

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, setting forth in detail the manner and form in which they have complied with the order to cease and desist set forth herein.

Commissioner Elman not concurring in the provisions of the order, and Commissioner Reilly not participating.

IN THE MATTER OF
BULOVA WATCH COMPANY, INC.

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

Docket 7583. Complaint, Sept. 11, 1959—Decision, Feb. 28, 1964

Order dismissing—on findings that in three of the four communities selected for investigation, the respondent's watches were fair-traded and the preticketed prices were the prevailing prices—complaint charging a watch manufacturer with preticketing its watches with fictitious prices, thereby representing that said prices were the usual retail prices in the trade areas concerned.

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 Bulova Watch Company, Inc., a corporation, hereinafter referred to as respondent, has 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 4 is set forth as amended by order of hearing examiner dated Feb. 10, 1960.

PARAGRAPH 1. Respondent Bulova Watch Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Bulova Park, in the City of Flushing, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacturing, assembling, advertising, offering for sale, sale and distribution of watches to retailers, distributors and jobbers and others for ultimate resale to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said watches, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained a substantial course of trade in watches in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent has engaged in the practice of using fictitious prices by attaching or causing to be attached to the watches themselves, or by placing or causing to be placed in conjunction therewith, tickets or tags upon which certain amounts are printed, thereby representing, directly or by implication, that said imprinted amounts are the usual and customary retail prices for said watches in the trade areas where offered for sale. In truth and in fact, said amounts are not the usual and customary prices for said watches in trade areas where offered for sale but are fictitious.

PAR. 5. Respondent, by the aforesaid practice, places in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the usual and customary retail prices for its watches.

PAR. 6. In the conduct of its 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 respondent.

PAR. 7. 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 respondent's watches by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondent from its competitors and substantial injury has thereby been, and is being, done to competition in commerce.

Initial Decision

64 F.T.C.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Harry Middleton and *Mr. Francis Charleton* for the Commission.

Mr. Sol E. Flick, Bulova Watch Company, Inc., New York, N.Y., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

OCTOBER 11, 1962

The Federal Trade Commission on September 11, 1959, issued and subsequently served a complaint in this proceeding upon respondent.

The crux of the charges alleged in the complaint as amended is set forth in Paragraph Four thereof as follows:

PARAGRAPH FOUR: Respondent has engaged in the practice of using fictitious prices by attaching or causing to be attached to the watches themselves, or by placing or causing to be placed in conjunction therewith, tickets or tags upon which certain amounts are printed, thereby representing, directly or by implication, that said imprinted amounts are the usual and customary retail prices for said watches in the trade areas where offered for sale. In truth and in fact, said amounts are not the usual and customary prices for said watches in trade areas where offered for sale but are fictitious.

Respondent, before offering testimony in support of its defense, moved to dismiss the amended complaint, and in the alternative, to have the testimony of the New York City witnesses stricken on jurisdictional grounds claiming that the sales of watches in New York City did not involve interstate commerce, but intrastate commerce only. The basis of this contention was that the watches were manufactured by Bulova in New York and sold to retailers in New York for consumer purchase in that trade area. The hearing examiner denied respondent's motion on this premise, since the evidence established that the respondent engaged in nation-wide advertising through interstate media of communication for the purpose of inducing interstate sales. Furthermore, aside from the use of interstate communications to consummate sales, the nation-wide advertising conceded by respondent serves as an inducement to consumers residing in states adjoining New York such as New Jersey and Connecticut to make retail purchases in the New York City market which extends beyond the borders of the State of New York. See *Progress*

Tailoring Co., et al. v. Federal Trade Commission, 153 F. 2d 103 and *Ford Motor Company v. Federal Trade Commission*, 120 F. 2d 175, 314 U. S. 668.

Respondent also moved to have this proceeding discontinued or suspended pending institution of a trade practice conference. This relief was also denied by the hearing examiner, premised upon the fact that he was without authority to grant such relief and that an appropriate application therefor would have to be made to the Commission itself.

On April 5, 1962, the hearing examiner closed the hearings subject to a motion by respondent to reopen. Respondent so moved and, on July 19, 1962, further testimony was taken and the hearings closed. In moving to reopen respondent also requested leave to file a supplemental answer, which request was granted, and the supplemental answer was duly filed.

Following hearings on the issues, proposed findings and conclusions and proposed orders were filed by counsel supporting the complaint and counsel for respondent. Oral argument was had thereon on September 11, 1962. The examiner has carefully reviewed and considered the proposed findings and briefs, and oral argument of counsel. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters. Upon the entire record in the case, the hearing examiner makes the following:

FINDINGS OF FACT

1. Bulova Watch Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Bulova Park, in the city of New York, New York.

2. Respondent is now and for some time last past has been engaged in the manufacture, assembling, advertising, offering for sale, sale and distribution of watches to retailers for resale to the public, to post exchanges and ship stores and to premium houses.

3. Respondent does not sell to jobbers or wholesalers, with the single exception of premium jobbers, which latter group distributes watches not for resale but for incentive award programs.

4. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said watches, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade

in watches in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. Respondent in the course of its business is in substantial competition with corporations, firms and individuals in the sale of watches in Washington, D.C.; Newark, New Jersey; New York City, New York; Boston, Massachusetts, and elsewhere throughout the United States.

6. Respondent has been selling its watches for approximately fifty years.

7. Respondent sells directly to approximately seventeen thousand (17,000) authorized retail dealers. Respondent's customers include retail jewelers who are able to provide watch repairs and maintenance.

8. At the time respondent's watches are shipped from its plant in Flushing, New York, each watch bears a price tag which respondent prefixes to the box or container. Respondent does not furnish its customers with any other price ticket.

9. Approximately 75 percent, by volume, of respondent's watches are sold by its customers on credit, as contrasted to cash or charge account sales, and it is undisputed that all credit sales of respondent's watches are at the full ticket price. Of the dealers who testified that they are cash or cash and credit retailers, rather than straight credit retailers, several stated that they always received the full ticketed price.

10. Respondent's watches are classified by a number of series, and each series, in turn, includes a number of models which vary in certain characteristics although having a common characteristic.

11. Each individual model always bears the same price wherever and to whomever it may be shipped.

12. Respondent manufactures and sells to its customers between 350 and 400 different models, having prefixed prices ranging from \$24.75 to \$350, at an average discount of 50 percent therefrom.

13. Respondent has adopted fair trade agreements governing the prices at which its watches can be sold in every State, including New Jersey, Massachusetts and New York, where such agreements are authorized under state law.

14. Respondent, twice a year, sends a fair trade price list for all its watches to all of its dealers in each fair trade state.

15. The price on the tag affixed by respondent to a particular model watch is always the same without regard to the particular customer to whom it is being sent, and that price is identical with the one appearing for the same watch on the fair trade price list.

16. Respondent sends warning letters and telegrams to retailers when it first discovers a violation of its fair trade agreement. Re-

spondent also regularly enforces its fair trade agreements by means of litigation. In 1962, respondent had forty fair trade enforcement proceedings pending in the United States, of which three were pending in Massachusetts and two in Newark, New Jersey.

17. The testimony adduced in support of the complaint relates to the following trade areas only: New York City, Boston, Newark and the District of Columbia.

18. Respondent urges a finding that the primary purpose in preticketing its watches is the protection of the consumer in that it enables him to comparatively evaluate their dollar worth and the secondary purpose is to assist the retailer in pricing the watches. The evidence supports such a finding. However, as pointed out by Commissioner Elman in rendering the Commission's opinion in the Rayex case, Docket No. 7346, "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. 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."

19. Respondent engages in a national advertising program utilizing all mass media of communication.

20. Respondent has spent \$112,000,000 over the last 25 years in advertising. Since 1950 through 1961, respondent has spent \$78,000,000 on advertising and the current advertising budget is \$3,500,000, and respondent currently advertises in national media such as Life, Look, Ebony, Time, U.S. News & World Report, Newsweek, New Yorker, Fortune, Sports Illustrated, National Geographic magazines.

21. Respondent has been advertising on television at least since 1951, and currently sponsors the following nationally shown television programs: The Outlaws, The Detectives, Laramie, 87th Precinct, International Showtime, Saturday Night at the Movies.

22. All of respondent's advertising always includes the preticketed prices.

23. Respondent does not furnish its dealers with price tickets other than those physically attached to the boxes containing its watches.

24. Respondent does not furnish any "inserts" to the catalog houses to which it sells.

25. The evidence establishes that during the period contemplated by the complaint, respondent's watches have been sold in the retail market in the trade areas in which proof was adduced¹ at the preticketed prices and at various prices less than the preticketed price.

26. In the course and conduct of its business, respondent has made deceptive and misleading representations with respect to the prices of its watches in Washington, D.C. In attaching or causing to be attached to the watches themselves, or by placing or causing to be placed in conjunction therewith, tickets and tags upon which certain amounts are printed, respondent thereby represented directly or by implication that said imprinted amounts are its usual or customary retail prices for said watches in the Washington, D.C. trade area where offered for sale. In truth and in fact, said amounts are not the usual and customary prices for said watches in the aforesaid trade area since the evidence adduced establishes that in a substantial number of instances said watches of the respondent were sold at a price less than the ticketed price.² This being the case, the hearing examiner finds respondent's price tickets to be unlawfully misleading in that they conveyed the impression that the stated prices were the regular and usual retail prices for the watches when in fact the price pattern as evidenced indicate the nonexistence of a usual and regular price. Under these circumstances, it would appear that the price tickets provided by the respondents are meaningless and if so, fictitious. However, with regard to the Newark, New Jersey, New York City, New York, and Boston, Massachusetts areas, the evidence is abundant that, although the prices of respondent's watches vary from the ticketed price to some degree, the respondent has been diligent and reasonably successful in enforcing its preticketed prices as the fair trade prices of its watches. Under these circumstances preticketing cannot be deemed to be meaningless and therefore fictitious or misrepresentative. To the contrary, the respondent's preticketed prices are exceptionally meaningful as a media for enforcement of predetermined prices within the scope of the fair trade laws of New York, New Jersey and Massachusetts. A substantial likelihood of deception would therefore appear to be remote since the ticketed price (also the fair trade price) of respondent's watches is the usual and regular price generally prevailing in the Newark, New Jersey, New York City and Boston, Massachusetts trade areas.³

¹ See Finding of Fact No. 17.

² See testimony of Cohen (Tr. 288); Ahren (Tr. 311) and Greenbaum (Tr. 325).

³ See opinion of Commissioner Elman in the matter of Rayex Corporation et al, Docket No. 7346, dated April 2, 1962 [60 F.T.C. 664], particularly at pages 3 and 4 thereof. A rule of reason is clearly applicable. Although the Act is protective of the most *unsuspecting*, such protection cannot be deemed to extend to those who are unreasonably so.

The constitutionality of the fair trade laws of Massachusetts, New Jersey and New York, to wit, Massachusetts General Laws, 1932, Chap. 93, Sec. 14A-14D, New Jersey Revised Statutes, 1937, Title 56, Chap. 4, Art. 2 and New York General Business Law, 19 McKinney's, Sec. 369, including the non-signer provisions, has been upheld by the highest court of each state under both Federal and State constitutional objections. *General Electric Co. v. Kimball Jewelers, Inc.*, 333 Mass. 665, 132 N.E.2d 652 (1956); *Lionel Corp. v. Grayson-Robinson Stores, Inc.*, 15 N.J. 191, 104A 2d 304 (1954), appeal dismissed for want of a substantial federal question sub nominee *Grayson-Robinson Stores, Inc. v. Lionel Corp.*, 348 U.S. 859; *General Electric Co. v. Masters, Inc.*, 307 N.Y. 229, 120 N.E.2d 802 (1954), appeal dismissed for want of a substantial federal question sub nominee *Masters, Inc. v. General Electric Co.*, 348 U.S. 892.

CONCLUSIONS

1. The Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

2. The use by the respondent of the aforesaid false, misleading and deceptive representations in Washington, D.C., as to prices has had and now has the capacity and tendency to mislead and deceive members of the purchasing public into the mistaken belief that the stated prices were the usual and regular retail prices for the watches so marked, thus providing dealers in respondent's watches in Washington, D.C., with the means of deceiving the purchasing public. This deception, however, does not extend to those trade areas such as New York City, New York, Boston, Massachusetts and Newark, New Jersey, where there is no substantial likelihood of deception since the ticketed price is the enforced fair trade price. For this reason the cease and desist order hereinafter set forth is limited to the Washington, D.C., and other jurisdictions in which fair trade agreements are not enforceable since there is no substantial likelihood of deception resulting from respondent's preticketed prices elsewhere.

3. The aforesaid acts and practices of respondent as hereinabove found are to the prejudice and injury of the public and of respondent's competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That in selling watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, that respondent

Opinion

64 F.T.C.

Bulova Watch Company, Inc., a corporation, and its officers, representatives, agents and employees, acting for or in behalf of respondent corporation, do forthwith cease and desist from the act or practice of preticketing watches for sale in Washington, D.C., and other jurisdictions in which fair trade agreements are not enforced, at an indicated retail price, or of otherwise conveying an impression to the public concerning such retail prices in said trade areas when there is no generally prevailing retail price for such watches, 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 area, and it is

Further ordered, That respondent Bulova Watch Company, Inc., a corporation, and its officers, representatives, agents and employees, acting for or in behalf of respondent corporation, do forthwith cease and desist from placing in the hands of jobbers, retailers and dealers, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning the usual and regular prices of its watches in the respects set out above.

OPINION OF THE COMMISSION

FEBRUARY 28, 1964

This matter is before the Commission for consideration of exceptions to the hearing examiner's initial decision filed by counsel supporting the complaint and by counsel for respondent.

The amended complaint in this matter in effect charges respondent watch manufacturer with having violated Section 5(a)(1) of the Federal Trade Commission Act¹ by preticketing its watches with fictitious prices and thereby representing, directly or by implication, that said prices are the usual and customary retail prices for such watches in the trade areas where offered for sale, when in truth and in fact the watches usually sell for substantially lower prices. The complaint further charges that by the above practice respondent places in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the usual and customary retail prices for its watches. Respondent's answer essentially denied all material charges of the complaint.

To prove his case, counsel in support of the complaint relied principally upon testimony of twenty-four watch retailers from the following four communities: New York City; Newark, New Jersey; Boston, Massachusetts; and Washington, D.C. Counsel for respondent

¹ 38 Stat. 719 (1914); 52 Stat. 111 (1938); 15 U.S.C.A. § 45(a)(1).

ent produced thirty-one rebuttal witnesses from the latter three of the above areas.

On October 11, 1962, the hearing examiner issued his initial decision, holding that the allegations of the complaint had been sustained in only the Washington, D.C., area. The order proposed by the hearing examiner would require respondent to cease and desist from falsely preticketing watches " * * * for sale in Washington, D.C., and other jurisdictions in which fair trade agreements are not enforced * * * ."

Respondent has taken exception to the hearing examiner's finding that the evidence concerning the sale of respondent's watches at retail in Washington, D.C., provides sufficient basis for the order and has requested that the complaint be dismissed. Counsel in support of the complaint has taken exception to the order on the basis that it is too narrow, in view of the hearing examiner's finding that the watches had been sold in all of the above-mentioned communities " * * * at various prices less than the preticketed price."

Subsequent to the date on which the initial decision herein was filed, the Commission promulgated Guides Against Deceptive Pricing (effective January 8, 1964) which deal specifically with practices of the type challenged in this proceeding. Guide III thereof relates to the advertising of retail prices which have been established or suggested by manufacturers and states in pertinent part:

* * * Typically, a list price [which includes a pre-ticketed price] is a price at which articles are sold, if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.

* * * a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice.

We have reviewed the record in this case and can find no evidence that respondent has preticketed its watches with amounts in excess of the highest prices at which substantial sales were made in the area in which it was doing business. As a matter of fact, the record

Final Order

64 F.T.C.

discloses that in three of the four communities selected by counsel supporting the complaint to show that respondent engaged in fictitious pricing, the products are fair traded and the preticketed prices are the prevailing prices of this merchandise.² The hearing examiner has made the following finding concerning the retail prices of respondent's watches in these communities:

* * * with regard to the Newark, New Jersey, New York City, New York, and Boston, Massachusetts areas, the evidence is abundant that, although the prices of respondent's watches vary from the ticketed price to some degree, the respondent has been diligent and reasonably successful in enforcing its preticketed prices as the fair trade prices of its watches. Under these circumstances preticketing cannot be deemed to be meaningless and therefore fictitious or misrepresentative. To the contrary, the respondent's preticketed prices are exceptionally meaningful as a media for enforcement of predetermined prices within the scope of the fair trade laws of New York, New Jersey and Massachusetts. A substantial likelihood of deception would therefore appear to be remote since the ticketed price (also the fair trade price) of respondent's watches is the usual and regular price generally prevailing in the Newark, New Jersey, New York City, and Boston, Massachusetts trade areas.

Under these circumstances we find no basis for holding that respondent's preticketed prices were fictitious or that the practices challenged by the complaint were deceptive under the new pricing guides. Consequently, the complaint will be dismissed and an order so providing will be issued herewith.

Commissioner MacIntyre not participating, and Commissioner Reilly not participating for the reason that he did not hear oral argument.

FINAL ORDER

FEBRUARY 28, 1964

Respondent and counsel in support of the complaint having filed exceptions to the hearing examiner's initial decision, and the matter having been heard on briefs and oral argument; and

The Commission having concluded for the reasons stated in the accompanying opinion that the record fails to establish that the practices challenged by the complaint herein are in violation of Section 5 of the Federal Trade Commission Act, and having further concluded that the complaint should be dismissed:

It is ordered, That the complaint be, and it hereby is, dismissed.

By the Commission, Commissioner MacIntyre not participating and Commissioner Reilly not participating for the reason that he did not hear oral argument.

² It also appears that even in the one community, Washington, D.C., where the examiner found that the preticketed prices were "meaningless", twelve dealers testified that they sold respondent's watches at the preticketed prices and the majority of these dealers testified that they sold exclusively at such prices.

Initial Decision

IN THE MATTER OF
CARROLL F. CHATHAM TRADING AS
CHATHAM RESEARCH LABORATORIES ET AL.

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

Docket 7609. Complaint, Oct. 13, 1959—Decision, Feb. 28, 1964

Order reinstating consent order of Apr. 4, 1960 (56 F.T.C. 1196)—vacated April 5, 1962—requiring a San Francisco manufacturer of man-made stones having the appearance of emeralds, and the New York City wholesalers of the stones, to cease representing falsely that said stones were cultured or natural or identical to natural stones, and using the word “emerald” as descriptive thereof unless preceded by the word “synthetic” or some other word which would clearly disclose that the product was not natural; and adding the provision that the charges of the complaint be dismissed in so far as they might be construed to allege that the term “Chatham-Created Emeralds” was deceptive.

Mr. Berryman Davis and *Mr. Paul F. Helfer* for the Commission.
Mr. Caesar L. Pitassy, New York, N.Y., for respondents *Mr. Carroll L. Chatham*, trading as Chatham Research Laboratories, Anglomex, Inc., and *Mr. Dan E. Mayers*.

Mr. Peter W. Quinn, New York, N.Y., for respondents *Ipekjdian, Inc.*, *Mr. Adom Ipekjdian*, *Mr. Georges Ipekjdian*, and *Cultured Gem Stones, Inc.*

Hollabaugh & Jacobs, Washington, D.C., for all respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

SEPTEMBER 4, 1963

The Federal Trade Commission issued a complaint herein on October 13, 1959, charging in effect that respondents' advertising was misrepresentative. The complaint alleged that respondents variously referred to their product as “Chatham Emeralds” and “Chatham Cultured Emeralds”, and claimed their stones are identical to natural emeralds in all their properties; that these statements were exaggerated, false, misleading and deceptive because the stones were not identical to emeralds, but were synthetic.

Soon after the complaint was issued, the parties entered into discussions for the purpose of working out a consent order. The chronology of events at that time is hereinafter set forth.

On December 28, 1959, counsel for respondents wrote the Com-