

sideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered. That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

IN THE MATTER OF

BENRUS WATCH COMPANY, INC., ET AL.

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

Docket 7352. Complaint, Jan. 8, 1959—Decision, Feb. 28, 1964

Order requiring two New York City associated distributors of watches to wholesalers, retailers and premium users for resale to the public, to cease using—in preticketing their watches, and in price lists, catalogs, newspaper and magazine and other advertising—fictitious amounts as the usual retail prices; setting forth fictitious amounts as retail prices from which reductions were to be made for trade-ins, allowance certificates and other reduction offers, and representing falsely that dealers would make such reductions against the indicated retail price; representing falsely that their watches were guaranteed and “shock proof”; failing to disclose the true metal content of bezels; and placing in the hands of purchasers for resale means for misleading the purchasing public in the above respects.

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 Benrus Watch Company, Inc., a corporation, Belforte Watch Company, Inc., a corporation, S. Ralph Lazrus, Oscar M. Lazrus and Benjamin Lazrus, individually and as officers of the above corporation, and Harvey M. Bond, Stanley M. Karp, Norman Slater, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Martin J. Rasnow, Robert

Gasser, Clifford L. J. Siegmeister, Leo Hyman, and Julian Lazrus, individually and as officers of Benrus Watch Company, Inc., herein-after referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Benrus Watch Company, Inc., and Belforte Watch Company, 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 50 West 44th Street, New York 36, New York.

Respondents S. Ralph Lazrus, Oscar M. Lazrus and Benjamin Lazrus are officers of both of the aforesaid corporations. Harvey M. Bond, Stanley M. Karp, Norman Slater, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Martin J. Rasnow, Robert Gasser, Clifford L. J. Siegmeister, Leo Hyman and Julian Lazrus are officers of the Benrus Watch Company, Inc. 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.

PAR. 2. 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. 3. In the course and conduct of their business, respondents now cause 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 other 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. 4. Respondents, for the purpose of inducing the purchase of their products, have engaged in the practice of attaching or causing to be attached price tickets to their said products upon which certain amounts are printed. Respondents have also disseminated, or caused to be disseminated, price lists, catalogs, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising, in which certain amounts are shown as the retail prices of respondents' products. Respondents thereby represent, directly or by implication, that said amounts are the usual and regular retail prices of said products. In truth and in fact said amounts are fictitious and in excess of the usual and regular retail prices of said products.

PAR. 5. Respondents, for the purpose of inducing the purchase of their products, have disseminated or caused to be disseminated newspaper advertisements and other forms of advertising which contain statements that a designated amount will be granted as a trade-in allowance for an old watch, toward the purchase of a new watch, the product of respondents. Respondents thereby represent that by trading in an old watch a purchaser will save such designated amount as compared with the usual and regular retail price of said new watch, and that the purchaser by trading in an old watch will be obtaining a new watch, product of respondents, at a reduction of such designated amount below the usual and regular retail price of said new watch. In truth and in fact the purported trade-in allowance does not result in a saving to the purchaser, of such designated amount or any other amount; trading in an old watch does not enable the purchaser to obtain a new watch at a reduction of such designated amount or any other amount below the usual and regular price; the usual and regular prices quoted in such advertising are fictitious, misleading and deceptive.

PAR. 6. Respondents further use deceptive "allowance certificates" by representing in nation-wide advertising that they and their dealers will allow a certain amount against the advertised price of their products. In truth and in fact, their products are not usually and regularly sold at the said advertised price and the use of the "allowance certificate" does not effect an actual saving for the purchaser or prospective purchaser of respondents' products. Furthermore, dealers in respondents' products do not uniformly honor such "allowance certificates."

PAR. 7. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their said products respondents have made and are making false, deceptive and misleading representations through nationally distributed magazines, newspapers and other advertising media that certain low-priced models of their products are available at respondents' dealers, when such is not the fact, such representations being made to induce prospective purchasers of their products to make inquiry at the dealer's store, whereby the dealer can then induce the sale of more expensive models.

PAR. 8. Respondents represent in their advertising that their watches are guaranteed by the use of such terms as "guaranteed", "fully guaranteed", "guaranteed by Benrus", and other terms and expressions of which these are typical. Respondents also represent in guarantee certificates that their watches will be serviced upon payment of one dollar. In truth and in fact, the representations as to

guarantee are false, misleading and deceptive. The fact that the guarantee provides for payment of a service charge is not set forth in advertising, and the respondents frequently impose service charges in excess of those set forth in the certificates of guarantee. The terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are not clearly and conspicuously disclosed in close conjunction with the representations of guarantee.

PAR. 9. Respondents further deceptively represent that their watches are "shock proof" or "shock protected". In truth and in fact, their watches are not "shock proof" or "shock protected" in every respect.

PAR. 10. Respondents' watches are in cases, the bezels of which have been treated or processed to simulate or have the appearance of precious metal, that is, gold or gold alloy. Said watch cases are not marked to disclose clearly that the bezels are composed of base metal. The practice of respondents in offering for sale and selling watches with bezels which have been treated or processed to simulate or have the appearance of precious metal as aforesaid without disclosing clearly the true metal composition of said bezels is misleading and deceptive and has a tendency and capacity to lead members of the purchasing public to believe that the said bezels are composed of precious metal.

PAR. 11. Respondents represent in advertising through use of terms such as "chrome top case" that certain of their watches contain tops or bezels composed throughout of chromium or chromium steel, commonly known as chrome steel or as stainless steel. In truth and in fact said bezels are not composed throughout of chromium or chromium steel and contain only a surface coating or plating of chromium. The practice of respondents in this respect is misleading and deceptive, as watch cases or parts thereof composed throughout of chromium or chromium steel are of greater utility than watch cases which are only surface coated or plated with chromium or chromium alloy.

PAR. 12. Respondents, by furnishing advertising and labeling material and selling and distributing watches to dealers, retailers and premium users as above set forth, furnish said dealers, retailers and premium users with means and instrumentalities by and through which they may mislead and deceive the public as to usual and regular prices, availability, quality and construction of respondents' watches, the amount of allowances, savings and price reductions in connection with the sale of respondents' watches, the nature and ex-

tent of respondents' guarantee and the manner of performance thereunder.

PAR. 13. In the conduct of their business at all times mentioned herein, respondents have been in substantial competition in commerce with corporations, firms and individuals in the sale of watches of the same general kind and nature as that sold by respondents.

PAR. 14. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products 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. 15. 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. H. E. Middleton, Jr., for the Commission.

Weisman, Allan, Spett & Sheinberg, New York, N. Y., for the respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

MAY 23, 1962

Respondents are charged in the Commission's complaint, issued on January 8, 1959, with having made false, misleading and deceptive statements with respect to their watches in the conduct of their business. The crux of the substantive charges alleged in the complaint is as follows:

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

that said amounts are the usual and regular retail prices of said products. In truth and in fact, said amounts are fictitious and in excess of the usual and regular retail prices of said products. (See paragraph 4 of complaint.)

2. Respondents, for the purpose of inducing the purchase of their products, have disseminated, or caused to be disseminated, newspaper advertisements and other forms of advertising which contain statements that a designated amount will be granted as a trade-in allowance for an old watch, toward the purchase of a new watch, the product of respondents. Respondents thereby represent that by trading in an old watch a purchaser will save such designated amount as compared with the usual and regular retail price of said new watch, and that the purchaser by trading in an old watch will be obtaining a new watch, product of respondents, at a reduction of such designated amount below the usual and regular retail price of said new watch. In truth and in fact, the purported trade-in allowance does not result in a saving to the purchaser of such designated amount or any other amount; trading in an old watch does not enable the purchaser to obtain a new watch at a reduction of such designated amount or any other amount below the usual and regular price; the usual and regular prices quoted in such advertising are fictitious, misleading and deceptive. (See paragraph 5 of complaint.)

3. Respondents further use deceptive "allowance certificates" by representing in nation-wide advertising that they and their dealers will allow a certain amount against the advertised price of their products. In truth and in fact, their products are not usually and regularly sold at the said advertised price and the use of the "allowance certificate" does not effect an actual saving for the purchaser or prospective purchaser of respondents' products. Furthermore, dealers in respondents' products do not uniformly honor such "allowance certificates." (See paragraph 6 of complaint.)

4. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their said products respondents have made and are making false, deceptive and misleading representations through nationally distributed magazines, newspapers and other advertising media that certain low-priced models of their products are available at respondents' dealers, when such is not the fact, such representations being made to induce prospective purchasers of their products to make inquiry at the dealer's store, whereby the dealer can then induce the sale of more expensive models. (See paragraph 7 of complaint.)

5. Respondents represent in their advertising that their watches are guaranteed by the use of such terms as "guaranteed", "fully

guaranteed", "guaranteed by Benrus", and other terms and expressions of which these are typical. Respondents also represent in guarantee certificates that their watches will be serviced upon payment of one dollar. In truth and in fact, the representations as to guarantee are false, misleading and deceptive. The fact that the guarantee provides for payment of a service charge is not set forth in advertising, and the respondents frequently impose service charges in excess of those set forth in the certificates of guarantee. The terms, conditions and extent to which such guarantee applies, and the manner in which the guarantor will perform thereunder, are not clearly and conspicuously disclosed in close conjunction with the representations of guarantee. (See paragraph 8 of complaint.)

6. Respondents further deceptively represent that their watches are "shock proof" or "shock protected". In truth and in fact, their watches are not "shock proof" or "shock protected" in every respect. (See paragraph 9 of complaint.)

7. Respondents' watches are in cases, the bezels of which have been treated or processed to simulate or have the appearance of precious metal, that is, gold or gold alloy. Said watch cases are not marked to disclose clearly that the bezels are composed of base metal. The practice of respondents in offering for sale and selling watches with bezels which have been treated or processed to simulate or have the appearance of precious metal as aforesaid, without disclosing clearly the true metal composition of said bezels, is misleading and deceptive and has a tendency and capacity to lead members of the purchasing public to believe that the said bezels are composed of precious metal. (See paragraph 10 of complaint.)

8. Respondents represent in advertising through use of terms such as "chrome top case" that certain of their watches contain tops or bezels composed throughout of chromium or chromium steel, commonly known as chrome steel or as stainless steel. In truth and in fact, said bezels are not composed throughout of chromium or chromium steel and contain only a surface coating or plating of chromium. The practice of respondents in this respect is misleading and deceptive, as watch cases or parts thereof composed throughout of chromium or chromium steel are of greater utility than watch cases which are only surface coated or plated with chromium or chromium alloy. (See paragraph 11 of complaint.)

Respondents' position with regard to these charges is that counsel supporting the complaint has failed to prove the following:

1. That respondents have represented, directly or by implication, that the amounts appearing on the price tickets attached to their

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watches and in their advertising are the usual and regular price of such watches.

2. That the trade-in of a watch does not result in a saving to the consumer.

3. That the presentation of an allowance certificate did not result in a saving to the customer and that the pre-ticketed price was not usually and regularly charged without the presentation of such a certificate.

4. That respondents have not honored their guarantees in accordance with their terms.

5. That respondents have represented, except in one instance, that their watches are "shock proof" or that such a representation, if made, was misleading in the circumstances of this case.

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

7. The metal composition of respondents' "chrome top" cases, or that consumers are misled by the appearance of such cases.

Proposed findings 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 involving immaterial matters.

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

FINDINGS OF FACT

1. Respondents Benrus Watch Company, Inc., and Belforte Watch Company, 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 50 West 44th Street, New York 36, New York.

2. Respondents Oscar M. Lazrus and Benjamin Lazrus are officers of both of the aforesaid corporations. Harvey M. Bond, Stanley M. Karp, Norman Slater, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Martin J. Rasnow, Clifford L. J. Siegmeister, Leo Hyman, and Julian Lazrus are officers of the Benrus Watch Company, Inc. Respondent S. Ralph Lazrus died in September 1959.

3. Individual respondents Oscar M. Lazrus, Benjamin Lazrus, Harvey M. Bond, Stanley M. Karp, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Clifford L. J. Siegmeister and Julian Lazrus 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.

Robert Weil heretofore referred to although initially found to be in default in this proceeding, subsequently appeared by counsel and is properly chargeable only with the violations established by the evidence herein. See the order of the hearing examiner dated March 31, 1961, granting the Motion for Default against this respondent.

As regards Robert Gasser, it has been established that he was last employed by the Benrus Watch Company, Inc., on December 30, 1957, at which time he retired from the corporation's employ, and since that time has not been employed by the corporation in any capacity whatsoever. The Commission's complaint was filed January 8, 1959. It would appear, therefore, that service on Mr. Gasser at the offices of Benrus Watch Company, Inc., 50 West 44th Street, New York, New York, was invalid and did not meet the requirements of Section 3.4(a) (1) of the Commission's Rules of Practice for adjudicative proceedings. The Commission therefore is without jurisdiction as to this respondent.

4. 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.

5. In the course and conduct of their business respondents now cause 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 other 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 watches in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. In the course and conduct of their business respondents have made deceptive and misleading representations with respect to the prices of their watches. Respondents attached to certain of their watches price tickets upon which various prices were printed, thereby representing directly or indirectly, or by implication, that such prices were the generally prevailing retail prices for their watches. Respondents also have disseminated, or caused to be disseminated, price lists, catalogs, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising in which they represent the prices set forth therein were the generally prevailing retail prices for their watches. In fact, the aforesaid ticketed prices and prices listed in advertising, or otherwise, were not the generally prevailing retail prices for respondents' watches. The prices charged for respondents' watches by different dealers in the same trade area varied consider-

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ably, so that no single uniform retail price existed. Furthermore, respondents' watches were widely sold in the same trade area at a variety of retail prices significantly lower than those stated on respondents' price tickets, price lists, catalogs, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising.¹

7. Respondents for the purpose of inducing the purchase of their products have disseminated, or caused to be disseminated, newspaper advertisements and other forms of advertising which contain statements that a designated amount will be granted as a trade-in allowance for an old watch toward the purchase of a new watch, the product of respondents. They have not thereby represented that by trading in an old watch a purchaser would save such designated amount as compared with the usual and regular retail price of said new watch, and that the purchaser by trading in an old watch will obtain a new watch, the product of respondents, at a reduction of such designated amount below the usual and regular retail price of said new watch. Furthermore, a misrepresentation can not be imputed since there is no allegation in the complaint to the effect that trade-in allowances are not uniformly granted or that respondents have represented that the value of the watch traded in is equal to the saving granted the purchaser who trades in an old watch. Regardless of any defect in the allegation, however, the evidence establishes that a uniform trade-in allowance has been granted by the respondents.

8. Respondents engaged in issuing deceptive "allowance certificates" in nation-wide advertising indicating that they and their dealers will allow a certain amount against advertised products when, in fact, dealers in respondents' products do not uniformly honor such allowance certificates.

9. Since January 1, 1959, respondent Benrus has had an unconditional 3-year guarantee policy. In performance of this policy, respondent has repaired or replaced all watches for a period of three years from the date of purchase regardless of the cause of damage to such watches. This policy was adopted in the fall of 1958 or some four months prior to the institution of this proceeding. Prior to the present guarantee policy, respondent Benrus guaranteed its watches for any difficulties in manufacture and complied with the terms of its guarantee certificate.² There is therefore no deception in this respect.

¹ See Commission's finding numbered 6, Rayex Corporation, et al., Docket No. 7346, April 2, 1962 [60 F.T.C. 664], and opinion of that date affirming the initial decision of the hearing examiner dated July 18, 1961.

² Tr. 1248-1329; Respondents' Exhibits 12 through 21.

10. With the exception of one mat prepared by respondent Benrus, the term "shock proof" or "shock protected" was never employed by respondent.³

11. Respondents have customarily and consistently, with the one exception above noted, employed other terms such as "shock resistant" or "shock absorbing" to describe the protection from shock afforded by its watches. No charge of deception in the use of such terms is made by the complaint.⁴

12. The single instance of the term "shock proof" on this record was not deceptive since there is no absolute prohibition of the use of such term and there is no evidence that the term as employed was construed by consumers as representing that respondents' watches afforded a greater protection from shock than was the case.

13. There is no evidence that respondents have manufactured any watch cases having the appearance of gold or gold alloy which do not in fact contain such gold or gold alloy. The only watch cases of respondents having such appearance which were subjected to metallurgical analysis in fact had gold plate of 18.46 and 18.32 carat gold respectively.⁵

14. There is no evidence that consumers regarded these watch cases as having a different gold content from that which in fact they had. The evidence establishes that all watch cases presently being manufactured by respondents which are of base metal and which have a yellow or gold color are clearly marked as base metal or aluminum, as the case may be.⁶ There is therefore no deception in this respect.

15. There is no evidence of the actual metallic composition of any watches advertised by respondents as having "chrome top cases". There is no evidence that any consumer regarded a watch advertised as having a "Chrome top case" as being composed throughout of chromium or chromium steel. There is therefore no deception in this respect.

16. In the conduct of their business at all times mentioned herein respondents have been in substantial competition in commerce with corporations, firms and individuals in the sale of watches of the same general kind and nature as those sold by respondents.

³ Tr. 1484-1460; Commission's Exhibits 288, 290, 291 and 293.

⁴ Commission Exhibits 10, 11, 19, 31-34, 36, 45, 47, 64, 65, 75, 93; Respondents' Exhibit 25.

⁵ Tr. 839-841.

⁶ Tr. 1388-1389; Respondents' Exhibit 24(A-L).

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CONCLUSIONS

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The main charge alleged in the complaint appears to be Paragraph Four thereof which is as follows:

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

The evidence adduced appears to support this charge, although some retail sales of Benrus watches were made at the manufacturer's ticketed price, other retail sales, equally substantial, were made at prices less than the manufacturer's ticketed price. The general retail price structure appears to have no uniformity except that some retailers having a discount policy consistently sell at prices less than the manufacturer's ticketed price, whereas other retail merchants sell at the best obtainable price not exceeding the manufacturer's ticketed price, or consistently sell at the ticketed price. It is unnecessary for counsel supporting the complaint to establish that Benrus watches were predominantly sold at less than the ticketed price. It is sufficient if it may be inferred from the evidence adduced that a substantial number of retailers of Benrus watches sell at prices less than the price ticketed by Benrus in a market where the retail price pattern is varied.

As pointed out by Commissioner Elman in rendering the opinion of the Commission in the Rayex case, Docket No. 7346 [60 F.T.C. 664, 675]:

The danger inherent in price preticketing is that, whatever other purpose it may serve, it gives many consumers the impression that the stated price is the retail price generally prevailing in the area. Everyone loves, and hopes to find, bargains. It is this universal human trait which is exploited by the practice of fictitious pricing, whatever its form. In *George's Radio & Television Company, Inc.*, Docket S134, decided January 19, 1962, we held that "The representation 'Mfr's Sug. List' creates the impression that there is a usual and customary retail price for the product in the trade area, and that that price is the specified 'Mfr's Sug. List' price." (Opinion, p. 3) The record there showed that "the products in question were being widely sold in the trade area at a variety of retail prices significantly lower than" the "Mfr's Sug. List" price (*Ibid.*) Accordingly, the Commission found that the public had been misled.

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There is, of course, no convention requiring manufacturers and distributors to use preticketing as a means for "suggesting" resale prices to their dealers. They could as well simply enclose a list of suggested prices with each shipment. That procedure would involve no possibility of the sort of deception with which we are here concerned, assuming that the price list information was not passed on to the public. Such conduct would not necessarily be immune from scrutiny under other statutory provisions regulating business activity. For example, it might in some circumstances suggest the existence of illegal anti-competitive pricing conditions in the industry.⁷ But ordinarily there would be no occasion to question such a practice on the ground that it is deceptive.

However, when resale prices supplied to dealers—whether through preticketing or some similar practice—are made public, the consequences may vary considerably. It may be, for example, that the industry in which the practice is undertaken is characterized by price rigidity or uniformity. That is to say, all dealers in a particular product may be content to sell at the same price. If a manufacturer of such a product pretickets it at what is in fact the uniform retail price in the area, he is not engaging in false or misleading pricing. Of course, rigidity and uniformity of price may make preticketing even more suspect as a manifestation of some form of illegal restraint of trade, but in such circumstances the practice is not vulnerable as deceptive to consumers.

A different problem is presented by an industry in which the manufacturer habitually labels his product at a given price and his dealers in a trade area, or many of them, just as habitually market it for substantially less. This is the context of classic "fictitious" pricing. In such circumstances, the preticketing's tendency to deceive, and hence its illegality, are settled matters. As the court stated in *Clinton Watch, supra*, note 1, a case involving factory preticketing of watches at a price substantially in excess of the "normal" retail price:

"Preticketing at fictitious and excessive prices must be deemed to have the tendency of deceiving the public as to the savings afforded by the purchase of a product thus tagged as well as to the value of the product acquired. Petitioners' practice places a means of misleading the public into the hands of those who ultimately deal with the consumer. Notwithstanding the prevalence of these practices and the familiarity therewith among members of the trade, these activities are proscribed to protect the interest of the public. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922).

"Misrepresentation as to the retail value of merchandise by means of an attached, fictitious price and deception as to savings afforded by the purchase of the product at a substantially lower price than that indicated thereon constitute unfair methods of competition. *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 340 (7th Cir. 1960), cert. denied 364 U.S. 883; *Harsam Distributors, Inc. v. Federal Trade Commission*, 263 F. 2d 396, 397 (2d Cir. 1959)." 291 F. 2d, at 840.

In such a situation there is a substantial likelihood of deception, whether the dealers resell the product to the public at a uniform lower price or at a widely varying range of lower prices. Since the preticketed price is not in fact

⁷ Compare, e.g., *United States v. Parke, Davis & Co.*, 362 U.S. 29. [Footnote 2, original footnote.]

the usual or regular price generally prevailing in the area, the public may be misled. In appraising the capacity of a business practice to deceive and mislead, it is not the understanding or purpose of the manufacturer or distributor or dealer that is of critical importance; rather, it is the public impression created by that practice.⁸ And, so far as many members of the public are concerned, the impression made by preticketing is that it is the manufacturer's indication of the approximate retail value of his product, i.e., his representation that this is what it should and generally does sell for in the sales area.⁹

The manufacturer or distributor who provides his dealers with a spurious indication of a normal and generally prevailing price places in their hands a ready-made instrument of deception.¹⁰ If the buyer believes—as the preticketed price may well lead him to believe—that that is the going price generally being charged for the product, he will be forestalled from seeking it at a lower price elsewhere. The dealer can thus induce the consumer not to shop among his competitors for a bargain. Obviously, both consumers and competitors are thereby prejudiced.

The evidence adduced in the within case clearly establishes that the manufacturer's ticketed price is not the usual and regular price in the sense that the price pattern as evidenced indicates the nonexistence of a usual and regular price.

Respondents' counsel, however, takes the position that there is no misrepresentation since most of the buying public understands that medium priced watches are sold in the same market at variable prices. Supporting his view in this respect is "A Motivation Pilot Study" with respect to the patterns of price perception among watch purchasers, received in evidence as Respondents' Exhibit 26. This study was prepared by Motivation Dynamics, Inc., under the direction of Albert Shepard, president, who testified in detail as to the manner in which the studies were made as the result of interviews. The basic data supporting the expert opinion rendered by Mr. Shepard was not received in evidence for the purpose of establishing the truth of what was stated, but as the premise upon which Mr. Shepard rendered his opinion. From his testimony it is apparent that, premised upon his experience in making such studies, he could rely upon the basic data with a reasonable degree of certainty in rendering

⁸ *E.g.*, *Koch v. Federal Trade Commission*, 206 F. 2d 311, 319, (C.A. 6); *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52, 58 (C.A. 4); *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676, 679 (C.A. 2). [Footnote 3, original footnote.]

⁹ The Commission so finds in the discharge of its duty to make the necessary factual determination of the impression on the public that advertising creates. See, *e.g.*, *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337 (C.A. 7); *Kahwaity v. Federal Trade Commission*, 237 F. 2d 654, 656 (C.A. 7); *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F. 2d 382 (C.A. 7). [Footnote 4, original footnote.]

¹⁰ See *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483; *Baltimore Luggage*, *supra*, note 1; *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273 (C.A. 3). [Footnote 5, original footnote.]

an opinion. At page 17 of his opinion pursuant to the survey, he states as follows:

Confirming the tone and the frequency of their spontaneous remarks, we find that 86% of all respondents, report as matching their own personal impression the comment that "the actual purchase price that people pay often varies from one kind of store to another, even though the manufacturer's list price remains the same for the same watch in all stores."¹¹

It must be concluded from this evidence offered by respondents, that they concede a variability of watch prices within the market areas at issue. It would also appear from this evidence, which confirms the proof adduced by the Commission, as further indicated in Test III of the survey, that 14% of those investigated were of the view that prices were not variable. As to this latter group, therefore, it is clearly apparent that they would be misled into believing that the ticketed price was invariable, and therefore the usual and customary price they would be required to pay, when in fact there was no usual and regular price in the market in question. Even assuming that 86% of the public would not be deceived by the ticketed price because they knew prices were variable, the remaining 14% would apparently be deceived by the ticketed price. Test III therefore indicates unequivocally that a substantial segment of the public would be deceived by respondents' representation as to the price indicated on the price tickets attached to respondents' watches. The Commission is not required to establish that a preponderance of the public is deceived. It is only necessary to establish that the manufacturer's indicated price is a misrepresentation in a substantial segment of the market. This concept, enunciated by the Commission, requires the protection of any group of buyers even though they may not be in the majority and even though they may be more susceptible to the misrepresentations of the seller (intended or unintended) than a majority of buyers perhaps more experienced in seeking bargains.

II

There is no merit to what appears to be the argument of counsel for the Commission that he has proved that the trade-in of a watch does not result in a saving to the consumer. In the first place, it is not charged in the complaint that the respondents have represented that the value of the watch traded in is equal to the saving granted the purchaser who trades in an old watch. Paragraph Five of the complaint alleges that respondents for the purpose of inducing the purchase of their products have disseminated, or caused to be disseminated, newspaper advertisements and other forms of advertis-

¹¹ Respondents' Exhibit 26.

ing which contain statements that a designated amount will be granted as a trade-in allowance for an old watch, toward the purchase of a new watch, the product of respondents. The complaint then goes on to say that respondents thereby represent that by trading in an old watch a purchaser will save such designated amount as compared with the usual and regular retail price of said new watch. This deduction from the prior sentence of the allegation can not logically be imputed. Furthermore, the Commission is not in a position to prove that trade-in allowances were not made, since there is no allegation to this effect.

The same type of allegation is set forth in Paragraph Six of the complaint with regard to allowance certificates. The allegation there states that dealers in respondents' products do not uniformly honor such allowance certificates. There is persuasive proof to this effect, since the evidence establishes that some dealers will not allow a certain amount against the advertised price of their products if such certificates are presented. However, with regard to Paragraph Six of the complaint, there is a failure of proof, as in Paragraph Five, of a misrepresentation based upon a claimed saving to the customer.

III

On the issue as to whether or not the respondents have honored their guarantees in accordance with their terms, the Commission's evidence is unsubstantial.

Paragraph Eight of the complaint alleges that respondents have represented that their watches are "guaranteed, fully guaranteed and guaranteed by Benrus" and that such representations are false in that the fact that the guarantee provides for a service charge is not set forth in advertising, and service charges in excess of those set forth in the certificate of guarantee are charged.¹²

The guarantee policy presently being followed by respondent Benrus Watch Company was summarized as follows by Milton H. Putterman, vice president of Benrus Watch Company, who is directly responsible for the supervision of the service department which administers this guarantee policy:

Q What is the present policy with respect to guarantees of the Benrus Watch Company?

A. We have an unconditional three-year guarantee on all of our Benrus watches.

Q Can you explain what you mean by an unconditional three-year guarantee?

A Every watch that is sold, the consumer is to take a portion of this guarantee, fill out the information, and send it in to validation. Three years from

¹² This charge is not directed to respondent Belforte. No evidence whatever was offered concerning the practice of Belforte in honoring its guarantees.

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the date of that validation the watch is unconditionally guaranteed. When we say 'unconditionally', there are no strings attached, no matter what happens to the watch, no matter what damage occurs to the watch, that watch is repaired absolutely free of charge.

Hearing Examiner Buttle: Suppose through some act of mine—I have a Benrus watch—and something broke on the watch, aren't there some limitations in that respect?

The Witness: There are no limitations at all.

Hearing Examiner Buttle: In other words, you mean what you say by your guarantee.

The Witness: It is absolutely unconditional.

Hearing Examiner Buttle: And that has been your practice, to repair those watches in the event something did happen?

The Witness: That's right.

Hearing Examiner Buttle: Suppose you couldn't repair the watch?

The Witness: We would replace it.

Hearing Examiner Buttle: With the same type of watch?

The Witness: Absolutely.

Q Is it your policy to make any charge with respect to such watches so far as postage or handling charges are concerned?

A No. There is absolutely no charge to the consumer. Once the watch is received in our company, there is no bill. The watch is simply repaired and returned to the customer.

Q How long has this been the policy and practice of Benrus?

A Since January 1, 1959."¹³

This policy was in effect prior to the issuance of the complaint, and the decision to adopt this policy predated the complaint by some four or five months.¹⁴

As Mr. Putterman's testimony made abundantly clear, this three-year unconditional guarantee means exactly what it says. If a consumer were to take a watch and smash it against the wall, Benrus Watch Company would repair or replace the watch. Even compliance with the formality of sending in a validated guarantee card is not required. For a period of three years from the date of purchase, the watch is absolutely and unconditionally guaranteed without any limitation whatever. Mr. Putterman testified at length without contradiction to the careful and conscientious manner in which Benrus Watch Company performs its guarantee policy. The issuance of an order concerning the guarantee policy of respondent would therefore appear to be inappropriate.

Furthermore, there is no evidence of consumer deception prior to the institution of the present policy. The prior policy provided a guarantee against any defects in workmanship. It is difficult to believe that any consumer would, in any case, expect more.¹⁵ The evi-

¹³ Tr. 1251-1253.

¹⁴ Tr. 1305.

¹⁵ Tr. 1296-1297.

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dence of consumer deception offered by Commission counsel does not support a conclusion of consumer deception. This evidence, consists of a letter from the Better Business Bureau to Benrus Watch Company with respect to an alleged complaint and the response of Benrus to that letter.¹⁶ In its letter, Benrus states that its watches are "fully guarantee (d) * * * against any manufacturing defect" and that the damage to the watch was not caused by any such defect but because of the "type of wear and handling the watch had been given." Obviously the charges in the complaint are not proved by this exchange of correspondence.

IV

Commission's proof that respondents have represented, except in one instance, that their watches are shock proof or that such representation they made was misleading in the circumstances of this case is unsubstantial and without merit.

Paragraph Nine of the complaint alleges that respondents have represented that their watches are "shock proof" or "shock protected" when, in truth and in fact, the watches are not "shock proof" or "shock protected" in every respect.

It must be noted initially that the complaint takes no exception to the use of the terms "shock resistant" or "shock absorbing" in the advertising of respondents' watches. It is these terms which have been used practically without exception by respondents.¹⁷

Respondents' policy with respect to the use of the term "shock proof" was described as follows by Harvey M. Bond, vice president of Benrus Watch Company, who is responsible for all of respondents' advertising:

Q In the course of approving the advertising submitted by you and in composing that advertising which you prepared, you develop certain policy with respect to the inclusion and exclusion of certain representations in that advertising?

A That's correct.

Q Do you have such a policy with respect to the use of the word "shockproof"?

A Yes, we have.

Q Tell us, please, what that policy is.

A We do not use the word "shockproof."

Q Have you so advised your subordinates?

A Yes.

¹⁶ Commission's Exhibits 59 and 60.

¹⁷ Commission's Exhibits 10, 11, 19, 31-34, 36, 45, 47, 64, 65, 75, 93; Respondents' Exhibit 25.

Q Have there ever been instances, Mr. Bond, in which you or your subordinates have detected the use of the word "shockproof" in copy submitted to you.

A Yes.

Q What actions have you taken in those instances?

A We have deleted that phrase.¹⁸

This policy according to the evidence dates at least to January 1, 1955, the earliest date upon which Commission counsel purports to rely.¹⁹

Commission counsel, in a lengthy cross-examination of Mr. Bond,²⁰ attempted to demonstrate that respondents have frequently employed the term "shock proof" in their advertising. What emerges from this cross-examination and an examination of the few exhibits introduced by Commission counsel in which the term was, in fact, employed was that the term was used in but a single advertising mat among the hundreds prepared by Benrus. To issue an order on the basis of what appears to be a single inadvertent inclusion of a term in advertising would be inappropriate and unjustified.²¹

Moreover, the evidence establishes that the device employed in respondents' watches does in fact afford substantial protection from damage through shock.²² The Trade Practice Rules of the Watch and Watch-Case Industry, promulgated April 24, 1947 (sec. 170.3), do not forbid the use of the term "shock proof" in all cases. They forbid the use of that term only "under any false, misleading or deceptive circumstances or conditions, or in any manner which has the capacity and tendency or effect of causing the purchasing or consuming public to be misled or deceived". Since the evidence adduced by Commission counsel establishes that no device offers absolute protection from damage from shock, it is apparent that, in promulgating the rule, the Commission did not believe the public construed the term "shock proof" to mean absolute protection. If it had so believed, it would necessarily have forbidden the use of the term in all cases, since there is no device which affords such protection.

In order to establish a violation, therefore, it is essential to show not only that the term was used, but that it was used in combination with other representations so as to convey the impression that the watch afforded protection from damage beyond that actually afforded. The record here discloses that the exhibits in which the term was used contain no language whatever which would convey such an impression.

¹⁸ Tr. 1418-1419.

¹⁹ Tr. 1423.

²⁰ Tr. 1434-1460.

²¹ Tr. 1434.

²² Tr. 783-832.

In any event, respondents in the within case have regularly employed the terms "shock resistant" or "shock absorbing" rather than "shock proof" and the complaint does not charge that these terms are misleading.

V

There is also merit to the position of counsel for respondents that counsel in support of the complaint has failed to prove that respondents' watches do not contain gold or gold alloy or that any watch composed solely of base metal has been considered by consumers to consist of gold or gold alloy.

Paragraph Ten of the complaint reads, as follows:

Respondents' watches are in cases, the bezels of which have been treated or processed to simulate or have the appearance of precious metal, that is, gold or gold alloy. Said watch cases are not marked to disclose clearly that the bezels are composed of base metal. The practice of respondents in offering for sale and selling watches with bezels which have been treated or processed to simulate or have the appearance of precious metal as aforesaid without disclosing clearly the true metal composition of said bezels is misleading and deceptive and has a tendency and capacity to lead members of the purchasing public to believe that the said bezels are composed of precious metal.

Thus, it is charged that the consumer is misled into believing that there is gold in the bezels of the watches, whereas in fact, those bezels are made entirely of base metal treated to simulate gold or gold alloy.

In the within case, the bezels of respondents' watches were gold electroplated. The only testimony offered with respect to the metal composition of respondents' watch bezels was that of Frederick Wright. He testified that the bezels of the watches contained gold plating of 18.46 and 18.32 carat gold respectively.²³ There is no evidence establishing that any of the bezels did not contain any gold or gold alloy. The charge should be dismissed since it is distinguishable in this respect from the Kagan case.²⁴

Apparently Commission's counsel has attempted herein to prove a charge not set forth in the complaint. He refers to the watches as "thin skinned";²⁵ and by this he obviously means the gold electroplating is so thin that a failure to disclose that there is such electroplating over base metal constitutes a deceptive practice. However, no such charge is contained in the complaint.

²³ Tr. 839-41.

²⁴ See Theodore Kagan Corp., Docket 6893 (1959) affirmed 283 F. 2d 371 CADC.

²⁵ See Commission counsel's memorandum in opposition to respondents' motion to dismiss at p. 12.

VI

There is further merit to the position of respondents' counsel that counsel supporting the complaint has failed to prove the metal composition of respondents' chrome top cases or that consumers are misled by the appearance and description of such cases as to their metal composition.

Paragraph Eleven of the complaint alleges that respondents, through use of terms such as "chrome-top case", represented that their watch tops or bezels were composed throughout of chromium or chromium steel, commonly known as chrome steel or stainless steel, whereas, in truth and in fact, the bezels are not composed throughout of chromium or chromium steel.

An obvious defect in the proof offered with respect to this charge is that no testimony establishing the actual metal composition of the bezels was offered. The record thus does not sustain the allegation that in fact respondents' watch bezels were not composed throughout of chromium or chromium steel.

Nevertheless, even assuming that the bezels were chromium plated rather than chrome or chrome steel throughout, the evidence fails to establish that consumers believe that the bezels are composed of chrome or chrome steel throughout and are thereby misled.²⁶ Furthermore, there is no evidence that the watches utilized by Commission counsel in questioning consumer witnesses were in fact advertised as having chrome top cases.

VII

Paragraph Seven of the complaint has heretofore been dismissed pursuant to order of the hearing examiner of June 9, 1961, since there was no evidence sufficient to establish a prima facie case as indicated therein. This charge is as follows:

In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their said products, respondents have made and are making false, deceptive and misleading representations through nationally distributed magazines, newspapers and other advertising media, that certain low-priced models of their products are available at respondents' dealers, when such is not the fact, such representations being made to induce prospective purchasers of their products to make inquiry at the dealer's store, whereby the dealer can then induce the sale of more expensive models.

Although the hearing examiner, pursuant to his order of June 9, 1961, did not dismiss any allegations of the complaint except Paragraph Seven in whole or in part, at the termination of the Com-

²⁶ Tr. 709, 762, 764; see also, Tr. 686.

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mission's prima facie case, his denial of a motion to dismiss was premised upon the concept enunciated in the *Brillo* case and the *Consolidated Foods* case²⁷ to the effect that at this stage of the proceedings of the case the evidence and inferences reasonably to be drawn therefrom should be viewed in the light most favorable to the complaint.

VIII

Counsel in support of the complaint presses for a default judgment against respondent Robert Weil, as to all charges set forth in the complaint. He has apparently overlooked the fact that after the objections to the service of process over Mr. Weil were rejected by the examiner, a separate answer was filed on behalf of Mr. Weil, incorporating the answer previously filed on behalf of the remaining respondents, and denying responsibility for any of the acts and practices here involved. Consequently, no default judgment may be entered.

IX

To the extent heretofore indicated, the use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to the respondents from their competitors and substantial injury has thereby been and is being done to competition in commerce.

The aforesaid acts and practices of respondents, to the extent that the Commission's case has been sustained, were and are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act. Accordingly, since the Federal Trade Commission has jurisdiction of the respondents herein and this proceeding is in the public interest, the following order shall issue:

ORDER

It is ordered, That respondents Benrus Watch Company, Inc., a corporation, Belforte Watch Company, Inc., a corporation, and their

²⁷ Matter of *Brillo Manufacturing Company, Inc.*, Docket No. 6557, [p. 245 herein] and *Consolidated Foods Corporation*, Docket 7000 [62 F.T.C. 929].

officers, Oscar M. Lazrus and Benjamin Lazrus, individually and as officers of the above named corporations, and Harvey M. Bond, Stanley M. Karp, Norman Slater, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Martin J. Rasnow, Clifford L. J. Siegmeister, Leo Hyman and Julian Lazrus, individually and as officers of Benrus Watch Company, Inc., and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches or other related merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of preticketing such merchandise at an indicated retail price, or of otherwise conveying an impression to the public concerning retail prices, when there is no generally prevailing retail price for such merchandise in the trade area, or when the indicated retail price is in excess of the prices at which such merchandise is sold at retail in a substantial segment of the trade area.

2. Representing that dealers in respondents' watches or other related merchandise will allow a certain amount against the advertised price of their products upon the presentment of an allowance certificate incident to the purchase of a watch or other merchandise manufactured by respondents unless such allowance is granted without exception,

and it is

Further ordered, That respondents do forthwith cease and desist from placing in the hands of jobbers, retailers, dealers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out above, and it is

Further ordered, That the complaint is dismissed as to respondent Robert Gasser, and as to respondent S. Ralph Lazrus, who is deceased, and it is

Further ordered, That the complaint is otherwise herein and hereby dismissed.

OPINION OF THE COMMISSION

JULY 31, 1963

By ANDERSON, *Commissioner*:

Respondents in this matter were charged in the complaint with various misrepresentations in violation of Section 5 of the Federal Trade Commission Act. The corporate respondents are Benrus Watch Company, Inc., and Belforte Watch Company, Inc., both

corporations organized and doing business under the laws of the State of New York. Belforte Watch Company, Inc., is a subsidiary of Benrus Watch Company, Inc. The hearing examiner, in his initial decision, filed May 24, 1962, found that part of the charges were sustained and part were not. He ordered those practices to be discontinued which he found to be unlawful.

Counsel supporting the complaint and respondents have both filed exceptions to the initial decision. The former excepts to the dismissal of certain charges as follows: (a) alleged misrepresentation as to the savings from turning in an old watch and the savings involved in the use of "allowance certificates", (b) the use of the term "guaranteed", (c) the use of "shock proof" and "shock protected", and, finally, (d) misrepresentation as to the composition of certain bezels (rims in which watch crystals are set). Respondents except to the examiner's findings that respondent misrepresented the usual and regular resale prices of their watches, that respondents' dealers did not uniformly honor "allowance certificates" and to the inclusion in the order of certain named respondents.¹

We will proceed to consider the facts for each alleged misrepresentation charged in the complaint as to which an exception to the examiner's findings thereon has been taken.

Misrepresentation As To Usual And Regular Retail Prices

The complaint first charges respondents with falsely representing certain amounts as the usual and regular prices of their products through both preticketing and advertising statements. Respondents concede in their answer that they have attached or caused to be attached price tickets to their watches upon which certain amounts are printed and that they have disseminated advertising containing representations as to the retail prices of their watches.² They assert, however, that they had no knowledge sufficient to form a belief as to whether the prices printed on the tickets and the advertisements have been or are in excess of the usual and regular retail prices.

The hearing examiner found that the preticketed prices and the prices listed in the advertising were not the generally prevailing retail prices for respondents' watches, that prices charged for respondents' watches by different dealers in the same trade area varied considerably so that no single uniform retail price existed,

¹ The allegations under Paragraph Seven of the complaint charging misrepresentation as to the availability of certain watches from dealers were dismissed by order of the examiner on the ground of a failure to show a prima-facie case. No exception was taken to this action.

² Admissions by individuals named in the complaint were only as to their capacities as officers and employees of corporate respondent.

and that respondents' watches were widely sold in the same trade area at a variety of prices significantly lower than those stated on its price tickets and advertising.

Preticketing refers to the practice of supplying with the watch a ticket upon which is printed a represented retail price. For convenience, the term "preticket" will hereafter be used, unless otherwise stated, to refer to the prices appearing on the tickets supplied with the watches and to respondents' representations as to retail prices in other advertising. It is used interchangeably because for the same model of watch the preticketed price and the advertised retail price were the same.

The record supports the charge of false and fictitious preticketing. We will proceed to review evidence on this issue.

Respondent Benrus had two categories of customers: catalog customers and retail customers; respondent Belforte had three: catalog, jobbing and retail customers. The catalog customers distribute merchandise by means of catalogs and in some cases by retail outlets. The customers of the catalog houses include industrial accounts, small retailers and consumers. Many of the catalog houses sell large amounts of merchandise to consumers. Some of them sell respondents' products to consumers almost exclusively. For example, Zeff Distributing Company, Inc., a catalog house, sold approximately 85% of its purchases of respondents' watches to consumers.

The catalogs distributed by the catalog houses typically contain code numbers which reveal the actual selling prices of the articles. They also contain other figures higher than the actual selling prices which purport to be the suggested retail prices or the usual and regular prices for the articles. Respondents provide inserts for these catalogs, which inserts contain a display of their watches and price information, including the representations as to usual and regular retail prices. One such catalog insert sheet prepared by respondents is identified Commission Exhibit 91. As an example of pricing representations thereon, the "Hampton" watch is identified with the following reference:

36-32080-1908-----39.39

The actual retail price which the customer pays is shown by the last four digits in the first part of the reference, i.e., "1908" means the actual price is \$19.08. The last four figures "39.39" are a representation that the suggested retail price or the usual and regular retail price is \$39.39.

Samuel Felderman, vice president of Benrus Watch Company, testified that only catalog houses were solicited by respondents for the purchase of certain designated watches such as those identified

in Commission Exhibits 91 and 92. According to the testimony, Commission Exhibit 92 was a list distributed exclusively to the catalog houses. Mr. Felderman's further testimony was that such watches were available to other customers but he did not know whether any non-catalog customers purchased them. We may infer from the evidence, however, that few, if any, of such watches were sold to other than catalog houses. The finding is that respondents offered and sold certain groups of watches to catalog houses and other groups of watches to other customer categories. The record shows that the catalog houses regularly sold the watches for substantially less than the prices represented to be the usual and regular retail prices. Their usual and regular retail prices were the lower actual prices charged their customers (the "coded" prices). The conclusion is that the generally prevailing retail prices were such "coded" prices and that these were substantially less than the prices represented by respondents as the "retail" prices. Accordingly, the respondents' representations as to the regular retail prices were false and deceptive. *Leeds Travelwear, Inc.*, Docket No. 8140 (Commission decision, July 20, 1962) [61 F.T.C. 152]. Cf. *Helbros Watch Company, Inc., et al. v. Federal Trade Commission*, 310 F. 2d 868 (D. C. Cir. 1962).

The record additionally supports the examiner's finding that respondents' watches were widely sold in the same trade area at prices significantly less than the advertised or preticketed retail prices. Kansas City, Missouri, is one such area. The evidence taken in this market includes testimony from various retail distributors, all of whom sold respondents' watches, or at least certain groups of respondents' watches, at prices substantially below the preticketed prices. The distributors in Kansas City included jewelry stores or the jewelry departments of stores, a consumer buying organization, catalog houses selling through catalogs as well as through retail outlets, and a wholesale concern which sold at retail. Mr. Hickock, of Emery, Bird, Thayer Dry Goods Company, testified that the watches identified as Superior 25, Space Ranger, Diamond Tiara, and Diamond Glitter all sold at prices under the preticketed amount. Included in his testimony was the statement that the Space Ranger and the Diamond Glitter models were preticketed at \$59.50 and sold for \$34.50. Mr. Keller of Jones Stores testified that watches identified as Space Ranger and Diamond Glitter were preticketed at \$59.50 (stipulated by respondents' counsel) and were sold at \$34.50.

The concerns in the Kansas City area selling at retail through catalogs as well as through retail outlets from which testimony was received were Meyer Jewelry Company and Zeff Distributing Co.,

Inc. The witnesses representing these businesses testified to the effect that in all instances sales were made at prices below respondents' preticketed prices. Other witnesses from Kansas City included Gerald Jaben, of Employers Consumer Organization, Inc., and David Dolginow, of Dolginow's Wholesale Company (a concern selling at retail). The last witness testified that he shopped other stores in competition with his kind of business on a regular basis and that he never found any selling at the preticketed prices. It is clear from the testimony that the differences between the preticketed prices and the actual selling prices were substantial.

The evidence from the Kansas City, Missouri, market, which includes the testimony of representative retailers selling in that market, such as dealers, catalog houses, discount houses and other types of retailers, shows in substance that a number of retailers regularly sell respondents' watches at prices substantially below the preticketed prices. We find and conclude, therefore, that in this market the preticketed prices were not the generally prevailing retail prices or the usual and regular prices for respondents' watches.

The hearing examiner received into evidence a study entitled "A Motivation Pilot Study", identified as Respondents' Exhibit 26. Albert Shepard, president of Motivation Dynamics, Inc., the firm which prepared this study, testified to the effect that it shows the patterns of perception of price among watch purchasers. The study is based upon interviews with consumers. The hearing examiner gave no weight to the study because he found that test III therein indicates unequivocally that a substantial segment of the public would be deceived by respondents' price representations. Respondents take exception to this finding.

We do not agree, nor does it appear that the examiner found, that the study shows that 86 percent of the purchasers of watches interviewed would not be deceived. The examiner decided the question by making the assumption merely for the purpose of his analysis that the study showed a high level of nondeception. The fact is it shows nothing of the kind. If it does show something about "the patterns of perception of price among watch purchasers" as Mr. Shepard testified, it shows very little if anything as to the impression which prospective purchasers or purchasers have in seeing the prices which respondents place on tickets attached to watches or the prices they include in advertising. The impression of the representations is the critical issue. As indicated, the evidence clearly shows that the prices on the tickets were not the regular and usual prices of respondents' watches. The only question, therefore, is what was represented by such tickets as to price. This the study fails to answer.

Moreover, even if the study does show 86 percent nondeception as assumed by the examiner, which it does not, this still leaves 14 percent of the prospective purchasers who may be deceived, and, of course, these are entitled to protection. *Helbros Watch Company, Inc., et al. v. Federal Trade Commission*, 310 F. 2d 868, 869 (D.C. Cir. 1962).

Preticketing at fictitious prices must be deemed to have the tendency of deceiving the public as to the savings afforded by the purchase of a product thus tagged, as well as to the value of the product acquired. The practice places a means of misleading the public into the hands of those who ultimately deal with the consumer. *Clinton Watch Company, et al. v. Federal Trade Commission*, 291 F. 2d 838, 840 (7th Cir. 1961). See also *Baltimore Luggage Company v. Federal Trade Commission*, 296 F. 2d 608 (4th Cir. 1961).

We find and conclude that respondents by misrepresenting their usual and regular prices engaged in false and misleading advertising, and further that respondents, by furnishing advertising materials, such as catalog insert sheets, advertising mats and other advertising to customers, provided their customers with a means of deceiving the public as to the usual and regular prices.

Represented Savings on Trade-Ins

The next allegation, which charge was dismissed by the examiner, concerns the trade-in allowance. The complaint alleges that advertisements stating that a designated amount would be given on a trade-in on an old watch represents that the purchaser will save such amount over the usual and regular retail price and that, in fact, there is no saving of the designated amount or any amount below the usual and regular price. A similar charge is made in connection with the advertising promotion involving "allowance certificates". An "allowance certificate" is a coupon or certificate which states that the holder will be granted a designated allowance upon the purchase of a new watch. The hearing examiner dismissed the trade-in charge, and in this we believe he erred. Commission Exhibit 64 is a typical advertisement offering trade-in allowances. It contains the following price representation:

Price	\$59. 50
Trade-in allowance.....	20. 00
	39. 50
\$5 extra for a coupon from <i>Reader's Digest</i>	5. 00
You pay only.....	34. 50

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We find that this is a representation that the prospective purchaser will save \$20.00 (for a trade-in) and \$5.00 (for the coupon) from the usual and regular price, which price is represented to be \$59.50. Retailers sold the watches for which allowances were advertised at the same price whether or not the customer brought in the old watch or the coupon. For instance, in the above illustration the watch was sold for \$34.50 whether or not it was sold with a trade-in and the coupon. Dealers so testified. (Transcript 301, 325.) This testimony was from dealers in the Kansas City market, an area in which we have found that the preticketed prices were not the usual and regular prices. Accordingly, the prospective purchaser, believing he would have a saving of \$20.00 from the usual and regular price, falsely stated to be \$59.50, in fact had no such saving from the true usual and regular price. Similarly, there was no saving of \$5.00 for the coupon. The reduction given to the purchaser, if any, was from the fictitious price of \$59.50, not from the usual and regular price as represented. In some cases, moreover, dealers did not honor the allowance certificates, and the examiner so found.

We find and conclude that respondents' representations as to savings in connection with trade-in allowances and allowance certificates and as to the honoring by dealers of allowance certificates were misleading and deceptive. Furthermore, they provided means to the dealers for misleading and deceiving the purchasing public.

Guarantee

The complaint alleges deception in connection with use of terms such as "guarantee", "fully guaranteed", and "guaranteed by Benrus". The charge is, in effect, that the terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are not clearly and conspicuously disclosed in close conjunction with guarantee representations. The examiner dismissed the charge from which counsel supporting the complaint has taken exception.

Respondents have admitted as to the charge on guarantees as follows:

b. Admit that respondents have from time to time represented in advertising, that certain of the corporate respondents' watches are guaranteed.

c. Admit that respondents have represented in some certificates accompanying certain of the corporate respondents' watches that the sum of one dollar must be enclosed with watches returned for servicing, to defray handling charges; and that such information has not been set forth in advertising. State that respondent Benrus has made no such representations in any such certificates accompanying its watches since on or about January 1, 1959.

Thus, respondents have admitted representing their watches as guaranteed without disclosing a service charge. This is an important limitation on respondents' guarantee liability, and the failure to reveal such limitation has the tendency and capacity to mislead and deceive the purchasing public. *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509 (7th Cir. 1946). In addition, the record shows that respondents have referred to guarantees in their advertising representations in a deceptive manner. For instance, Commission Exhibit 61, a guarantee certificate, represents that there is a guarantee on the watch referred to but does not clearly disclose that a service charge is made for sending the watch to respondents. The fact that there is a minimum charge of \$1.00 on all watches returned for repair or adjustment is inconspicuously stated in small print remote from the word "guarantee". Accordingly, it is found and concluded that respondents have engaged in deceptive representations in connection with guarantees on their watches. Additionally, by furnishing such representations to their dealers they have provided them with a means of deception. The Commission has prohibited deceptive guarantee claims in watch cases, including the following: *Helbros Watch Company, Inc.*, Docket No. 6807, *aff'd Helbros Watch Company, Inc., et al. v. Federal Trade Commission*, 310 F. 2d 868 (D.C. Cir. 1962); *Hilton Watch & Clock Co., Inc.*, Docket No. 8402; and *The Clinton Watch Company*, Docket No. 7434, *aff'd Clinton Watch Company, et al. v. Federal Trade Commission, supra*. See also the Commission's Guides Against Deceptive Advertising of Guarantees, adopted April 26, 1960. These provide in part that any guarantee in advertising shall clearly and conspicuously disclose (a) the nature and extent of the guarantee, (b) the manner in which the guarantor will perform, and (c) the identity of the guarantor.

"Shock Proof" and "Shock Protected"

The complaint charges that respondents falsely represented their watches as "shock proof" and "shock protected." The hearing examiner dismissed this charge on the ground that the evidence is insufficient. He stated that, to issue an order on the basis of what appears to be a single inadvertent inclusion of a term in advertising would be inappropriate and unjustified. The issue, however, is not so narrow since respondents (except Belforte) admitted in their answer that from time to time they represented certain of respondents' watches as "shock proof" or "shock protected." Commission Exhibits 164 and 171 show the use of the words "shock proof" in adver-

tisements. Accordingly, the examiner's dismissal on the ground of a single violation appears to be clearly in error.

The testimony in the record is to the effect that no watch is absolutely protected against shock or is "shock proof." Henry B. Fried, a teacher of watch making for the New York City Board of Education and an expert in watches, testified in substance that the devices used to cushion shock in watches do not make them shock proof and that at the most such devices provide only shock resistance for certain parts of the watch. Such is revealed in the following colloquy with the examiner:

Hearing Examiner Buttle: * * *

Is there such a thing, Doctor, as a shockproof watch?

The witness: There is no such thing as a shockproof watch in the sense that the watch will break, can break, and does break.

Hearing Examiner Buttle: So that when you use terminology "shock-proof"—

The witness: It is too broad.

Hearing Examiner Buttle:—it is a misnomer?

The witness: It is too inclusive and includes a field far beyond its potential.

This testimony applied to respondents' use of the term "shock proof" as well as to use of the term generally in the watch industry. Respondents themselves seem to recognize the inappropriateness of the term "shock proof" as applied to their watches since the testimony is that they have a current policy not to use the term in their advertising copy.

The hearing examiner, in dismissing the charge as to "shock proof" and "shock protected," cites the trade practice rules relating to such terms promulgated for the watch industry, April 24, 1947 (16 C.F.R. 170.3). Rule 3(a) of these rules provides in substance that it is an unfair trade practice to use the term "shock proof" and other terms relating to shock protection under any false, misleading or deceptive circumstances or in any manner having the capacity and tendency or effect of misleading or deceiving the purchasing public or of aiding sellers in misleading the public. To use the terms referred to in any false or deceptive manner would constitute a violation of Section 5 of the Federal Trade Commission Act. Their use in accordance with Rule 3(a) would be deemed to be compliance with the law. The examiner held that to prove a violation of law, counsel supporting the complaint must show not only that a term such as "shock proof" was used but that it was used in combination with other representations so as to convey the impression that the watch afforded protection from damage beyond that actually afforded. He erred in this holding because nothing in Section 5 of the Federal Trade Commission Act or the rule referred to sets forth such a

standard. It is well established on this record that respondents have used the term "shock proof" falsely. They have represented their watches as "shock proof" when in fact the watches are not shock proof. Accordingly, we find and conclude that such representation is false and deceptive and that the furnishing of material containing this term to customers has provided them with a means of deception.

Metal Content of Bezels

The complaint charges deception as to the metal content of bezels. Specifically, Paragraph Ten thereof alleges that bezels treated or processed to simulate gold or gold alloy were not marked clearly to disclose that they are composed of base metal and that this is deceptive. Deception is also charged in connection with using the term "chrome-top case" on bezels not composed throughout of chromium or chrome steel. As to the latter, there is insufficient evidence to prove the charge. However, the examiner erred in dismissing the charge of deception involved in the practice of simulating precious metal. He dismissed the charge because he found as a fact that the bezels were electroplated and contained a trace of gold. We think that he interpreted the language in the complaint too narrowly.

Paragraph Ten states in part, "Respondents' watches are in cases, the bezels of which have been treated or processed to simulate or have the appearance of precious metal, that is, gold or gold alloy. Said watch cases are not marked to disclose clearly that the bezels are composed of base metal." This language is broad enough to cover non-precious or base metal as well as metal containing a trace of gold where the gold content is so small as to be insignificant. The essence of the charge, which is deception as to gold content, is not altered by the fact that the bezels may contain insignificant quantities of gold. We note that the Trade Practice Rules for the Watch Case Industry, promulgated January 30, 1948 (16 C.F.R. PART 174) in effect include, in the category of base metal, metal which has been flashed or coated with a very thin and unsubstantial coating of precious metal. Thus, where the complaint alleges that the watch cases were not marked to disclose clearly that the bezel was composed of base metal, the term "base metal" may be construed as meaning not only metal without gold but also metal with an insignificant quantity of gold. The position of counsel supporting the complaint as to the interpretation of this paragraph of the complaint was clearly made known at the close of the case-in-chief in his reply to respondents' memorandum in support of motion to dismiss. It is in this document that complaint counsel refers to the "thin

skinned" products of respondents. Accordingly, the respondents were informed of this construction of the complaint and they had complete and adequate opportunity to defend on the issue. We believe it fair to say that the issue was directly brought into question by the language of the complaint.

Two of respondents' unmarked bezels were put in evidence and identified as Commission Exhibits 174 and 175. Witnesses testified that these bezels had the appearance of gold or gold alloy. Tests of the bezels disclosed that they had gold coverings, respectively, of .00083 of an inch of 18.46 karat gold and .0007 of an inch of 18.32 karat gold. The report of the test is identified Commission Exhibit 179 A-B. The test document further reveals that the gold coating on both bezels referred to had been applied by electroplating.

From the exhibits themselves and testimony of record it is clear that the bezels tested have the appearance of gold or gold alloy. It is also established that they do in fact contain some gold. The mere presence of gold in the coatings, however, does not necessarily mean that markings are unnecessary to prevent deception. A purchaser who is led to believe from appearances that articles are made of substantial gold, when they are only base metal with an insignificant coating of precious metal, would be deceived. *Cf. Theodore Kagen Corp. v. Federal Trade Commission*, 283 F. 2d 371 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 843. There the court sustained the Commission in its holding that the base metal bezels of respondents in that proceeding could be mistaken for precious metals, in the absence of a clear disclosure to the contrary, because of the appearance of the bezels.

The record here shows that respondents' bezels, even though containing some gold, were in fact composed of base metal with a thin and unsubstantial coating of gold. The test results disclose that the gold coatings were extremely thin. We note that under the Commission's Trade Practice Rules for the Watch Case Industry a coating of less than $1\frac{1}{2}/1000$ of an inch thickness of precious metal is deemed either base metal or base metal flashed or coated with a very thin and unsubstantial coating. 16 C.F.R. 174.2(9). A bezel with less than $1\frac{1}{2}/1000$ of an inch thickness of gold marked in a manner set forth in such rule would not be considered misleading. Watches improperly marked as to gold content may be found to be deceptive and in violation of the Federal Trade Commission Act. Respondents do not dispute the reasonableness of the rule referred to. In fact, they assert in their reply brief that "* * * the record discloses that respondents, at the present time, mark all the watch cases they man-

ufacture strictly in accordance with the regulations of the Commission."

We find and conclude that the gold appearance of respondents' bezels and the failure of respondents to properly mark them as a base metal or as base metal with a thin and unsubstantial gold coating has the tendency and capacity to mislead and deceive the purchasing public as to the metal content of such bezels. We also find and conclude that respondents, by their failure to properly mark their bezels, have provided their customers with a means of deception.

Counsel supporting the complaint has asked that individual respondent Robert Weil be held in default as to all the charges because of a failure to file a timely answer. The hearing examiner on April 3, 1961, entered an order holding this respondent in default, but further ordered that a hearing be held to determine the form of the "default order" to be entered. Subsequently, on April 13, 1961, respondent Weil filed an answer. The hearing examiner, in view of the answer, stated in his initial decision that no "default judgment" may be entered. He included respondent Weil in the order for the practices which he found to be unlawful. Since respondent Weil, along with other respondents, is found to be in violation of the law as to practically all of the allegations in the complaint, making the question nearly moot, we do not believe that further consideration of the issue is warranted. The contention of complaint counsel is rejected.

Respondents in their exceptions claim there is no evidence that Norman Slater, Martin J. Rasnow and Leo Hyman formulated, directed or controlled the acts and practices here involved. Such responsibility was expressly denied as to the three men in respondents' answer. The hearing examiner, while he made no finding as to the individual responsibility of these respondents, includes them in the order in their individual as well as their official capacities. Counsel supporting the complaint claims that the hearing examiner inadvertently omitted these names in his findings on individual liability and further asserts that the hearing examiner must have been satisfied that policy was jointly determined by the officers. Complaint counsel, however, gives no record support for this view and in fact suggests that the Commission should "either support the order in the initial decision in this respect, or hold the particular individuals as officers of respondent Benrus Watch Company." Moreover, the evidence fails to show that such officers were individually responsible for the violations. In the circumstances, the complaint will be dis-

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missed as to the aforementioned persons in their individual capacities.

The exceptions of complaint counsel are sustained to the extent above indicated and otherwise rejected. Respondents' exceptions likewise are 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.

Commissioner Elman concurs in the result.

FINAL ORDER

Pursuant to § 4.22(c) of the Commission's Rules of Practice, published May 16, 1962, 27 Fed. Reg. 4609, 4621 (superseded August 1, 1963), respondents were served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of the order which the Commission contemplates entering; and

Respondents having timely filed exceptions to the order proposed, which were opposed by a reply thereto filed by counsel supporting the complaint; and the Commission, upon review of these pleadings, having determined that the exceptions filed by the respondents should be disallowed and that the order proposed should be entered as the final order of the Commission:

It is ordered, That the initial decision be modified by striking the findings in paragraphs 7 and 9 through 15 contained in the Findings of Fact and substituting therefor the findings and conclusions of the Commission contained in the Commission's opinion.

It is further ordered, That the initial decision be modified by striking therefrom all paragraphs under the heading "Conclusions" except for those under the Roman numeral IX.

It is further ordered, That respondents Benrus Watch Company, Inc., a corporation, Belforte Watch Company, Inc., a corporation, and their officers, Oscar M. Lazrus and Benjamin Lazrus, individually and as officers of the above-named corporations, and Harvey M. Bond, Stanley M. Karp, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Clifford L. J. Siegmeister, and Julian Lazrus, individually and as officers of Benrus Watch Company, Inc., and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of preticketing merchandise at an indicated retail price, or otherwise setting forth an indicated retail

price as to merchandise in any material disseminated or intended for dissemination to the public, when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area or when there is no generally prevailing retail price for such merchandise in the trade area.

2. The act or practice, in connection with the use of trade-in allowances, allowance certificates, coupons, or other promotions offering price reductions, of setting forth an indicated retail price for which reductions or allowances are to be made unless there is a generally prevailing retail price in the market in which the act or practice is engaged in, and such indicated retail price is not in excess of the generally prevailing retail price in said market.

3. Representing, directly or by implication:

a. That their merchandise is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor shall perform thereunder are clearly and conspicuously disclosed.

b. That their watches are "shock proof" or "shock protected" or otherwise representing that their watches possess greater shock resistance than is a fact.

c. That dealers in their merchandise will allow a certain amount against the indicated retail price thereof upon the presentation of an allowance certificate or coupon or for any reason in connection with the purchase of said merchandise, unless such allowance is granted without exception.

4. 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 on such cases the true metal composition of such treated cases or parts.

5. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated with an electrolytically applied flashing or coating of precious metal of less than 1-1/2/1000 of an inch over all exposed surfaces after completion of all finishing operations, without clearly and conspicuously disclosing on such cases or parts that they are base metal which have been flashed or coated with a thin and unsubstantial coating.

6. Supplying to, or placing in the hands of, any jobber, retailer, dealer, or other purchaser, means and instrumentalities by and through which they may deceive and mislead the pur-

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chasing public in respect to practices prohibited in paragraphs 1 through 5 above.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent Robert Gasser and as to respondent S. Ralph Lazrus, who is deceased.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Norman Slater, Martin J. Rasnow and Leo Hyman in their individual capacities.

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

It is further ordered, That the respondents, except Robert Gasser and S. Ralph Lazrus, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing,