

(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 this order.

IN THE MATTER OF
MOORE BUSINESS FORMS, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF THE
CLAYTON ACT

Docket 7086. Complaint, Mar. 13, 1958—Decision, June 18, 1964

Order dismissing—failure to establish a prima facie case—complaint charging the largest producer of business forms in the United States with manufacturing plants in 10 States, with discriminating in price between competing purchasers in violation of Sec. 2(a) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act

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(U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Moore Business Forms, Inc., a subsidiary of Moore Corporation, Ltd., 350 University Avenue, Toronto, Ontario, Canada, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. It operates its business in the United States through three Divisions: (1) Eastern Division at 900 Buffalo Avenue, Niagara Falls, New York, which is its principal place of business in the United States; (2) South-Central Division, 601 E. Hickory Street, Denton, Texas; and (3) Pacific Division at 2624 Yates Street, Los Angeles, California. The general sales policy in each of these Divisions is the same. Respondent recently formed a new Division, Stock Forms Company, with offices at 4300 Forest Park Road, St. Louis, Missouri; 491 South Dean Street, Englewood, New Jersey; and 425 Brannon Street, San Francisco, California, to engage in the purchase and sale of stock forms primarily on a mail order basis.

PAR. 2. Moore Business Forms, Inc., hereinafter sometimes referred to as Moore or as respondent, is engaged in the manufacture, distribution and sale of various classes, types or descriptions of business forms products. It has 18 manufacturing plants and in excess of 150 sales offices throughout the United States and in Hawaii.

Moore Business Forms, Inc., is the largest producer of business forms products in the United States, with a total sales volume in 1955 substantially in excess of \$78 million. Approximately 93% of respondent's business forms products are sold by respondent through its salesmen directly to the users. About 7% are sold through dealers or jobbers.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent is now, and for a number of years past has been engaged in commerce, as "commerce" is defined in the aforesaid Clayton Act, having sold its business forms products from its several plants located in the States of New York, Maryland, Texas, Iowa, Kentucky, Missouri, Alabama, California, Oregon and Wisconsin, and transported or caused the same to be transported from its plants or other places of business in said states, to purchasers that are users thereof located in other states of the United States, or in other places under the jurisdiction of the United States.

PAR. 4. In the course and conduct of its business, as aforesaid, Moore Business Forms, Inc., is now and for a number of years past has been in substantial competition with others engaged in the manufacture, sale or distribution of business forms products in commerce

between and among the various states of the United States, or other places under the jurisdiction of the United States.

PAR. 5. In the course and conduct of its business, as aforesaid, respondent Moore has discriminated in price between different purchasers of its business forms products of like grade and quality by selling to some of its user customers at higher prices than to other of its user customers.

Various methods were employed to effectuate the discriminations practiced by respondent. Some of these were:

1. When the "Regular Method" of pricing is used, favored customers are allowed a concession or a cut from the computed list price. The unfavored customer is charged the regular list price without any concession or cut therefrom.

2. When the "Special Estimate" system is used, those customers who are favored by having their purchases priced according thereto are caused to pay a lower price than is charged to unfavored customers buying according to the "Regular Method" without a price concession.

Examples of the discrimination in price alleged are as follows:

1. During 1954 respondent sold several kinds of forms of varying characteristics to GMC Truck and Coach Division of General Motors Corporation at \$17.82 per M, \$13.54 per M, and \$26.33 per M, whereas during the same period it sold to other customers similar forms of like grade and quality at higher prices, thereby resulting in concessionary differentials in price in excess of 20% in each instance in favor of the said GMC Truck and Coach Division.

2. During 1954 respondent sold certain of its forms to White Owl Express, Inc., at \$19.75 per M, whereas it sold similar forms of like grade and quality to other customers during the same period at higher prices, thereby resulting in concessionary differentials in price in excess of 15% in favor of the said White Owl Express, Inc.

3. During 1954 respondent sold certain of its forms to Allis-Chalmers Manufacturing Co. at \$47.02 per M, whereas it sold similar forms of like grade and quality to other customers during the same period at higher prices, thereby resulting in concessionary differentials in price in excess of 20% in favor of the said Allis-Chalmers Manufacturing Co.

4. During 1955 respondent sold certain of its forms to Jamaica Water Supply Company at \$4.92 per M, whereas it sold similar forms of like grade and quality to other customers during the same period at higher prices, thereby resulting in concessionary differentials in price in excess of 30% in favor of the said Jamaica Water Supply Company.

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The foregoing examples are typical of many price discriminations in transactions wherein respondent Moore sold its business forms products of like grade and quality in commerce to different customers, favoring some with substantial price concessions and selling to others at list prices as computed from respondent's own price books.

Respondent Moore's reduced prices and the consequent discriminations in price to its favored customers were sufficient to and did divert business from its competitors. Furthermore, such price reductions by respondent in these and other instances are sufficient to divert business from respondent's competitors to respondent in the future.

Said price concessions by respondent have been extremely harmful and injurious to respondent's competitors who have quoted prices according to their respective price books and have been thus foreclosed from opportunities to compete for the business on which respondent quoted concessionary prices substantially under respondent's own list prices and under the prices quoted by competitors.

PAR. 6. The effect of respondent's said discriminations in price as hereinabove alleged may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy, or prevent competition with respondent.

PAR. 7. The discriminations in price, as hereinabove alleged and described, are in violation of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended by the Robinson-Patman Act.

Miss Ida I. Kloze for the Commission.

Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y. by *Mr. Milton Handler* and *Mr. Stanley D. Robinson*; and

Fish, Richardson & Neave, New York, N.Y., by *Mr. William J. Barnes* and *Mr. Stephen H. Philbin* for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

APRIL 30, 1964

The Commission's complaint in this matter, issued March 13, 1958, charges the respondent, Moore Business Forms, Inc., a corporation, with discriminating in price in the sale of its products (business forms) in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13). The hearing examiner to whom the case was originally assigned was the late Frank Hier. Upon Mr. Hier's death in June 1959, the case was re-assigned to the present examiner. There have also been several changes in complaint counsel since the complaint was issued.

This is exclusively a "primary line" case. The only competitive injury charged is in the line of commerce in which respondent itself is engaged.

At the conclusion of the case-in-chief in support of the complaint, respondent on May 9, 1963, filed a motion to dismiss the complaint on the ground that a prima facie case had not been established. The hearing examiner's ruling on the motion was deferred pending the Commission's decision in a companion case, *Uarco, Inc.*, Docket No. 7087 [64 F.T.C. 924].

On February 24, 1964, the Commission issued its final order in the *Uarco* case, holding that a prima facie case had not been established and dismissing the complaint. After a review of the record in the present case in light of the Commission's decision in the *Uarco* case, complaint counsel has informed the hearing examiner that the motion to dismiss is not opposed.

The *Uarco* case and the present case are very similar on the facts, and the legal question as to competitive injury presented in the *Uarco* case is identical with that presented in the instant case. Unquestionably the Commission's decision in *Uarco* is controlling here.

It is concluded that a prima facie case in support of the complaint has not been established and that the motion to dismiss should be granted.

ORDER

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

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice effective August 1, 1963, the initial decision of the hearing examiner shall, on the 18th day of June, 1964, become the decision of the Commission.

IN THE MATTER OF

BRITE MANUFACTURING CO. ET AL.

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

*Docket 8325. Complaint, Mar. 15, 1961—Decision, June 18, 1964**

Order requiring Providence, R.I., distributors of expansion watchbands to jobbers and wholesalers and retail stores, to cease falsely marking metal watchbands

*Reported as modified by an order of the Commission dated Sept. 25, 1964.

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that contain expansion segments imported from Japan, "Made in U.S.A." without clearly disclosing on display cards and on the watchbands themselves the country of origin of the products.

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 Brite Manufacturing Co., a corporation, Brite Industries, Inc., a corporation, B.M.C. Trading Corp., a corporation, and Samuel Friedman and Theodore Levy, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Brite Manufacturing Co., Brite Industries, Inc., and B.M.C. Trading Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of Rhode Island with their offices and principal place of business located at 50 Aleppo Street, Providence, Rhode Island. Individual respondents Samuel Friedman and Theodore Levy are officers of said corporations. They formulate, direct and control the practices of the corporate respondents. The address of the individual respondents 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 sale and distribution of expansion watchbands to jobbers and wholesalers and to retail stores for resale to the public. Respondents' said watchbands are principally sold under the trade name "Brite."

In the regular and usual course and conduct of their said business, respondents cause, and have caused, said products, when sold, to be transported from their place of business in the State of Rhode Island to purchasers located in various other states of the United States.

Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said expansion watchbands in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Many of respondents' expansion watchbands are imported from Japan, while others contain expansion segments which have been imported from Japan and then joined to end pieces made in the United States. Prior to distribution respondents attach their said watchbands

to cardboard strips and to counter display cards for display and sale to the public. Various words and statements such as "Brite," "Brite Brands," "Brite Manufacturing Co., Providence 9, Rhode Island," and "Brite, Providence 9, R.I." are printed, and have been printed, on the said display cards and cardboard strips. Respondents' watchbands, which contain the expansion segments imported from Japan, have been, and are now, marked "Made in USA." At no place on the cardboard strips or display cards, or on the watchbands assembled in the United States which contain the imported expansion segments, as aforesaid, is the country of origin of the said imported watchbands or the imported expansion segments disclosed. As a result thereof, the purchasing public is not informed, prior to the purchase, of the country of origin of said imported bands, or the country of origin of the expansion segments contained in said bands. The use of the aforesaid words, statements and representations, in the absence of such disclosure, tends to lead the public to believe that said expansion watchbands in their entirety are of domestic origin.

PAR. 4. There are among the members of the purchasing public a substantial number who have a preference for products originating in the United States over products originating in foreign countries, including expansion watchbands originating in Japan.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of their said products, respondents have caused to be printed on the cardboard strips to which their watchbands are attached the word "Guaranteed", thereby representing that the said watchbands are unconditionally guaranteed.

PAR. 6. Said representation was and is false, misleading and deceptive. In truth and in fact said watchbands were not, and are not, unconditionally guaranteed in that the so-called guarantee provides for the payment of a service charge. The terms, conditions and extent to which said guarantee applies, and the manner in which the guarantor will perform thereunder are not disclosed in respondents' advertising matter.

PAR. 7. Respondents, in the course and conduct of their business, have been and are in substantial competition in commerce with corporations, firms and individuals likewise engaged in the sale and distribution of expansion watchbands.

PAR. 8. The use by respondents of the foregoing false and misleading statements, representations and practices and their failure to disclose the country of origin of their watchbands has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken and erroneous belief that said products are of domestic origin and said statements, representa-

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tions and implications were and are true, and to induce a substantial portion of the purchasing public, because of said mistaken and erroneous belief, to purchase said product. As a result thereof, trade in commerce has been unfairly diverted to respondents from their competitors and injury has thereby been done to competition in commerce.

PAR. 9. 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. Garland S. Ferguson supporting the complaint.

Mr. I. H. Wachtel, Washington, D.C., for respondents.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER
OCTOBER 25, 1963

This proceeding was commenced by the issuance of a complaint on March 15, 1961, charging the above-named corporate respondents and the individual respondents, their officers, with unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act by (a) falsely marking metal watch bands, which contain expansion segments imported from Japan, "Made in U.S.A." without disclosing on the cardboard strips upon which the watch bands are mounted or display cards to which the mounted bands are attached, or on the watch bands themselves the country of origin, Japan; and (b) making misleading and deceptive statements as to guarantees imprinted on the cardboard strips to which their watch bands are attached thereby representing that said watch bands are unconditionally guaranteed, when the terms, conditions, and extent to which said guaranty applies and the manner in which the guarantor will perform thereunder were not disclosed in respondents' advertising matter.

Upon being served with the complaint Respondents appeared by counsel and thereafter filed their joint answer (a) admitting the allegations of Paragraph One of the complaint, but denying the portion thereof which alleges that respondents Friedman and Levy formulate, direct, and control practices of corporate respondents, and (b) denying the allegations of Paragraphs Two, Three, Four, Five, Six, Seven, Eight, and Nine of the complaint but admitting as to the corporate respondents so much of said paragraphs as alleged that said respondents sell expansion watch bands.

A prehearing conference was held in this matter on March 7, 1962, pursuant to which certain uncontested facts were agreed to, lists of exhibits and witnesses were exchanged and certain admissions were made by respondents. In addition, complaint counsel by motion dated February 28, 1962 requested the hearing examiner to take official notice of the following facts:

1. That there are among the members of the purchasing public a substantial number who have a preference for products originating in the United States over products originating in foreign countries.

2. That when the country of origin of merchandise offered for sale in the United States is not marked or if so marked, the markings are concealed, the purchasing public or a substantial segment thereof understands and believes such products to be wholly of domestic origin.

By order dated April 23, 1962, the hearing examiner took official notice of the matters hereinabove set forth, but in doing so, pointed out that such matters could be rebutted by respondents by evidence adduced at the hearing. Respondents, at the hearing, did not avail themselves of this opportunity and in the absence of any such evidence the aforesaid matters officially noticed by the examiner are herein now adopted as findings of fact.

Hearings on the complaint were held at Providence, Rhode Island, on July 29 and 30, 1963, at which testimony and other evidence were offered in support of the complaint. The respondents, at the close of the Commission's case, presented no evidence and moved to dismiss the complaint on the grounds that the Government had failed to prove or establish the facts alleged in the complaint.

Proposed findings of fact, conclusions of law, and brief were filed by counsel supporting the complaint and by counsel for respondents on September 19, 1963.

Consideration has been given to proposed findings of fact, conclusions of law and briefs submitted by the parties and all proposed findings of fact hereinafter not specifically adopted are rejected. Based upon the entire record and his observation of the witnesses the hearing examiner makes the following findings as to facts, conclusions and order.

FINDINGS OF FACT

1. Brite Manufacturing Co., Brite Industries, Inc., and B.M.C. Trading Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of Rhode Island with their offices and principal place of business located at 50 Aleppo Street, Providence, Rhode Island. All of the respondent corporations sell expansion watch bands (Answer paragraphs 1 and 2).

2. Since its inception in 1955, B.M.C. Trading Corp., hereinafter referred to as B.M.C., has imported expansion watch bands and substantial segments thereof (Tr. 104, 111, 226, and 227). Approximately 50% of such goods imported by B.M.C. comes from Japan (Tr. 226).

3. Since its inception in 1955, Brite Industries, Inc., hereinafter referred to as Brite Industries, has done the assembling, finishing, alteration, polishing and plating work on the imported expansion watch bands or imported segments thereof (Tr. 111).

4. Since its inception in 1955, Brite Manufacturing Co., hereinafter referred to as Brite, has acted as the sales agent and distributor of "Brite" expansion watch bands including the imported and partially imported watch bands which are the subject of this complaint (Tr. 111). Said watch bands are sold and distributed by Brite in the United States to approximately one thousand wholesale and retail outlets for resale to the public under the name of "Brite" (Tr. 112). In connection with its sale and distribution of said watch bands, Brite uses and issues to such wholesalers and retailers "loose leaf" catalogs and catalog sheets depicting the watch bands and counter display cards or racks upon which they are shown to the public (Tr. 119, CX 1, 2, 3, 4, 5, 6, 9, 10, 14, 17, and 19). The display cards or racks are used as point of sale advertising tools (Tr. 237).

5. Prior to the incorporation of B.M.C., Brite Industries and Brite in 1955, the entire business and functions of these three corporate entities were carried on as Brite Manufacturing Co. (Tr. 224).

6. The respondent corporations since 1955 have operated out of the same premises, each corporation was assigned different complementary functions in connection with the over-all business and prior to 1955 the business was essentially an individually owned and singly operated affair. In their joint answer all three respondent corporations admit that they sell expansion watch bands. Under these circumstances the business affairs of the three corporate respondents are so interwoven as to make them responsible, if proved, for the acts and practices charged in the complaint. See *Delaware Watch Company, Inc.*, Docket 8411, August 15, 1963 [63 F.T.C. 491].

7. The individual respondents Samuel Friedman and Theodore Levy are officers of the respondent corporations. Respondent Friedman has served as president of all of the corporate respondents since their incorporation in 1955 and Respondent Levy has held the position of secretary for the three corporate respondents during the same period of time (Tr. 102, 235). The individual respondents Friedman and Levy managed and controlled the affairs and policies of the respondent corporations up to August 21, 1958 and no evidence has been adduced to show that this situation has undergone any change since that date

(CX 38b). Affirmative evidence of record shows that Respondent Friedman acted as any other executive might act in the position of president of the corporations, and that he hired and fired important personnel, and made decisions for the corporations (Tr. 103).

8. It is conceded and the hearing examiner finds that all of the corporate respondents maintain, and for some time last past have maintained, a substantial course of trade in imported expansion watch bands and partially imported expansion watch bands in commerce, as "commerce" is defined in the Federal Trade Commission Act (Tr. 109, 110).

9. It is also conceded and the hearing examiner finds that respondents have imported and continue to import completed expansion watch bands and substantial segments of watch bands such as center expansion segments which are then joined to end pieces (Tr. 110). All of the aforesaid imported and partially imported expansion watch bands are sold and distributed as completed watch bands by respondents under the trade name "Brite".

10. Prior to the distribution of the aforesaid watch bands respondents attach said watch bands to cardboard strips. In 1956 and 1957 the bands mounted on the cardboard strips were encased in a cellophane bag (Tr. 239, CX 12 and CX 13), but in 1960 a plastic cover or shell was affixed to the front of the cardboard strips (Tr. 240, CX 20 and CX 32). The individual bands on their cardboard holders so packaged are then attached to or hung on counter display cards or racks which serve to hold a group, or assortment, of several, or at times large numbers, of watch bands (Bands CX 12 and CX 13 were hung on Card CX 10; Band CX 20 was hung on Card CX 19). On the face of the cardboard strips holding the six watch bands put into evidence the word "Brite" appears (CX 12, 13, 20, 32, 33, and 37a). On the back of the cardboard strip in conjunction with the instructions for attaching the band to the watch the words "Brite Manufacturing Co., Providence 9, Rhode Island" appears (CX 12, 13, and 33) and in conjunction with the guarantee provisions the words "Brite, Providence 9, R.I." (CX 20 and 32.) The display cards or racks at the bottom also carry the words "Brite Manufacturing Co., Providence 9, R.I." (CX 9, 10, 14, 17, and 19).

11. Respondents concede that the cardboard strips and packaging do not state the foreign country of origin of the watch bands or segments thereof (Tr. 232). Similarly the display cards or racks do not state the foreign country of origin.

12. In support of the allegations in the complaint, a total of six watch bands were received in evidence. Although the gravamen of the complaint charges that respondents marked their watch bands, which contain expansion segments imported from Japan, "Made in U.S.A.",

not one of the six watch bands insofar as the hearing examiner is able to detect is so marked and complaint counsel in his proposed findings has failed to point out any such watch band in evidence that is so marked. On the contrary, an inspection by the hearing examiner of the six watch bands in evidence discloses that they are all marked either "Made in Japan" or "Japan" on the linkage (CX 12, 13, 20, 32, 33, and 37a). The uncontradicted testimony of Respondent Friedman shows that since at least August 21, 1958 [the date of a "Stipulation as to the Facts and Agreement to Cease and Desist" entered into by respondents and approved by the Commission covering among other things this type of violation (CX 38)], all expansion watch bands sold by Brite to retailers and wholesalers have been marked thereon "Made in Japan" or the appropriate country of foreign origin, whether it was imported entirely, or contained one part, or was made completely of parts of foreign origin (Tr. 229). This marking procedure or practice was adopted by Brite prior to August 21, 1958, and has been continued in force and effect until the present (Tr. 230). Accordingly, the hearing examiner finds that the charge in the complaint alleging that respondents mismark imported watch bands as "Made in U.S.A." is not supported by even so much as a scintilla of evidence, and as a matter of fact the Commission's exhibits affirmatively establish without exception that such watch bands are all marked on the linkage "Made in Japan" or "Japan".

13. In seeking a Cease and Desist Order complaint counsel relies on the "Stipulation as to Facts and Agreement to Cease and Desist" entered into by respondents and approved by the Commission August 21, 1958 to establish the marking of respondents' watch bands "Made in U.S.A." (CX 38c). Said Stipulation and Agreement is admittedly only evidence of prior acts and practices and expressly states that it is entered into "without prejudice to its [the Commission's] right to issue a complaint and institute formal proceedings against the said parties, or any of them, if at any time the Commission shall deem that such action is warranted." The hearing examiner believes the latter to be a representation by the Commission that in the absence of evidence of subsequent acts in violation of the Stipulation and Agreement the issuance of a formal complaint would not be warranted. As a corollary, it would seem to follow that should a complaint issue, mere reliance on the "Stipulation and Agreement" without evidence of subsequent acts as alleged in the complaint in violation thereof would not be in keeping with the spirit and intent of such agreements, particularly where the acts and practices have long since been discontinued. Accordingly, the hearing examiner specifically rejects complaint counsel's proposed finding that respondents mark their imported watch

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bands "Made in U.S.A." where the only evidence to support this is contained in a 1958 "Stipulation".

14. In order to buttress his case, complaint counsel seeks to shift the thrust of the complaint from a charge of *mismatching* the country of foreign origin to a charge of *concealing* the marking of the correct country of foreign origin by the packaging, without disclosing on the packaging or display cards the country of foreign origin. In effect complaint counsel without specifically so stating seeks to liberally construe the charges in Paragraph Three of the complaint so as to cover the charge of *concealment*. Paragraph Three of the complaint reads as follows:

PAR. 3. Many of respondents' expansion watch bands are imported from Japan, while others contain expansion segments which have been imported from Japan and then joined to end pieces made in the United States. Prior to distribution respondents attach their said watchbands to cardboard strips and to counter display cards for display and sale to the public. Various words and statements such as "Brite," "Brite Brands," "Brite Manufacturing Co., Providence 9, Rhode Island," and "Brite, Providence 9, R.I." are printed, and have been printed, on the said display cards and cardboard strips. Respondents' watchbands, which contain the expansion segments imported from Japan, have been and are now, marked "Made in USA." At no place on the cardboard strips or display cards, or on the watchbands assembled in the United States which contain the imported expansion segments, as aforesaid, is the country of origin of the said imported watchbands or the imported expansion segments disclosed. As a result thereof, the purchasing public is not informed, prior to the purchase, of the country of origin of said imported bands, or the country of origin of the expansion segments contained in said bands. The use of the aforesaid words, statements and representations, in the absence of such disclosure, tends to lead the public to believe that said expansion watchbands in their entirety are of domestic origin.

15. The purpose of a complaint is to give respondents reasonable and fair notice of the acts or practices with which they are charged. Paragraph Three can be summarized as follows:

- (1) Many of the respondents' expansion watch bands are imported from Japan.
- (2) Others contain expansion segments which have been imported from Japan and then joined to end pieces made in the United States.
- (3) Respondents attach said watch bands to (a) cardboard strips and (b) display cards.
- (4) Various words and statements, such as "Brite", "Brite Bands", "Brite Mfg. Co., Providence 9, Rhode Island", and "Brite, Providence 9, R.I.", have been printed on the said display cards and cardboard strips.
- (5) Respondents' watch bands, which contain the expansion segments imported from Japan, have been and are now marked "Made in U.S.A."

(6) At no place on (a) the cardboard strips, *or* (b) the display cards, *or* (c) the watch bands assembled in the United States containing imported expansion segments is the country of origin of the imported watch bands or imported segments disclosed. [Emphasis Supplied.]

(7) The use of the aforesaid words, statements and representations in the absence of *such* disclosure, tends to lead the public to believe that said expansion watch bands in their entirety are of domestic origin. [Emphasis Supplied.]

16. The various statements contained in Paragraph Three as summarized above in items (1) to (7) must be read in relation to each other. Consequently, reading the paragraph as a whole, the principal element of the charge, as summarized in item (5), is that respondents mismark their watch bands "Made in U.S.A." All of the rest of the statements in the paragraph are reasonably related to and must be read in conjunction with this principal charge. Items (1), (2), and (3) *supra* state certain basic facts. Item (4) setting forth the use of the words "Brite Mfg. Co., Providence 9, Rhode Island", or variations thereof, when read in conjunction with item (5), serves to further the impression that the watch bands are manufactured in the United States. However, item (4) adds no new element to the charge, but merely indicates a compounding of the mismarking. Parenthetically it should be noted that the words "Brite Mfg. Co., Providence 9, Rhode Island" actually are imprinted on the back of the cardboard strips under the guarantee provisions to inform the purchaser where to mail the watch band in case of a defect. (CX 20 and 32.)¹

Again reading items (6) and (7) in conjunction with item (5) we find that item (6) is worded in the alternative, and a reasonable interpretation thereof would be that marking the country of origin on either the cardboard strips, display cards or watch band would suffice. Finally item (7) read in the context of item (6) states that absent "*such*" disclosure, the public would be deceived. The word "*such*" can refer only to the marking of either the cardboard strips, display cards or watch bands.

As so interpreted, Paragraph Three reasonably places respondents on notice that they are charged with deception in mismarking their watch bands as "Made in U.S.A." without disclosing on either the cardboard strips, display cards, or watch bands the foreign country of origin. There is no reasonable basis for reading into Paragraph Three language that puts respondents on notice that they are charged

¹ CX 12 and CX 13 also carry these words on the back side in conjunction with the instructions for attaching to the watch, but both of these exhibits were in use prior to the 1958 "Stipulation" discussed in finding No. 13 *supra*.

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with concealing the correct foreign country of origin marked on the watch band by virtue of their packaging. Without such unequivocal notice to respondents, it would be manifestly unfair and a denial of due processes to enlarge the scope of the complaint to include these charges. It should be noted that complaint counsel at no time sought to amend the complaint to include a charge of concealment and it is now too late to correct this deficiency.

17. Complaint counsel in support of his position in this matter relies primarily on the decision of the Commission in *Manco Watch Strap Co., Inc.*, Docket No. 7785, March 13, 1962 [60 F.T.C. 495, 496]. Reference to the complaint in that matter shows that the pertinent paragraph in that complaint reads as follows:

PAR. 4. Respondents import their watch bands from Japan and Hong Kong. After receipt of said watch bands they are packaged or mounted for retail sale by respondents. The packaging and mounting takes various forms depending upon the retail customer outlet. Some of the bands are mounted on individual cards and enclosed in separate cellophane envelopes. These are affixed to large counter display cards and are sold primarily to drug stores and other retailers who utilize this method of offering merchandise to the public. Other bands are packaged in individual containers for sale primarily through chain stores. Some are attached to cards and enclosed in boxes having a clear plastic "window"; others are enclosed in a clear plastic tube with a card inserted; while others are mounted on cards under a clear plastic "bubble". At no place on the packaging, container, or cards is the fact disclosed that respondents' bands are imported from Japan and Hong Kong. Stamped into the metal on a link on the inside of the bands is the word "Hong Kong" or "Japan" as the case may be. In many instances these words are so small, indistinct or made unnoticeable because of other impressions, that they do not constitute adequate notice that the bands are imported. Further, the manner of packaging conceals the inside of the band so that the words stamped thereon cannot be seen prior to purchase except by destroying or damaging the container or packaging.

18. The *Manco* complaint clearly and concisely spells out the deception alleged as concealment of the country of origin on the watch band by packaging. The respondents in that matter were placed on full notice of the acts and practices with which they were charged. Furthermore, the *Manco* complaint was issued over a year before the complaint in this matter and the charges in *Manco* could have been easily incorporated into the subject complaint. In the absence of such charges, they may not be read in by the hearing examiner.

19. Complaint counsel in support of his position also relies on the decision of the Commission in *Baldwin Bracelet Corp.*, Docket No. 8316, October 2, 1962 [61 F.T.C. 1345]. Inspection of the complaint and decision in that matter reveals that it was alleged and proved that respondents therein failed to make any affirmative disclosure of foreign origin on the watch bands in issue (see page 1365 of the

Decision). Having proved this charge, the order, in addition to requiring respondents to properly mark their watch bands, contained an additional paragraph requiring a disclosure on the packaging. There is no doubt that once the charges in a complaint have been proved, the Commission may issue an order sufficiently broad to cover all forms of the deceptive acts or practices. That is not the case here.

20. In a recent decision, *Sacks Woolen Co., Inc.*, Docket No. 8436, November 27, 1962 [61 F.T.C. 1226], the Commission refused to enter an order due to the substantial variance of the pleadings from the evidence. In that case the complaint alleged respondents misbranded its wool products by understating the wool fiber content and the evidence adduced at the hearing demonstrated that they misbranded wool products by overstating the wool fiber content. Although the Commission found the latter to be equally false and deceptive within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act, it determined that "it would be inappropriate to enter a cease and desist order as to this charge on this record." It is submitted that the *Sacks* case is perhaps a weaker case than the one at hand, since that complaint put the respondents on notice of misbranding which in fact was proved. In the instant case respondents were put on notice of mismarking which was in fact not proved.

21. Respondents from 1956 to 1960 for the purpose of inducing the purchase of their watch bands have on the front of the cardboard strips to which the watch bands are attached used the words "Guaranteed" and "Fully Guaranteed" with no words of limitation, condition or qualification in close conjunction therewith. (CX 12, 13, 20, and 32). In 1960 respondents placed the following legend on the back side of the cardboard strip: (CX 20 and 32)

THIS WATCH BAND IS GUARANTEED BY BRITE. It is the product of expert craftsmen, working with quality materials. Brite's faith in its performance is expressed by this guarantee * * * to repair or (at its option) replace for any manufacturing defect without charge, within thirty days of purchase.

In 1960 respondents placed the following legend on the bottom of one of its display cards: (CX 17)

This watch band is the product of expert craftsmen, working with fine materials. BRITE'S faith in its performance is expressed by this Guarantee to repair or replace for any mechanical defect, provided the band is returned with this Guarantee, plus 50¢ for postage and handling.

22. No evidence was adduced by complaint counsel that respondents have in the course and conduct of their business ever charge a single purchaser of their watch bands a service charge for the handling, service and repair of their bands or that respondents have ever en-

forced the 30 day guarantee period.² Accordingly, the hearing examiner specifically rejects any such finding.

23. Affirmative uncontradicted testimony in the record shows that respondents established prior to August 21, 1958 a policy and practice of no charge whatsoever in connection with their guarantee (Tr. 284); that the respondents do not presently charge a mailing fee or any other charge in connection with their guarantee; that they do not enforce the 30 day limitation of the guarantee, and that any watch bands which are returned are replaced without charge (Tr. 283).

24. Complaint counsel in his brief argues: (Brief, page 19)

In the matter of *Baldwin Bracelet Corp.*, Docket 8316, decided December 18, 1962, the Commission found that the words of condition and limitation appeared on the back of the individual watchband holders to which respondents' watchbands were attached while the guarantee representation "unconditionally guaranteed" and "fully guaranteed" appeared on the counter display cards or racks to which said watchbands were attached. The Commission in discussing this question stated:

*These limitations, although they do not appear on the display placards or racks, are set out on the reverse side of the cards to which the bracelets are attached. They are not visible to the prospective purchaser unless he removes the "carded" bracelet from the placard or rack and examines the back side of the card. [Undescoring Supplied.]*³

What complaint counsel overlooks and fails to quote is the sentence immediately preceding the quoted portion from the *Baldwin* case which reads:

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

No such finding can be made here and as pointed out above there is affirmative evidence in the record to support and a finding has been made that no such service charge or guarantee period is in fact imposed by respondents. Accordingly, there is no substantial evidence establishing that respondents' watch bands are not "Fully Guaranteed."

25. In the sale and distribution of "Brite" watch bands including those imported from Japan, and those containing substantial seg-

² Complaint counsel relies solely on the "Stipulation as to Facts and Agreement to Cease and Desist" executed August 21, 1958, but as set forth in Finding No. 13 *supra*, this stipulation without evidence of subsequent acts in violation thereof is not sufficient to sustain the allegations of the complaint.

³ The complaint alleges that the terms and conditions of respondents' guarantees are not disclosed in their "advertising matter." No advertising matter was placed in the record in support of this charge and consequently proof of statements on the back of display cards is at variance with the allegations of the complaint. However, in view of the failure of complaint counsel to prove that respondents' bands are not in fact fully guaranteed, this variance in the pleadings is not material.

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ments which have been imported from Japan, respondents have been in substantial competition in commerce with corporations, firms and individuals likewise engaged in the sale and distribution of expansion watch bands.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of and over the respondents and the subject matter of this proceeding.
2. The complaint herein states a cause of action and this proceeding is in the public interest.
3. The reliable, probative and substantial evidence in this record does not sustain the allegations of the complaint.

ORDER

Accordingly,

It is ordered, That the complaint in this matter be, and hereby is, dismissed.

OPINION OF THE COMMISSION

JUNE 18, 1964

By Reilly, *Commissioner*:

Respondents herein have been charged with violation of Section 5 of the Federal Trade Commission Act.

This case is before us on appeal from dismissal of the complaint by the hearing examiner at the close of the Commission's case-in-chief.

The case breaks down into a number of separate considerations including: the question of guarantee; the sufficiency of the complaint as far as failure to disclose is concerned; whether, assuming the complaint sufficiently charges failure to disclose as distinguished from mismarking, a prima facie case has been made out by complaint counsel, and finally whether, if complaint counsel has made a prima facie case, the matter should be finally disposed of at this juncture or whether it should be remanded to the hearing examiner for further proceedings.

The hearing examiner found that although respondents' display cards said "guaranteed" and "fully guaranteed" the cards on which the watch bands are mounted indicate that respondent will replace defective watch bands only if claim is made within 30 days of purchase and is accompanied by a 50¢ payment. The record contains no proof and the hearing examiner accordingly found that respondents have never insisted upon either the 30-day or 50¢ requirement. More than this, the hearing examiner found affirmative evidence that respondents honor the guarantee without qualification.

We concur in the hearing examiner's dismissal of the complaint to the extent it relates to a guarantee.

The hearing examiner found that the gravamen of the complaint set forth in paragraph three is that respondents *misrepresented* their products to be domestically manufactured through the device of marking them "Made in U.S.A." and by suggesting domestic manufacture through prominent indication of the location of the place of manufacture as being Providence, Rhode Island.

The hearing examiner found and the record supports the proposition that there is no evidence that respondents mark any of their products "Made in U.S.A." and, further, that the indication of the place of manufacture being Providence, Rhode Island, is entirely innocuous. The hearing examiner rejected complaint counsel's argument that a stipulation executed by respondents in 1958 contained admissions as to mismarking and can therefore be used to make up any deficiency in the proof in this regard. The hearing examiner took the position that the stipulation was an implied agreement by the Commission not to use it or introduce evidence of pre-stipulation violations in subsequent proceedings in the absence of some indication that there have been post-stipulation violations.

We reject the reasoning of the hearing examiner as obligating the Commission in this connection, particularly in light of the Commission's Rules adopted May 1957, which prevailed at the time of the stipulation and which provided at § 1.55:

Effect of stipulation: When an executed stipulation is approved by the Commission the matter is closed without prejudice to the right of the Commission to reopen if and when warranted by the facts. The agreement does not constitute an admission by the parties that they have engaged in any method, act or practice violative of the law *but it shall, if relevant to the issues, be admissible as evidence of the prior use of the acts or practices set forth therein in any later formal proceeding.* (Emphasis added.)

While we disagree with the hearing examiner that the Commission is bound to find post-stipulation violations before it can employ the stipulation or pre-stipulation evidence, nevertheless, we feel that where there is no suggestion of post-stipulation violation, the Commission, as a matter of policy, should not resurrect a stipulation such as that here involved. Thus, to the extent that complaint counsel relies on the stipulation to prove *mismarking*, we think that his argument should be rejected, since the record contains no hint that respondents, since 1958, have mismarked their products as being "Made in U.S.A."

Apart from the question of mismarking, the examiner explicitly rejected complaint counsel's argument that either the principal or a subsidiary charge was failure to disclose.

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The pertinent paragraph of the complaint, paragraph three, has elements of both mismarking and failure to disclose. We think a fair reading of the paragraph reveals that the references to domestic manufacture were intended to provide counterpoint to the central charge of failure to disclose. We think the nub and charging sentence of the complaint is "At no place on the cardboard strips or display cards, or on the watch bands assembled in the United States which contain the imported expansion segments, as aforesaid, is the country of origin of the said imported watch bands or the imported expansion segments disclosed."

Paragraph three then goes on to spell out the ultimate deception upon the public brought about by the failure to disclose "country of origin of said imported watch bands."

The correlative of failure to disclose foreign origin is the implied assertion of domestic origin and thus we find it entirely reasonable for a charging paragraph to contain elements of both. We consider failure to disclose the principal charge and mismarking a subsidiary make-weight. For this reason we are entirely out of sympathy with the rationale of the hearing examiner's Findings 14, 15 and 16.

Once it is established that the complaint charges failure to disclose, the question arises whether complaint counsel has made out a case. On appeal respondents argued that no *prima facie* case had been made because there had been no showing that *foreign made* products were in fact displayed on the cards and in the packages which respondents admit bore no disclosure as to foreign origin. Respondents admit that some of their products are made in Japan and that none of their display cards or packages bear a disclosure as to foreign origin. They deny, however, that complaint counsel has tied in watch bands proven to be of foreign origin with display cards and packages containing no disclosure. In short, respondents state that there is no proof that the watch bands in evidence, which are on display cards which admittedly do not disclose foreign origin, came from a foreign country. *Even though all of the watch bands in evidence are marked Japan*, respondents argue, correctly, we think, that this is not proof that they are of foreign origin.

We are satisfied from our examination of the record that complaint counsel has adduced the necessary elements of proof to support the complaint's charge of non-disclosure.

A large number of display cards, catalog sheets, watch bands, and invoices, as well as a considerable amount of testimony, are in the record, but it has been difficult to find all of these elements related to an identifiable watch band in the record which was sold in commerce and demonstrated to have been of foreign origin, and shown to have been

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displayed on a display card and in a package whereon foreign origin was not shown.

Respondents concede that there is no marking as to foreign origin on any of their catalog sheets, display cards or watch band packages.

There is in evidence a 1960 memorandum of an officer of respondents¹ wherein various then current assortments of respondents' watch bands are described and wherein it is indicated that they are wholly or partly of foreign origin.

The assortments described in the memorandum in question are depicted on catalog sheets included in the record.²

These catalog sheets also depict the display cards on which the watch bands are mounted and there is testimony that these pictures on the catalog sheets are reproductions of the display cards.³

There is in evidence a number of invoices showing the sale in commerce of assortments depicted in the catalog.⁴

Furthermore, assortment No. 166, identified as partly Japanese in the 1960 memorandum⁵ was hung on a display card depicted on a catalog sheet⁶ which display card is in evidence.⁷ The display card includes watch bands manufactured in part in Japan. Finally, there is in the record an invoice⁸ representing sale in commerce of assortment No. 166.

We think this adequately supports a charge of nondisclosure.

At the conclusion of complaint counsel's case in chief respondents' counsel stated "We have no evidence to present * * * the respondent rests * * *".⁹

Thereafter, the hearing examiner closed the record but indicated that respondents might have the record note that they wanted to file a motion to dismiss.¹⁰ Thereafter respondents filed their "Request to Hearing Examiner for Findings and Motion to Dismiss."

We think the record is sufficient for issuance of a decision and final order by the Commission, and we see no necessity for remanding the matter to the hearing examiner.

Respondents chose not to introduce evidence by way of defense either to a charge of mismarking or failure to disclose foreign origin. In so choosing, it cannot be said that respondents were misled into be-

¹ CX 22(a), (b) and (c).

² CX 5(a) to 5(w).

³ Tr. 237 to 240.

⁴ CX 5(a) to 5(w).

⁵ CX 22 (a) to (c).

⁶ CX 5(c).

⁷ CX 19.

⁸ CX 28.

⁹ Tr. 285.

¹⁰ Tr. 288.

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lieving that the charge to which they were required to answer was one of mismarking and that consequently they had had no opportunity to present a defense as to failure to disclose foreign origin. There is nothing in the record which would lead respondents to believe that mismarking was the gravamen of the complaint. Indeed the record indicates that respondents affirmatively believed that the charge was failure to disclose foreign origin. In their Motion for a More Definite Statement and Extension of Time, respondents in speaking of the complaint stated "The 'illegal' conduct detrimental to the public interest and asserted in broad terms is: (1) the failure to disclose the country of origin * * *".

Furthermore, it was not until issuance of the initial decision that respondents learned that the hearing examiner was of opinion that the gravamen of the complaint was mismarking rather than failure to disclose foreign origin.

The appeal of complaint counsel is granted in part and denied in part.

The Findings and Conclusions of the hearing examiner to the extent they conflict with this opinion are overruled. The hearing examiner's order is overruled. An appropriate order will be entered.

FINAL ORDER

JUNE 18, 1964

This matter having been heard by the Commission upon complaint counsel's appeal from the hearing examiner's initial decision and upon briefs and oral argument in support thereof and in opposition thereto and the Commission having rendered its decision granting in part and denying in part the appeal of complaint counsel.

It is ordered, That respondents Brite Manufacturing Co., a corporation, Brite Industries, Inc., a corporation, and B.M.C. Trading Corp., a corporation, and their officers, and Samuel Friedman and Theodore Levy, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of expansion watch bands, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing said products in packages or containers in such a manner that the name of the country or place of origin on the product is concealed without clearly disclosing the country or place of origin of the product in a conspicuous place on the package or container.

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2. Offering for sale, selling or distributing said products mounted or affixed to cards in such a manner as to conceal the name of the country or place of origin without disclosing on such cards the name of the country or place of origin.

It is further ordered, That the hearing examiner's initial decision to the extent it is in conflict with the accompanying opinion be, and it hereby is, modified, and as modified is adopted as the decision of the Commission.

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

ORDER MODIFYING ORDER TO CEASE AND DESIST

SEPTEMBER 25, 1964

Respondents having filed a motion pursuant to § 3.25 of the Commission's Rules of Practice for reconsideration of the final order entered by the Commission on June 18, 1964, and further requesting that the Commission furnish guide lines for compliance with its order and the Commission having determined that guide lines for compliance should not be provided in the present instance but should be more properly sought under § 3.26(b) of the Commission's Rules of Practice, and the Commission having determined that clarification of its order is in the public interest.

It is ordered, That the final order of the Commission entered June 18, 1964, is modified to read as follows:

It is ordered, That respondents Brite Manufacturing Co., a corporation, Brite Industries, Inc., a corporation, and B.M.C. Trading Corp., a corporation, and their officers, and Samuel Friedman and Theodore Levy, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of expansion watch bands, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Offering for sale, selling or distributing any such product packaged, or mounted in a container, or on a display card, without disclosing the country or place of foreign origin of the product, or substantial part thereof, on the front or face of such packaging, container, or display card, so positioned as to clearly have application to the product so packaged or mounted, and of such degree of permanency as to remain thereon until consummation of con-

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sumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

It is further ordered, That the hearing examiner's initial decision to the extent that it is in conflict with the Commission's opinion accompanying its order of June 18, 1964, be, and it hereby is, modified and as modified is adopted as the decision of the Commission.

It is further ordered, That respondents shall, within sixty (60) days