the purchasing public as to the national origin of their watchcases, the metal composition of their watchcases and the moisture resistant capacity of their watches.

It is further ordered, That the initial decision as modified by the Commission's order of June 19, 1963, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents 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 set forth herein.

IN THE MATTER OF

MAX M. BARTH TRADING AS CHARLES BARTH & SON

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-568. Complaint, Aug. 16, 1963—Decision, Aug. 16, 1963

Consent order requiring a Chicago manufacturing furrier to cease violating the Fur Products Labeling Act by labeling spotted cat fur as "Leopard Cat" and labeling and invoicing other fur products improperly as "Broadtail"; failing on labels and invoices, to show the true animal name of furs, to disclose when fur was artificially colored, and to use the term "Dyed Broadtail-processed Lamb" as required; failing to use the word "natural" on labels where applicable, and to show the country of origin of imported furs on invoices; substituting nonconforming labels for those originally affixed to fur products; and failing in other respects to comply with labeling and invoicing requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Max M. Barth, an individual trading as Charles Barth & Son, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Max M. Barth is an individual trading as Charles Barth & Son.

Respondent is a manufacturer, wholesaler and retailer of fur products with his office and principal place of business located at 190 North State Street, Chicago, Illinois.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products have been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products which were labeled as Leopard Cat when the fur contained in such products was, in fact, Spotted Cat.

Also among such misbranded fur products, but not limited thereto, were fur products labeled as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in

accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Dyed Broadtail-processed Lamb" was not set forth on labels in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(b) The term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

(d) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.
3. To show the country of origin of imported furs used in fur products.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they

534

Decision and Order

were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(b) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 9. Respondent in introducing, selling, advertising, and offering for sale, in commerce, and in processing for commerce, fur products; and in selling, advertising, offering for sale and processing fur products which have been shipped and received in commerce, has misbranded such fur products by substituting thereon, labels which did not conform to the requirements of Section 4 of the Fur Products Labeling Act, for the labels affixed to said fur products by the manufacturer or distributor pursuant to Section 4 of said Act, in violation of Section 3(e) of said Act.

PAR. 10. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Max M. Barth is an individual trading as Charles Barth & Son with his office and principal place of business located at 190 North State Street, Chicago, Illinois.

Decision and Order

63 F.T.C.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Max M. Barth, an individual trading as Charles Barth & Son, or under any other trade name and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped or received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.
2. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.
3. Failing to set forth the term "Dyed Broadtail-processed Lamb" on labels in the manner required where an election is made to use that term in lieu of the term "Dyed Lamb".
4. Failing to set forth the term "Natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.
5. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting on labels affixed to fur products.
6. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.
2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.
3. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".
4. Failing to set forth on invoices the item number or mark assigned to fur products.

It is further ordered, That respondent Max M. Barth, an individual trading as Charles Barth & Son, or under any other trade name and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

By the Commission, Commissioner Elman not participating.

IN THE MATTER OF

STANLEY NEWCOMB TRADING AS
STAN NEWCOMB FIFTH AVENUE