

a deceptive advertising practice. However, the complaint did not allege a violation of law on this ground, and to enter a cease and desist order against respondents based on this record would not be proper. Accordingly,

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

IN THE MATTER OF

DETRA WATCH CASE CORP. ET AL.

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

Docket 8597. Complaint, Sept. 24, 1963—Decision, Sept. 24, 1964

Order requiring Long Island City, N.Y., distributors of watch cases to watchmakers, assemblers of watches and wholesalers of watchmaker's supplies for resale, to cease selling watch cases made of base metal treated to simulate precious metal or stainless steel, or plated with gold or gold alloy of less than the minimum thickness approved by the Trade Practice Rules for the Watch Case Industry, without clearly disclosing on the exterior the true metal composition; and to cease selling imported watch cases—such as those from Hong Kong—without conspicuous disclosure of the country or place of foreign origin.

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 Detra Watch Case Corp., a corporation, and Arthur D. Natanson and William Levites, individually and as officers of said corporation, and Simon Kaplan, Arthur D. Natanson and William Levites copartners doing business as Conde Watch Case Company, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Detra Watch Case Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 42-34 27th Street, Long Island City, State of New York.

Respondents, Simon Kaplan, Arthur D. Natanson and William Levites are individuals and copartners trading as Conde Watch Case Company. Their principal office and place of business is the same as that of the Detra Watch Case Corp.

Respondents Arthur D. Natanson and William Levites are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

All of the aforesaid respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale and distribution of watch cases to watchmakers, assemblers of watches and wholesalers of watchmaker's supplies for resale 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 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. Certain of the watch cases offered for sale and sold by respondents consist of two parts, that is, a back and a bezel. The back part has the appearance of stainless steel and is marked "stainless steel back." The bezel is composed of metal other than stainless steel which has been treated or processed to simulate or have the appearance of precious metal or stainless steel. Some of the bezels are finished in a color which simulates silver or silver alloy or stainless steel. Some of the bezels are finished in a color simulating gold or gold alloy. Said watch cases are not marked to disclose that the bezels are composed of base metal or metal other than stainless steel.

The practice of respondents in offering for sale and selling watch cases which incorporate bezels composed of base metal which has been treated or processed to simulate or have the appearance of precious metal or stainless steel as aforesaid, without disclosing the true metal

composition of said bezels is misleading and deceptive and has a substantial tendency and capacity to lead members of the purchasing public to believe that the said bezels are composed of precious metal or stainless steel.

Respondents market some of their watch cases with bezels which have the appearance of being "rolled gold plate," "gold filled" or "solid gold" and respondents do not disclose that these bezels are composed of a stock of base metal to which has been electrolytically applied a flashing or coating of precious metal of a very thin and unsubstantial character. This practice is deceptive and confusing to the consuming public unless the thin and unsubstantial character of the flashing or coating is disclosed by an appropriate marking.

PAR. 5. Respondents import watch cases from Hong Kong and sell and distribute said watch cases without disclosing the country of origin of said watch cases except on the inside of the bezel which cannot be seen by prospective consumer purchasers after the watch movements have been assembled into the cases.

PAR. 6. The watch cases are used by watch movement importers to house and protect movements, many of such movements are imported from Switzerland. In such cases the dials are usually marked "Swiss." Therefore, in the absence of an adequate disclosure that the watch cases are of Hong Kong origin, the public believes and understands that they are of domestic or Swiss origin, a fact of which the Commission takes official notice.

As to such watch cases, a substantial portion of the purchasing public has a preference for domestic or Swiss products, of which fact the Commission also takes official notice. Respondents' failure clearly and conspicuously to disclose the country or place of origin of said watch cases is therefore, to the prejudice of the purchasing public.

PAR. 7. 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 watch cases of the same general kind and nature as that sold by respondents.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the capacity and tendency to mislead and deceive 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 said watch cases by reason of said erroneous and mistaken belief.

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

methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Harry E. Middleton, Jr., supporting the complaint.

Mr. Arthur D. Natanson, respondent in person, representing all respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

APRIL 1, 1964

The complaint herein was issued September 24, 1963. It alleges that the respondents violated Section 5 of the Federal Trade Commission Act by failing to mark properly the metallic content of bezels of watch cases, and by failing to mark (except on the inside) the foreign origin of watch cases.

By order filed September 24, 1963, Hearing Examiner Loren H. Laughlin was designated to take testimony, receive evidence, and perform other authorized duties herein.

Respondents interposed a rather responsive answer, although in somewhat informal style and prepared, not by an attorney, but by respondent Arthur D. Natanson. It is subscribed as follows:

CONDE WATCH COMPANY
S/ Arthur D. Natanson
Partner

DETRA WATCH CASE CORP.
S/ Arthur D. Natanson
President

If the answer is strictly construed as to parties appearing and answering there may be a default as to one or more individual respondents herein. However, since it is not drawn by an attorney and the obvious intent is that it constitute an answer in behalf of all respondents, the answer interposed will be so regarded.

Hearing herein was set for January 6, 1964, in New York City, by Hearing Examiner Laughlin, and subpoenae duces tecum were issued by him at the request of complaint counsel, returnable on the hearing date.

By order dated December 30, 1963, the undersigned hearing examiner was designated to act in his place and stead due to serious illness in his family.

Accordingly, the hearing herein was conducted by the undersigned examiner, commencing January 6, 1964 and concluding January 8, 1964. The only individual representing the respondents at the hearing,

or testifying for them as a witness, was respondent Arthur D. Natanson.

In this matter the respondents have admitted the practice of placing required markings on the inside of their watch cases, rather than the outside. This practice meant that the dealers would see the markings, but that ultimate consumers would not see them. The practice covered two types of operations.

First, watch cases having a base metal bezel processed or otherwise made to look like precious metal, would be marked as being base metal, *i.e.*, including bezel, but would be so marked only on the inside of the back. The examiner sustains herein the complaint counsel's proof as to the sale of such improperly marked watch cases. However, in doing so the examiner relies very largely on respondents' admissions as to the practice, on collateral exhibits, and the like, inasmuch as actual sale was supported in the evidence by only one watch case and there is at least some doubt as to whether it contains the same back with which it apparently was sold.

Secondly, other watch cases, having a Hong Kong origin, would be marked as having such an origin but only on the inside of the bezel. The pertinent facts are not in serious dispute, except for the official notice taken as to consumer understanding as to unmarked watch cases and, more particularly, consumer preference for non-Hong Kong cases. In rebuttal, or to disprove official notice, respondents offered only very meager evidence. Actually respondents' defense as to Hong Kong watch cases was highly argumentative, and the examiner holds herein that the charge has been fully proved.

The difficulty in this matter, however, is that complaint counsel struggled to go further, in connection with the first part thereof, by attempting to prove that watch cases marked even on the outside of the back, *i.e.*, as having bezels made of 10 karat rolled gold, instead had bezels merely simulating such gold by not having a minimum required thickness thereof. The examiner is constrained to hold herein that this proof failed, not on the issue of metal content—which complaint counsel supported by ample proof, some of it perhaps unnecessary—but on the issue of whether respondents had sold the one and only watch case analyzed, *i.e.*, sold it with the back containing the rolled gold marking, or with some other back. To be sure, this watch case was obtained at the same time and under the same circumstances as the other watch case, *i.e.*, the one marked only on the inside of the back as to metallic content of the bezel, in respect to which a finding is made herein supporting complaint counsel. But unlike the situation with the watch cases marked only on the inside as to metallic content, there is *no other evidence* tending to prove that watch cases were sold

by respondents marked on the outside as containing rolled gold bezels although actually not rolled gold, and, of course, there are no admissions, but only strenuous denials, by respondents that they engaged in any such practice.

Both watch cases as they purportedly appear in the exhibits herein were obtained, by the Commission attorney-investigator, not in respondents' original packages, containing quantities thereof, but from trays in the workroom of a dealer watchmaker whose workmen inserted movements. No one from the dealer watchmaker testified at the hearing. Moreover, the undisputed proof is that the back on one type of watch case fits on the other type, so that backs might have been switched, however inadvertently. Both watch cases were obtained by the then attorney-investigator as far back as March 1959, so that there is even the possibility of switching, however remote, after changing Commission personnel obtained custody thereof.

As already indicated, the examiner, in spite of the weakness of proof pertaining, not to one, but both the watch case exhibits proper, sustains the charge in the complaint as to watch cases improperly marked (on the inside) as to metallic content of bezels—but only by reason of other proof and respondents' own admissions as to sale of such watch cases. He cannot do so as to the charge in the complaint in respect to watch cases marked on the outside as containing rolled gold bezels—since there is no additional proof or admissions of respondents attesting to the sale of such watch cases.

Although the cease and desist order herein, in respect to disclosure of metallic content of parts, is based solely on the proof of watch cases containing base metal bezels marked as such only on the inside of the backs, it is sufficiently broadly drawn to cover mismarking of metallic content generally, so that the dismissal of the charge of mismarking watch cases as containing rolled gold bezels may in a large sense be academic.

The order, of course, is also directed against failure to mark country of foreign origin, based on the proof of watch cases marked only on the inside of the bezel as to country of foreign origin.

The facts in this matter, together with some analysis, are fully set forth as follows:

FINDINGS

I

Metallic Content. Detra

1. Respondent Detra Watch Case Corp., hereinafter referred to as Detra, 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 42-34 27th Street, Long Island City, State of New York.

2. Respondents Arthur D. Natanson and William Levites are officers of the corporate respondent. They formulate, direct and control the acts of the corporate respondent, including its acts as hereinafter set forth, in connection with the failure to mark properly the metallic content of bezels of watch cases. The address of each of these individual respondents is the same as that of the corporate respondent Detra.

3. Respondent Detra is, and for sometime past has been, engaged in the business of manufacturing ladies' watch cases in the United States, as well as selling and distributing these watch cases to watchmakers, assemblers of watches, and wholesalers of watchmakers' supplies, for resale to the public.

4. In the course and conduct of its business respondent Detra now causes, and for some time last past has caused, its said products, 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 maintains, and at all times mentioned herein has maintained a substantial course of trade in such products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. Said watch cases, as do watch cases generally, contain two parts pertinent here, a back and a bezel (front), each a substantial and main part of the watch case.

6. In the conduct of its business, at all times mentioned herein, respondent Detra has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of watch cases of the same general kind and nature as that sold by said respondent.

7. The only watch cases offered in evidence by complaint counsel as manufactured and *sold* by respondents, and mismarked or unmarked, as alleged in the complaint, are two such cases picked up by Mr. Wolter, then a Commission attorney-investigator, from a Chicago dealer and assembler, Clinton Watch Company, in March 1959. These are ladies' watch cases. One is a "white" watch case, marked 10 karat rolled gold bezel, on the outside of the back, but allegedly containing a bezel below minimum gold thickness for such a marking. The other is a "yellow" case, unmarked except marked base metal on the *inside* of the back, but containing a base metal bezel allegedly resembling gold. No watch case was offered in evidence supporting the allegation that respondents sold watch cases with bezels falsely simulating stainless steel but not properly marked to show actual base metal content.

8. One of these two watch cases is partly represented by CX 43, con-

taining a back, and, detached from it, about half of a bezel, and partly represented by CX 46, containing the rest of the bezel cut in two sections, remaining over, apparently, after metallurgical and assaying tests. Both the back and the bezel, as contained in CX 43, 46, are "white," or what might also be described as a silvery or white gold color. The back is plainly marked on the outside, with the following words:

10K RGP BEZEL

STAINLESS BACK

About the same wording appears on the inside of the back, plus DETRA WATCH CASE CO., referring to respondent Detra.

9. The other of the two watch cases is represented by CX 45, containing "intact," and attached together, both a back and a bezel in one exhibit. Both the back and bezel are "yellow" in color, or what might be described as yellow gold in color. The back is not marked, that is on the outside, but as already indicated, it is marked on the inside, *i.e.*, with the wording:

DETRA

BASE METAL

Complaint counsel contends that the marking on the inside of the back is no notification to ultimate consumers.

10. Complaint counsel proved convincingly by expert witnesses from a reputable firm, Lucius Pitkin Inc., which is in the business of making metallurgical and assay tests, that the bezel of CX 43, 46 is not composed of 10 karat rolled gold of the required minimum thickness of .0015 prescribed by the Trade Practice Rules for the Watch Case Industry (Rule 2, II(i), promulgated by the Commission in 1958, and by custom in the trade.

11. Respondents have strenuously raised the question, however, particularly as to CX 43, 46, the subject of most of complaint counsel's efforts herein, as to whether CX 43, 46 and CX 45 represent watch cases each in the form manufactured and sold by respondents, *i.e.*, whether the correct back is with the correct bezel as to each of the two watch cases represented by these exhibits. It was clearly demonstrated at the hearing that the back of CX 43, 46 may be fitted on to the back of CX 45 (Tr. 101:8-10*). Complaint counsel has not contested the interchangeability of backs of respondents' watch cases generally, and for some purpose has actually stressed this (Tr. 15).

*TR 101:8-10 means Transcript page 101, lines 8 to 10.

12. Accordingly, inasmuch as respondents have not been represented by counsel, the hearing examiner has diligently read and studied all of the transcript in order to ascertain precisely the actual facts recorded therein identifying CX 43, 46 and CX 45. A detailed summary and analysis appears toward the end of this decision under an identifying caption. It shows that complaint counsel's proof that the two watch cases were sold by Detra in the form indicated by the aforementioned exhibits, *i.e.*, with a particular back respectively belonging to each bezel, is clearly insufficient, certainly not without any further supporting or corroborating proof. In other words, the exhibits, certainly not by themselves, and the testimony as to how they were acquired, do not prove that such watch cases were manufactured and sold by respondents.

13. The two watch cases picked up from the dealer-watch company (by Mr. Wolter, the then Commission attorney-investigator), were not only outside of respondents' original boxes (Tr. 105:17-20), but they were already in the watch company's workroom in trays and racks (Tr. 105:9) for the purpose of being worked on by inserting watch movements and apparently were being worked on (Tr. 104:22-3), a process requiring adjustments and manipulations of the watch cases as well as insertion of the movements. No one testified for the watch company, so there is no evidence of what happened between the date the watch cases were purchased from the respondent, apparently February 18, 1959 (CX 14, 23), and the date they were acquired, March 3, 1959, or of any precautionary measures taken by the watch company to prevent interchange of backs.

Secondly, somewhat less important perhaps, although the then Commission attorney-investigator, Mr. Wolter, did testify, he identified the exhibits in large part only by tag marks (apart from his signature of acquisition), and definitely did not identify them, so far as anything directly shown in the record, by personal knowledge or recollection, such as color of the bezel and back or other detailed specifications actually recalled by him.

14. Apart from this, and perhaps less important, although not without bearing, is the consideration, thirdly, that the New York attorney-investigator who first handled the matter in New York, where it arises, never testified, *i.e.*, on the issue whether, even assuming that the watch cases sold by Detra to the dealer remained intact in the watch company's hands, the backs of the two watch cases were inadvertently switched by Commission personnel after receipt of the cases from the watch company.

No Other Pertinent Proof as to Case or Cases Marked Rolled Gold

15. As to CX 43, 46, which, as already stated, involved most of complaint counsel's proof and argument, there is no other proof which demonstrates the sale, or manufacture, of a watch case marked as having a 10 karat rolled gold bezel where the bezel was not actually such. There is no proof of lack of sufficient gold content of any bezel save that embraced in CX 43, 46, the only bezel analyzed and assayed—*i.e.*, even of watch cases manufactured but not yet sold by Detra. CX 22 and 26 are both watch cases marked, on the outside, 10 karat rolled gold bezel and both were picked up at the Detra premises, but the gold content of the bezels was never subjected to analysis and study or assay. Complaint counsel's reliance on CX 17 and 19, both of them bezels, and on various other bezel exhibits, is completely misplaced since bezels by themselves prove nothing as to mismarking; the complaint alleges that watch *cases* were mismarked or inadequately marked, and there is no requirement that the bezel itself, a part of the watch case, must be marked in order to protect consumers.

16. As to CX 43, 46, furthermore, other factors militate against complaint counsel's proof.

(a) Detra in the period concerned did, indeed, on complaint counsel's own proof, purchase (CX 29, 30 and 35, of 14 invoices in all) gold stock of at least requisite minimum quality, .002 inches in thickness (Tr. 69:3), for acceptable rolled gold plating to come out to a thickness of .0015. Detra manufactures two kinds of watch cases (Natanson, Tr. 208). Some of its watch cases, at least a dominant portion (Tr. 230:10), contain base metal bezels, touched up, perhaps, with sub-quality gold (10/20) or otherwise treated to simulate precious metal; CX 45 represents at least a possible example. Other of its watch cases, Mr. Natanson testified, have bezels containing 10 karat rolled gold marked as such on the outside of the back, as appears on the back contained in CX 43, which back would be truthfully marked alined to a proper gold plated bezel.

(b) Respondent Natanson testified to a surveillance policy of Detra as to adequate thickness of rolled gold bezels manufactured by it, including check-ups with a testing company. Although this is self-serving testimony, it was partially corroborated by a letter he produced from the testing company as to one such test (Tr. 209:10).

(c) The extra cost in gold of 10 karat gold plating is only 24 to 28 cents a bezel, as brought out by questions propounded by Mr. Natanson (Tr. 142:13-17), thus minimizing the incentive for faslely and deliberately marking watch cases as containing gold plated bezels when they do not contain such gold plating, *i.e.*, of requisite thickness.

(d) CX 43, 46 purports to represent a watch case obtained relatively a long time ago, 1959. Mr. Natanson testified that, after August 1959, when he received a statement of the charges, he heard nothing from the Commission until 1963, apparently in connection with consent order procedure (Tr. 208: 20; 209: 2). To find violation on the basis of a single watch case manufactured by a company producing, perhaps, 350,000 units a year of the type (Tr. 75; 2) and doing a gross of perhaps \$240,000 a year (Tr. 21: 21; for 1963), when the authenticity of the watch case offered in evidence is in doubt and the respondent because of lapse of years is at a serious disadvantage in trying to disprove authenticity, would seem not only to be contrary to the law of evidence but to ordinary standards of fairness.

Other Proof as to Cases With Base Metal Bezels and Backs Marked on Inside Only

17. There is, however, other proof, and admissions, in respect to the watch case or kind of watch case purportedly comprehended by RX 45, *i.e.*, a case not marked that the base metal bezel is base metal, except on the inside of the back. There is, to begin with, proof of precisely such watch cases manufactured by Detra for distribution and sale, but, at the time they were picked up by the Commission investigator at Detra's premises, not yet sold by Detra. CX 24 and CX 25 are two such watch cases picked up in January 1959 by a Commission investigator (not Mr. Wolter). CX 25 has a "yellow" bezel exactly like CX 45 and appears to be identical to CX 45. CX 24 has a "white" bezel but otherwise appears to be identical to CX 45, that is, in size, form and design. Whether or not these two exhibits are identical to CX 45, they definitely prove on the evidence in this case that Detra had a practice of marking only on the inside of the backs as to metal content of a base metal bezel having the appearance of precious metal, whereas to notify consumers the marking should have been on the outside. Incidentally, this is not unlike respondents' admitted practice of marking foreign origin only on the inside of the bezel, a practice covered by the second part of this decision.

18. The relevancy and authenticity of CX 24 and 25, for the purpose of proving sale as well as manufacture, are assured. Mr. Natanson freely admitted at the hearing that CX 24 is one of Detra's watch cases (Tr. 37: 15), that it is base metal (including, of course, the bezel), as marked on the inside of the back, and that it is a good sample of its style (Tr. 37: 20). In addition, Mr. Natanson admitted that CX 25 also is one of Detra's watch cases (Tr. 38: 16), and that this case, includ-

ing the bezel, is base metal as marked on the inside of the back (Tr. 38: 18). Mr. Natanson never contested—in the pleadings, in his arguments at the hearing, in his testimony, or in his written submission after the hearing—what would obviously and presumably be the fact, namely, that Detra sold watch cases of these styles in its regular course of business. That he did not contest this is perhaps explicitly, if not completely, indicated by the following colloquy at the hearing (Tr. 38):

HEARING EXAMINER KAUFMAN: I assume again that all of these watch cases or bezels received in evidence are the kind of watch cases or bezels that the respondent sold or manufactured or both, in its business, respondent sold or manufactured during the times alleged in the complaint?

THE WITNESS: Yes, sir.

19. Complaint counsel's evidence, heretofore found defective, as to the actual sale of CX 43, 46 and 45—even if it does not prove the sale of these exhibits, each with the back and bezel respectively together as shown by the exhibits—does at least prove that Detra sold some watch case, whether CX 43, 46, CX 45, or some other, with the back contained in CX 45 *i.e.*, a back marked on the inside, not the outside, as to base metal content of the watch case including the bezel, and, it must be assumed, with a bezel actually composed of base metal, *i.e.*, exactly like CX 24 and CX 25, if not CX 45 itself.

20. The hearing examiner has closely examined the bezel of CX 45, the bezel of primary concern on this point, and finds that by its bright yellow or gold color it simulates gold or gold alloy, at least to the uninitiated or unsophisticated. He has also closely examined the bezel of CX 25, which, as already stated, seems to be identical to CX 45, and finds the same. His examination of CX 24 results in a similar finding, although the "white" bezel of this exhibit simulates white gold or other precious metal, not yellow gold as with CX 25 or CX 45.

Incidentally, CX 17 and 19, cited by complaint counsel in his submission as evidence of lack of proper marking, proves nothing of the kind since these exhibits are merely bezels, and bezels need not themselves be marked, as distinguished from complete watch cases, which may normally and properly bear the marking on the outside of the backs.

However, as properly brought out by complaint counsel, these two exhibits, CX 17 and 19, together with CX 25, may be used to prove, or help prove, in the light of Mr. Natanson's admissions in his testimony, that a "yellow" base metal bezel may and here do have the same appearance as a gold bezel. All three exhibits are yellow in color, and Mr. Natanson identified them as 10/20 gold (substandard gold, essentially

base metal), 10 karat gold electroplate, and yellow color base metal. Mr. Natanson further testified, moreover, that he could not tell merely by looking at them whether they, or any of them, were rolled gold plate or base metal (Tr. 23, 24, 28). Actually these admissions of Mr. Natanson would also extend to "white" base metal bezels as having the same appearance as gold or other precious metal.

* * * * *

21. Accordingly, the examiner finds and holds that complaint counsel's proof of sale by Detra, insofar as it pertains to CX 45, when said proof is considered together with CX 24 and 25, and with Mr. Natanson's admissions, implied as well as direct, is proof that Detra offered for sale and sold in commerce, as alleged in the complaint, improperly marked watch cases, *i.e.*, containing base metal bezels having the appearance of precious metal, but not being marked as containing base metal bezels except inside the backs, where consumers cannot see the marking. Considering the whole record, it is the examiner's view that the finding is supported by "reliable, probative and substantial evidence," within the meaning of § 3.21(b) of the Rules of the Commission, and it is the examiner's opinion that the evidence, including the admissions, is particularly reliable and persuasive whether or not it meets the standards of common law rules of evidence.

22. The practice of respondent Detra in so offering for sale and selling watch cases which incorporate bezels composed of base metal having the appearance of gold or other precious metal—due to treatment, processing, or other causes—without disclosing the true metal composition of the bezels, *i.e.*, by marking the same only on the inside of the backs, is misleading to ultimate consumers, inasmuch as the watch cases as sold to dealers and distributors are *instrumentalities of deception* which will readily be perpetrated on consumers. Said practice, it is hereby found, has a substantial tendency to lead members of the purchasing public to believe that such bezels are composed of gold or other precious metal.

23. A case supporting the finding of violation herein is *In the Matter of Theodore Kagen Corp.*, D. 6893, 56 F.T.C. Decisions 514 (1959), *affd.* 283 F. 2d 371 (CA DC, 1960), *cert. denied*, 365 U.S. 843. This case was cited by the Commission *In the Matter of Benrus Watch Co., Inc.*, D. 7352, September 3, 1963 [64 F.T.C. 1018]. The *Kagen* case concerns bezels of base metal which might be mistaken for precious metal, in the absence of disclosure, as does the present matter. The Commission's decision treats the bezel there as a major component of the watch case (p. 519). The bezels had a yellow color, as in the present

matter. Witnesses were called to establish that the appearance was that of precious metal, which is similar to the situation brought about by the admissions and testimony of Mr. Natanson in the present matter that he could not distinguish between gold and base metal bezels by looking at them. Moreover, the Commission in its decision (p. 520) showed that it relied on its own examination of the bezels as well, if not primarily, as does the hearing examiner in the present matter, the decision stating:

Our own examination of these exhibits confirms that many of respondents' watch cases are to all appearances composed of precious metal.

The Commission also held, as the examiner does here, that the bezels were instrumentalities of deception (p. 521). The Court of Appeals affirmed an order to cease and desist requiring that watch cases composed in whole or in part of base metal treated to simulate precious metal should contain a clear disclosure thereon of the true metal composition of the treated cases or parts. Another base metal watch case is *Matter of Hilton Watch and Clock Co., Inc.*, D. 8402, September 25, 1962, [61 F.T.C. 742], in which the Commission adopted the initial decision of the hearing examiner therein containing a similar order.

II

Foreign Origin. Conde

24. Respondents Arthur D. Natanson, William Levites and Simon Kaplan are the individuals trading as Conde Watch Case Company, a copartnership, hereinafter called Conde. The principal office and place of business of Conde and of said respondent individuals is the same as that of respondent Detra. Said individual respondents direct and control the acts and practices of Conde in connection with the failure to mark watch cases, except on the inside of the bezels, as to the foreign origin of cases as will hereinafter be set forth in detail.

25. Said individual respondents, as copartners of said Conde, import men's watch cases from Hong Kong and sell and distribute said watch cases without disclosing country of origin of the same except by markings on the inside of the bezel. Said markings cannot be seen by prospective consumer-purchasers after the watch movements have been assembled into the cases. The watch cases are sold and distributed by them to watchmakers, assemblers of watches and wholesalers of watchmakers' supplies for resale to the public.

26. Said individual respondents, as copartners of Conde, in the course of their business, now cause, and for some time 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 maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

27. In the conduct of their business, at all times mentioned herein, said individual respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of watch cases of the same general kind and nature as that sold by them.

28. These watch cases are used by watch movement importers and other distributors to house and protect movements. Many of such movements are imported from Switzerland, and the dials are usually marked "Swiss."

In the absence of an adequate disclosure that the watch cases are of Hong Kong origin, the public believes and understands that they are of domestic or Swiss origin, a fact of which *official notice* is taken. (Authority for taking official notice is noted below under an appropriate caption.)

29. As to such watch cases, a substantial portion of the purchasing public has a preference for domestic or Swiss products, of which fact *official notice* is also taken.

30. Said respondents, copartners of Conde, by marking the watch cases only on the inside of the bezels as to Hong Kong origin, make the watch cases *instrumentalities of deception* in the hands of dealers and other distributors, to wit, on ultimate consumers, who will not see the markings. Accordingly, the failure of said respondents clearly and conspicuously to disclose the country of origin, *i.e.*, by making disclosure only on the inside, is to the prejudice of the purchasing public.

31. There is no dispute by said respondents of the fact that Conde imported and sold the watch cases originating in Hong Kong but so marked only on the inside of the bezel. As with CX 45, and other Detra exhibits marked only on the inside of the back (as to metallic content of the bezel), Mr. Natanson freely admitted and never questioned the practice of marking Hong Kong origin only on the inside of the bezel. There was no occasion for him to raise a point about possible mismating of backs and bezels of Conde watch cases, as he did with Detra watch cases, inasmuch as the marking of foreign origin was on the inside of the bezel part of the cases, and he expressly admitted that the backs of Conde watch cases were not marked (outside or inside) to show Hong Kong origin (Tr. 15:20-23). The pertinent Conde exhibits are CX 2, 3, 4 and 5, and Mr. Natanson

clearly affirmed that each represented "either a watch case or bezel which were imported and/or sold by respondents as alleged in the complaint" (Tr. 13:13-20). He also related these exhibits to CX 1, the invoices, or digests thereof, attesting to the sale by Conde of items noted (Tr. 13:9).

32. One of the defenses of these respondents is that the Conde watch cases have been marked as to foreign origin in accordance with the rules of the Bureau of Customs. Mr. Natanson testified that "We have at all times marked these cases legibly and distinctly with the country of origin in compliance with the rules of the Bureau of Customs" (Tr. 210:8). Assuming that the watch cases are so marked, this does not exonerate said respondents, or Conde. The Commission is not necessarily bound by Bureau of Customs' rulings. Moreover, the watch cases may well have been properly marked, on the inside, for import purposes and notice to importers, but not for ultimate sale to consumers as part of a full watch, as to which the unmarked watch cases come within the instrumentality of deception doctrine enunciated by the Commission and affirmed by the courts. (Adjudicated cases are noted below under an appropriate caption.)

33. Respondents also contend that they mark the packages containing the watch cases "with Hong Kong" (Tr. 210:12). This marking on the packages, also, would not be seen by ultimate consumers, who, of course, do not receive these packages sent by Conde to its distributors.

34. Respondents more emphatically contend that a watch case is not a substantial part of the ultimate watch or that the case is not sufficiently completed when imported, and that much domestic labor remains to be performed on an imported watch case (Tr. 210:17). Mr. Natanson testified that a watch case sold for 60¢ requires a 10¢ crown and labor of 10¢ to 25¢. Moreover, of course, the watch case is never sold at retail (Tr. 215:5). In his written submission, after hearing, Mr. Natanson refers to the cost of plating the bezel and assembling the movements of the case.

However, the examiner rejects the contention that a watch case, or its bezel, is not a substantial part of a watch or that it loses its identity when it is made into a watch. (Adjudicated cases are noted below under an appropriate caption.)

35. Mr. Natanson also argued at the hearing that the Commission is prejudiced against Hong Kong (Tr. 215:22). In his written submission he states that there is no comparable enforcement as against products made in Japan, Germany, Great Britain and France. He also talks about the "problem which would result if this ruling were

enforced in regard to watch movements assembled in the U.S. Virgin Isles," into which, he says, watch parts are brought from various countries and then the complete watches brought into the United States proper without any required marking. However, at the hearing, after giving some testimony in this connection, he declared: "I will withdraw the reference to other importers from this testimony" (Tr. 217: 9). The examiner holds that even if this point of alleged Commission prejudice against Hong Kong were validly presented and supported herein, it poses an issue not within the jurisdiction of the examiner and one apparently relating to the administrative discretion of the Commission proper.

36. Mr. Natanson also stressed at the hearing that it is a general trade practice to mark foreign origin only on the inside of the watch case, rather than the outside (Tr. 216: 9). The examiner, as indicated at the hearing, holds that a general practice in the trade does not, certainly not of itself, excuse deception of consumers.

37. Mr. Natanson also argues in his submission that outside markings of country of origin on watch cases might confuse consumers into believing that the movements come from the same origin revealed by the marking, whether Hong Kong or even Switzerland (if the watch case should, for some possibly devious reason, be imported from Switzerland). This poses a question of compliance. Unusual problems can be worked out with the Division of Compliance. (Moreover, the order below provides an alternative marking of foreign origin by labels or tags which may be removed by consumers.)

38. Finally, Mr. Natanson argues that the consuming public is "brand name" conscious, and that it relies on a guarantee, rather than country of origin of, say, a watch case. He further argues that a watch case produced in Hong Kong is generally recognized as reliable. These arguments are directed against the official notice taken herein. They are not supported by any substantial evidence, none except Mr. Natanson's brief self-serving testimony. Moreover, the consumer is entitled to get a watch with a case which does not come from Hong Kong if that is his desire, even if a Hong Kong watch case is reliable.

Collaboration of All Respondents

39. In respect to the acts and practices as alleged in the complaint, both as to Detra watch cases and metal content of bezels, as well as to Conde watch cases and foreign origin, the complaint alleges as follows in the last paragraph of One:

All of the aforesaid respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

The answer "acknowledges as true" all of One, as well as certain other paragraphs of the complaint. This admission is, of course, on its face conclusive as to the liability of *all* respondents herein for failure to mark, as found, on the outside of watch cases both as to metallic content of Detra bezels and foreign origin of Conde watch cases.

It is true that the answer is not drawn by an attorney, but the admission as to collective action embracing both businesses is altogether consistent with the actual proof and circumstances proved in this matter.

Both Detra and Conde have offices at the same place, and the same individuals, respondents Natanson and Levites, are the officers of of Detra and copartners of Conde. And, of course, both businesses engaged in the same general kind of violation, failure to mark watch cases on the outside, rather than the inside.

It is true that respondent Kaplan is not named herein as an officer of Detra, but only individually as a copartner of Conde, but in view of the admission in the answer, and the general factual proof, the examiner feels justified in holding him liable individually for the violations of Detra as well.

Incidentally, apart from the admission in the answer, the examiner has no difficulty in holding respondents Natanson and Levites liable individually, as well as in their capacity as officers of Detra. They are individually liable as copartner of Conde entirely as a matter of law.

40. The practice of all respondents named herein in offering for sale and selling Conde watch cases of Hong Kong origin disclosure of which is marked only on the inside of the bezels, as well as their practice of offering for sale and selling Detra watch cases with base metal bezels having the appearance of precious metal but disclosed as base metal only on the inside of the backs (see Finding 22), are practices which are misleading to ultimate consumers, inasmuch as, among other things, the watch cases as sold to dealers and distributors are *instruments of deception* readily perpetrated on consumers. Said practices, it is hereby found, have a substantial tendency to lead members of the purchasing public to believe that such Conde watch cases are of American (or Swiss) origin, and that such Detra watch cases contain bezels composed of gold or other precious metal.

LAW

On the Detra aspect of this matter, relating to disclosure of metallic content, the examiner has already referred to *In the Matter of Theodore Kagen Corp.*, 56 F.T.C. Decisions 514 (1959), *aff'd.* 283 F. 2d 371

Initial Decision

66 F.T.C.

(CADC 1960), *cert. denied*, and two other cases. (See paragraph 23 of the Findings). The present discussion will be confined to the Conde aspect of this matter relating to the disclosure of foreign origin.

Official Notice

Official notice may properly be taken in respect to articles unmarked, or improperly marked, as to country of origin. Such notice may relate to consumer understanding, to wit, that such articles are, for instance, American-made, and may also relate to consumer preference, to wit, that American-made articles are preferred by consumers. The Commission policy on this was expounded in *Manco Watch Strap Co., Inc.*, D. 7785 (March 13, 1962) [60 F.T.C. 495], a foreign origin matter dealing with watchbands from Japan and Hong Kong. Such official notice, when taken, is based on innumerable other cases adjudicated by the Commission involving the same or closely analagous issues. Official notice results in presumptions of fact, which are rebuttable, *i.e.*, are subject to "opportunity to disprove"—as expressly provided for by § 3.14(d) of the Commission's Rules.

In the present matter the official notice taken includes an alternative referring to Swiss origin, as well as American origin, in respect to consumer understanding and preference in reference to Hong Kong watch cases, or parts thereof, not disclosed as to origin.

This alternative arises from the fact that many of respondents' watch cases will ultimately have Swiss movements placed in them and the marking "Swiss" usually be on the dial.

So far as concerns consumer *understanding* this means merely that normal consumer understanding that a product, or a substantial part thereof, is American-made may readily give way because of the "Swiss" marking on the dial, which may easily be understood as referring to the entire watch including watch case.

As far as concerns normal consumer *preference* this alternative means merely that normal consumer preference that a product, or a substantial part thereof, be American-made, may give way in the instance of a watch, including watch case, supposedly Swiss-made. This is because it is common knowledge that Swiss-made watches are regarded by American consumers as good watches and often preferred to American watches. The opinion in *Manco Watch* expressly recognizes that there are instances of American consumer preference for foreign products.

As stated in *Manco Watch* [60 F.T.C. 495, 514],

* * * we have frequently acted on the premise, again drawn from experience and observation, that some imported products are far more highly prized by the vast majority of Americans than their counterparts made in the United States.

Examples are given of cigars, perfume and caviar. Other examples referred to in a footnote are "English" soap, "English" bath salts, "French" porcelain products, and other products.

Accordingly, there is full justification for the official notice taken here, referring to Swiss origin or American origin, both in respect to consumer understanding as to the Swiss or American origin of the watch cases, as well as consumer preference for Swiss or American watch cases.

Respondents herein were duly advised of the proposed taking of official notice by the allegations of official notice contained in the complaint and the announcement by the examiner of the taking of official notice at the commencement of the hearing (Tr. 5). Although they had full opportunity to disprove the officially noticed facts, such opportunity being provided for by the Rules, they offered nothing in this connection, as already pointed out, except some meager testimony of respondent Natanson.

Watch Case Retains Identity

The answer to respondents' argument at the hearing that a watch case is not a substantial component of a finished watch, and that it loses its identity in the finished watch, is no better expressed than in the Commission opinion *In the Matter of Delaware Watch Co., Inc.*, D. 8411, June 11, 1963 [63 F.T.C. 491], where it is said, on page 524:

While the case becomes a component of the assembled watch, it is a principal and observable component. Its appearance and quality are factors of prime importance in the salability of the watch. The watch case does not lose its identity in the manufacture of the watch, but retains its essential characteristics, as a foreign made product.

In that case, incidentally, it was found that the facts supported a finding of preference for American-made watch cases over Hong Kong watch cases. *In the Matter of Savoy Watch Co., Inc.*, D. 8080, June 19, 1963 [63 F.T.C. 473], it was similarly held that the watch case is a substantial and important part of a completed watch, that it has important functions of its own, which continue after the watch is fully assembled, including protection of the movement and appearance, that it is identifiable and does not lose its identity after becoming part of a full watch. That case also refers to *L. Heller & Sons, Inc. v. F.T.C.*, 191 F.2d 954, 956 (7th Cir. 1951).

Bureau of Customs Approval Not Controlling

Respondents argue that marking foreign origin on the inside of the bezels is a sufficient marking since approved by the Bureau of Customs.

Assuming that such approval has been proved herein, the argument must be rejected for two reasons:

First, even assuming that Bureau of Customs approval is binding on this Commission as far as the approval goes, the approval only goes so far as concerns the ultimate purchaser of the watch case, not the ultimate purchaser of the completed watch containing the watch case (and hiding the marking from the ultimate purchaser of the watch). The Bureau of Customs approval is thus beyond the domain of the Commission's instrumentality of deception doctrine under which the importer, properly notified of the foreign origin by the inside marking, nevertheless may use such "marked" watch case as an *instrumentality of deception* on the ultimate purchaser of the completed watch, for whom the inside marking is not visible due to insertion of the movement.

Second, assuming further that the approval of the Bureau of Customs does go far enough, and in effect holds that notice on the inside of the bezel is notice to the ultimate purchaser of the watch, an approval by the Bureau of Customs is not strictly binding on the Commission in any absolute sense—however much weight the Commission may give it as a matter of quasi-comity or good administrative procedure.

These two reasons will be dealt with in order:

First, the Tariff Act, 19 U.S.C. § 1304(a), pursuant to which the Bureau of Customs has its power of approval, provides merely that every article of foreign origin * * * imported into the United States shall be marked in a conspicuous place * * * in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. * * *

It seems obvious from this wording that the statute is seeking to protect the ultimate purchaser of the article, here the importer or purchaser of the watch case, not the ultimate purchaser of some other article, like a potential watch of which the article may become a part. The statute is thus much narrower in scope than the Federal Trade Commission Act, the purpose, or dominant purpose, of which is to protect not only importers and their purchasers of the same articles, but all purchasers, particularly truly ultimate purchasers of completed articles, protected, often, only by the instrumentality of deception theory evolved in enforcement of the Federal Trade Commission Act.

In *Heller & Son, Inc. v. F.T.C.*, 191 F. 2d 954 (CA 7, 1951), *supra*, the argument was expressly made that by enacting the marking provision of § 1304 of the Tariff Act Congress "withdrew regulatory juris-

diction over this subject from the Commission" (p. 956). The opinion, however, in upholding the Commission's cease and desist order in that case, states that an examination of the Tariff Act:

discloses no language expressing an intention on the part of Congress to repeal § 5 of the Federal Trade Commission Act, or to diminish the authority or the power of the Commission to prevent deceptive trade practices * * *.

The opinion also states that Congress in enacting § 1304

was concerned solely with the extent to which the Treasury Department, incidental to its collection of customs duties, should regulate the labeling of imported goods.

It thus would hardly seem that the "ultimate purchaser" referred to in § 1304(a) reaches out to the ultimate purchaser of a domestic watch containing an imported watch case. *Heller* is quoted with approval by the Commission *In the Matter of Baldwin Bracelet Corp.*, D. 8316, October 2, 1962 (*aff'd.* D.C.C.A., December 9, 1963 [61 F.T.C. 1345]), also favorably referring to *Heller*).

Second, even assuming that § 1304 of the Tariff Act and the assumed approval thereunder of the Bureau of Customs herein do go far enough, so that the Bureau lawfully approved the marking of foreign origin inside the bezel as sufficient notice to ultimate consumers of the eventual watch, it seems clear that this Commission is not absolutely bound by the Bureau approval, although it may be given due weight. This is brought out by *In the Matter of Standard Sewing Equipment Corporation*, 51 F.T.C. 1012 (1955). In that case the Bureau of Customs had approved the foreign origin marking in question. The Commission held that it was not legally bound by the approval by the Bureau. The Commission opinion, to be sure, was signed by only two members, the third concurring member stating that interagency differences as to markings put an undue hardship on business. All the Commissioners agreed that the Bureau of Customs approval is entitled to due weight and consideration by the Commission, and apparently all agreed that the Commission as a matter of strict law is not absolutely bound by Bureau approval. That matter, incidentally, was more controversial than the present one since the imported article was the entire machine head and there was no question of hiding the mark by the entire sewing machine.

DIGEST OF PROOF RE SALE

In the first part of this decision it has been held by the examiner that there is a defect in the proof that CX 43, 46 or 45 was sold by respondent Detra with the back as shown in the exhibits—although it is

also held that the proof as to CX 45, or watch cases like it, is saved by other exhibits and the admissions of Mr. Natanson, showing, among other things, that it was Detra practice to mark only the inside of the backs of its watch cases to show metallic content of the bezels. The proof thereon, particularly as to CX 43, 45, is digested here in detail, in support of the examiner's Findings thereon, *supra*. The saving proof and admissions as to CX 45, or watch cases like it, are not gone into again here, being covered in full detail in paragraphs 17, 18, and 19 of the Findings.

First, and most important, it is clear from the testimony that the two watch cases concerned were not taken from the original package or packaging of Detra. Quite the contrary, they were taken from the watch company's workroom after being laid out on trays contained on racks, for processing and for insertion of watch movements. Accordingly, there was ample opportunity for inadvertent interchange of the backs, it being conclusively demonstrated that backs are interchangeable.

In 1959 Mr. Wolter, complaint counsel's witness, was working in the Chicago office of the Commission as an attorney-investigator. He received instructions from the New York office, Detra being located in New York, to make an investigation at the Clinton Watch Company in Chicago. The investigation was in regard to Detra watch cases. Mr. Wolter spoke to Mr. Wein at the Clinton Watch Company premises (Tr. 91) on March 3, 1959. He had previously seen Mr. Wein concerning other cases (Tr. 104: 17). In speaking to Mr. Wein, he "asked for at least one sample of rolled gold plate and one that would be other than that" (Tr. 92-3). Mr. Wein took Mr. Wolter into his workroom where he had trays of cases (Tr. 104). Mr. Wein then "selected one of each of these from trays that supposedly had identical cases in them, because what they were doing there was assembling the watches, placing the movements in the cases. Therefore each tray had a large number of the same type of cases in it, and I would assume that if there was an error in the placement of the backs, then all in the tray would have been exchanged with whatever other tray there might have been" (Tr. 104-5). The two watch cases received by Mr. Wolter were not in the manufacturer's, that is Detra's, boxes as delivered to Mr. Wein, but in the trays (Tr. 105: 17-20). Mr. Wolter described what Mr. Wein did as follows: "He merely selected one at random from each tray and I asked him to present me with corresponding invoices * * * That's what he did." (Tr. 105-6).

Secondly, not only did Mr. Wein not testify that the two watch cases had the same backs as they had when he received them from

respondents, or that precautions were such that no exchange of backs could take place, but Mr. Wolter did not identify them, so far as the record discloses, on truly personal knowledge (not even, for instance, by identifying and collating the colors of the bezels and backs), but simply by referring to the identifying tags. This was at a hearing four years after he obtained the watch cases. These tags, to be sure, contained on the front his signature, the date, and Mr. Wein's name. However, it is on the reverse side that each watch case is referred to by style number and invoice number, and the handwriting thereon was not identified by Mr. Wolter in connecting them with the invoices in evidence, which in any event relate to a fairly large number of watch cases, not any particular one.

The facts as to CX 43, 46, relating to the watch case marked rolled gold, are in more detail as follows:

Mr. Wolter took the one watch case which he testified (Tr. 93: 10) was rolled gold plate and he attached to it a tag marked Wein, Ex. B, 3-3-59, Arthur Wolter (Tr. 93: 6). Through this tag he testified that he identified CX 43 at the hearing, containing, at least presumably, the back, crystal, and part of the bezel of the watch case, the other part being later used for the metallurgical examination and assay, and found in two sections in CX 46. CX 43 discloses a "white" watch case, and the back, on the outside, states that the bezel is 10 karat rolled gold.

Mr. Wolter also received from Mr. Wein CX 23, an authenticated copy of an invoice from Detra to Clinton Watch, dated February 28, 1959 for 100 #2522 rolled gold plate watch cases @ 87¢ each as covering, by inclusion, the particular watch case CX 43, 46 (Tr. 93). He paid Mr. Wein for the watch case, as evidenced by the receipt marked "1 Detra #2522 case—\$.87." As already stated, the style number 2522 appears in pencil on the back of the tag signed by Mr. Wolter, but the handwriting was not identified in his testimony.

Similarly, Mr. Wolter did not identify on true personal knowledge the other watch case, CX 45, as to which details will now be stated:

Mr. Wolter at the time he obtained the one watch case also received from Mr. Wein the other watch case. He affixed to the other watch case a tag marked Wein, Ex. A, 3-3-59, Arthur Wolter, Jr. (Tr. 95: 10). He testified at the hearing that through this tag he identified CX 45 (which is a "yellow" watch case) with no marking on the outside, but with a marking on the inside of the back reading Detra Base Metal.

Mr. Wolter related (Tr. 96: 8, 13) CX 45 to CX 14, an invoice from Detra to Clinton Watch, dated February 18, 1959, for 100 base metal

watches, #2438 at 67¢ (said invoice, incidentally, being obtained not by him but by another attorney-investigator and obtained not from Clinton Watch but from Detra). Mr. Wolter testified that he connected the invoice with the particular watch case by the number 2438 in pencil on the reverse side of the tag, again without identifying the handwriting, and by the fact that CX 44 shows up the same number as the item purchased by him from Mr. Wein (Tr. 96), *i.e.*, for 67¢.

Mr. Wolter further testified that after receiving the two watch cases and invoices from Mr. Wein, as related above, he "sealed the envelope containing the various exhibits" and turned the "completed case" over to his supervisor. "It was sent to New York." (Tr. 98:8) Mr. Wolter some time thereafter left the Commission. He apparently never saw the exhibits again until shortly prior to the hearing, in January 1964.

Thirdly, Mr. Hickman, the attorney-investigator who handled the investigation proper in New York, did not testify. He had picked up some of the Detra watch cases, CX 24, 25, and 26, in New York at Detra's premises in January 1959. However, at some unstated time, possibly the latter part of 1960, he was transferred to the Boston office. No explanation was offered at the hearing as to why he was not produced as a witness. Thus there is a gap in complaint counsel's evidence, namely the testimony of the person most likely to know, with possible cross examination thereon, as to the care exercised in keeping intact the two disputed watch cases, CX 43, 46 and CX 45, and keeping them intact with the proper backs—*i.e.*, even assuming that they were received intact from Mr. Wein of Clinton Watch Company by Mr. Wolter and promptly turned over to Mr. Hickman.

It should be observed that it was in 1959, apparently (Tr. 110:3), that the more debatable of the two watch cases was submitted to Lucius Pitkin and Company for examination, which, presumably, would be when Mr. Hickman was still the attorney-investigator in New York. Mr. Silkiss, who made the metallurgical examination, and testified, did not tell in his testimony just under what circumstances the watch case he received was delivered to him, or who brought or gave it to him. Mr. Kuck, who later did the assay, did not add anything in this connection in his testimony. The examiner does not stress too much the fact that Mr. Hickman did not testify, but in fairness to respondent, faced with a single alleged sample of a watch case marked rolled gold, obtained in 1959, the gap in proof is entitled to some consideration.

Mr. Hickman's successor as attorney-investigator was Mrs. Blanche Livingstone, who did testify, although she did not state just when she succeeded Mr. Hickman. She testified that she took over the exhibits obtained by both Mr. Wolter and Mr. Hickman, and that she kept

them intact just as she received them, apparently from Mr. Hickman. This would be some evidence to attest to the authenticity of CX 43, 46 and 45, assuming, of course, that they represent the same watch cases with the same backs obtained by Mr. Wolter from Mr. Wein of Clinton, by Mr. Hickman from Mr. Wolter, by the testing company from Mr. Hickman and back again (as to one watch case), and then by Mrs. Livingstone from Mr. Hickman. Mrs. Livingstone also picked up some other exhibits from the respondents in New York—CX 22, a Detra exhibit picked up apparently in January 1964, and CX 2, 3, 4, 5 and 6, Conde exhibits picked up apparently in August 1960 and January 1964. The dates may indicate that she succeeded Mr. Hickman in this case about August 1960, as suggested above. She also testified that she finally sent all these exhibits on to Washington in the regular course.

Although Mr. Hickman did not testify (*i.e.*, as to the period during which he was dealing with the exhibits) it should be noted that Mr. Wolter did testify that Commission practice prescribed great care in handling exhibits and in not intermingling them or their parts (Tr. 101-2). He admitted, however, that the back of CX 43, 46 would fit the bezel of CX 45 (Tr. 100-101). Mr. Natanson demonstrated that it could be done (Tr. 100:13).

FORM AND SCOPE OF ORDER

Inasmuch as no violation herein is found as to manufacturing and selling watch cases falsely marked as containing 10 karat rolled gold bezels, of sufficient thickness, the order below does not contain any specific paragraph such as par. 2 of complaint counsel's proposed order, which refers to a minimum thickness of .0015 inches where base metal is treated with an electrolytically applied flashing of precious metal.

The order below, as relates to metal content of watch cases or their parts, to wit, paragraph 1 thereof, is virtually the same as the comparable order issued by the Commission *In the Matter of Theodore Kagen Corp.*, *supra*, D. 6893, 56 F.T.C. Decision 514 (1959), *aff'd*. 283 F. 2d 371 (CA DC, 1960), and *Hilton Watch and Clock Co., Inc.*, D. 8402, September 25, 1962 [61 F.T.C. 742]. However, it is expressly provided below that the disclosure should be on the "exterior" of the case or parts, rather than merely "on" the same.

It is also the same as the order proposed by complaint counsel except that the word "exterior" has been added and, more importantly, any reference to "stainless steel" (*i.e.*, as being simulated) is omitted. This is because complaint counsel did not prove that respondents have manu-

factured and sold watch cases containing bezels or other parts simulating stainless steel, but unmarked to show the true metallic composition.

Although the order is cast in the general form indicated, respondents should be admonished that it appears to be broad enough to cover most situations of failure to mark or properly mark watch cases as to metallic content. Treating watch cases "to simulate precious metal" is easily construed to include plating them with an insufficient thickness of precious metal, including gold plating.

* * * * *

Paragraph 2 of the below order, relating to the foreign origin aspect of this matter, is exactly as proposed by complaint counsel. In proposing an alternative to marking the watch cases themselves, namely, making disclosure on tags or labels, complaint counsel goes beyond the foreign origin provision of the order in *Hilton Watch and Clock Co., supra*, for instance. However, since the alternative is proposed by complaint counsel himself, and since it seems altogether a reasonable one for foreign origin markings which may otherwise conflict with permanent "Swiss" markings on the dials, the hearing examiner has adopted the proposal.

* * * * *

The preamble to the below order is the same as that proposed by complaint counsel except for two points:

First, the words "or any other merchandise" are not used in the below order, *i.e.*, in addition to the words "watch cases." The body of the proposed order, as well as the below order, refers solely to watch cases, so that it seems inappropriate for the preamble to refer to any other merchandise.

Secondly, the below order describes respondents Kaplan, Natanson and Levites not only as copartners of Conde, but also names them, at the same place in the preamble, "individually" as well. To be sure, they are in effect named individually when merely referred to by name, and described as copartners of Conde. Moreover, of course, respondents Natanson and Levites are also expressly named individually at the beginning of the preamble in connection with their being officers of Detra. However, in the hearing examiner's opinion, it is salutary that the order clearly advise these three individual respondents that they are named therein strictly in their individual capacity as well as in any other capacity; and in particular to advise respondent Kaplan that he is so named in his individual capacity in connection with acts by Detra, as well as his capacity, however individual, as a described partner of Conde.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and over these respondents.

2. The acts and practices, described in the Findings herein, and particularly referred to in Finding 40, are to the prejudice and injury of the public.

3. The false, misleading and deceptive representations constitute unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Detra Watch Case Corp., a corporation, and its officers, and Arthur D. Natanson and William Levites, individually and as officers of said corporation, and respondents Simon Kaplan, Arthur D. Natanson, and William Levites, individually and as copartners trading as Conde Watch Case Company, or under any other name or names, and respondents' agents, representatives and employees, directly or through any other corporate or other device, in connection with the offering for sale, sale or distribution of watch cases in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale or selling watch cases which are in whole or in part composed of base metal and which have been treated to simulate precious metal without clearly and conspicuously disclosing on the exterior of such cases or parts the true metal or composition of such treated cases or parts.

2. Offering for sale or selling watch cases which are in whole or in part of foreign origin, without affirmatively disclosing the country or place of foreign origin on the exterior thereof on an exposed surface, or on a label or tag affixed thereto of such degree of permanency as to remain thereon until consummation of consumer sale of the completed watches and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers.

OPINION OF THE COMMISSION

SEPTEMBER 24, 1964

By DIXON, *Commissioner*:

This matter is before the Commission on the appeal of counsel supporting the complaint from the initial decision of the hearing examiner, dated April 1, 1964. The examiner found that Detra Watch

Case Corp. had offered for sale and sold in commerce watch cases, the bezels of which were composed of base metal treated to simulate precious metals, without disclosing on the exterior of the cases the composition of the bezels. In addition, the examiner found that Conde Watch Case Company had marketed watch cases of foreign origin without disclosing on the exterior of the cases the country of origin.¹ These acts and practices were found to be violations of Section 5 of the Federal Trade Commission Act.² Respondents admitted in their answer that all had cooperated and acted together in carrying out the acts and practices charged. On this basis, the examiner issued an order prohibiting each of the respondents from engaging in all of the practices found to be violations.³ Respondents have not appealed. Complaint counsel contends that the examiner erred in failing to find that Detra's practices were deceptive and therefore unlawful in two additional respects.

First, complaint counsel takes the position that Detra's unmarked white metal bezels for women's watch cases, which are made of base metal, resemble not only precious metal, as the examiner found, but also resemble stainless steel; and that the order should require that unmarked bezels which are wholly or in part composed of base metal that has been treated to simulate stainless steel should be marked to reveal their true composition. In this contention, we concur. The Commission's own examination of the unmarked white metal bezel introduced in support of this charge⁴ reveals that this bezel resembles stainless steel and could be mistaken for other bezels made of stainless steel.⁵ As a result, substantial numbers of uninformed customers may be misled into a belief that such unmarked bezels are so constituted, and, pursuant to that belief, into their purchase. It is apparent that the capacity and tendency to deceive are present. Accordingly, failure properly to identify these bezels as being composed of base metal constitutes an unfair method of competition and an unfair and deceptive practice in violation of the Federal Trade Commission Act. *W.M.R. Watch Case Corp.*, Docket No. 8573, 64 F.T.C. 1386 (March 24, 1964); *cf.*, *Delaware Watch Co. v. Federal Trade Commission*, 332 F. 2d 745

¹ Detra, a corporation, manufactures and sells women's watch cases. Conde, a partnership, imports and sells men's watch cases.

² 66 Stat. 631 (1952), 15 U.S.C. 45.

³ Initial Decision, Findings of Fact, par. 39.

⁴ CX 24. Detra's president, Arthur D. Natanson, testified that this was a base metal bezel. Tr. 37.

⁵ The outer metallic composition of this exhibit bears a striking resemblance to the outer metallic composition of CX 3 and CX 5, identified by Natanson as stainless steel bezels for men's watches imported by Conde. Natanson further testified that nickel silver is very difficult to distinguish from stainless steel (Tr. 14).

(2d Cir., 1964); *Theodore Kagen Corp. v. Federal Trade Commission*, 283 F. 2d 371 (D.C. Cir., 1960), *cert. denied*, 365 U.S. 843 (1961); *Benrus Watch Co.*, Docket No. 7352, 64 F.T.C. 1018 (February 28, 1964).

Secondly, complaint counsel contends that the examiner should have found that Detra affirmatively represented that the bezels of certain women's watch cases were plated with ten karat rolled gold, when in fact the gold plating on these bezels was less than $1\frac{1}{2}/1000$ (0.0015) of an inch, the minimum thickness approved for such plating by the Commission's Trade Practice Rules for the Watch Case Industry.⁶ If the plating on the bezels in question was less than the above-mentioned thickness, it is complaint counsel's position that Detra's representation that the surface of the bezels is composed of rolled gold plate is deceptive and is a violation of Section 5 of the Federal Trade Commission Act.

The evidence indicates that on February 18, 1959, Detra sold to the Clinton Watch Company one hundred yellow base metal watch cases identified on a Detra invoice by Detra stock number 2438,⁷ and one hundred watch cases described as white rolled gold plate and identified on a Detra invoice by Detra stock number 2522.⁸ On March 3, 1959, a Commission attorney-investigator obtained from Clinton one Detra #2438 watch case and one Detra #2522 watch case.⁹ When taken from the assembly area at the Clinton plant, the Detra cases were intact and included backs, bezels, and crystals.¹⁰ The bezel of the case identified as Detra case #2438 is yellow in appearance and was intro-

⁶ 13 F.R. 414 (Jan. 30, 1948); 16 C.F.R. 174. The applicable portions of these rules are as follows:

Rule 2—*Disclosure and Marking of Metal Composition.*

* * * * *

(c) "Rolled Gold Plate": In respect of watch cases which are plated with gold or an alloy of gold of not less than 10 karat fineness and of a thickness of not less than $1\frac{1}{2}/1000$ of an inch throughout after completion of all finishing operations, the mark shall show that the case is plated and shall also show the kind of metal in the plating and the fineness and thickness thereof, as for example—

14K Rolled Gold Plate

* * * * *

Rule 5—*Misuse of Significant Terms.*

In marking, describing, or representing watch cases, accessories, or parts thereof, it is an unfair trade practice to use, contrary to the respective conditions specified, any of the following terms, designations, or representations:

(a) "Rolled Gold Plate" * * * shall not be used contrary to the provisions and specifications of Rule 2 hereof, nor shall these designations be used under any other circumstances or conditions which are false, misleading, or deceptive.

⁷ CX 14.

⁸ CX 23.

⁹ CX 44, Tr. 94-97.

¹⁰ Tr. 104-105.

duced in evidence as CX 45.¹¹ The back of this case contains no marking. The bezel of the other case, identified as Detra #2522, is white in appearance and was introduced in evidence as CX 43.¹² The back attached to that case bore on its exterior the inscription "10 KRGP Bezel, Stainless Back."¹³

The bezel of the latter exhibit was submitted to a reputable testing laboratory for a determination of the thickness and metallic composition of its plating. The test established that the gold plating consisted of two layers. The inner layer on the portion of the bezel tested maintained an average thickness of 0.0003 inches. The outer layer varied in thickness from zero at the corners to a maximum of 0.0005 inches, with many areas averaging between 0.00015 and 0.0003 inches. At no place did the combined layers total more than 0.0007 inches.¹⁴ Obviously, this thickness is substantially less than that of 0.0015, the minimum thickness approved by the Commission's Trade Practice Rules for the Watch Case Industry.

The examiner dismissed the charge of deception through the use of the abbreviation "10 KRGP" in connection with the above bezel on the threshold determination that the evidence would not support a finding that Detra had sold this particular bezel together with the back identifying the bezel as rolled gold plate. He predicated this action on testimony that the back marked "10 KRGP bezel" was interchangeable with unmarked backs normally attached to base metal bezels, and evidence that Clinton Watch Company, from which the exhibit was obtained, had in its possession Detra backs of both types. The examiner apparently reasoned that because the bezel in question could have been sold by Detra with an unmarked back rather than the back identifying it as rolled gold plate and there was a possibility that Clinton might subsequently have switched the backs, complaint counsel was required to show to the contrary.¹⁵ In the absence of specific proof that Detra had sold the bezel of CX 43 together with

¹¹ Tr. 96, 97.

¹² Tr. 97.

¹³ It was assumed throughout the hearing both by complaint counsel and respondents that the use of the abbreviation "10 KRGP" is a representation that rolled gold plate has been used in the completed product. See Tr. 22, 47.

¹⁴ CX 47.

¹⁵ The examiner also observed that the attorney-investigator who obtained the cases from Clinton and who subsequently testified when they were introduced in evidence did not identify the exhibits by sight, but relied upon tags which he had attached to the exhibits. This led the examiner to speculate that Commission personnel might inadvertently have switched the backs after receiving possession from Clinton. In so doing, the examiner ignored testimony by this investigator that Commission personnel are careful to insure that identification tags are retained as originally attached, and that it is not the practice of such personnel to switch or intermingle exhibits (Tr. 101-102).

the back identifying that bezel as rolled gold plate, the examiner dismissed that portion of the charge.

The Commission does not agree with the examiner that the evidence is insufficient to establish that Detra sold the particular bezel in question together with a back identifying the bezel as rolled gold plate. In the circumstances, the Commission thinks it is reasonable to assume that the back bearing the inscription "10 KRGP bezel" was attached to the white bezel, identified on the Detra invoice as being composed of white rolled gold plate, at the time it was purchased by Clinton. The same assumption seems appropriate as to the relationship between the yellow bezel, identified on the Detra invoice as being made of base metal, and the unmarked back. It is wholly unrealistic, we think, to assume the contrary, namely, that Detra sold white bezels identified on its invoice as being composed of white rolled gold plate in conjunction with unmarked backs, while concurrently selling to the same customer yellow bezels identified on its invoice as being base metal, together with backs representing such bezels to be composed of rolled gold plate. Respondents' only attempt to rebut these presumptions was to show that the backs of the watch cases were interchangeable and thus could have been switched either by Clinton or Commission personnel. Respondents do not seriously contend that they were changed.¹⁶ In the absence of more specific rebuttal evidence, the Commission holds sufficient the evidence showing that Detra sold to Clinton CX 43, together with the back identifying the bezel of that exhibit as being made of 10 karat rolled gold plate.

We now turn to the question of deception. The Commission's Trade Practice Rules are promulgated only after appropriate rulemaking proceedings in which all interested persons are afforded an opportunity to participate. They express the judgment and experience of the Commission concerning the substantive requirements of the statutes which the Commission administers, and thus serve to interpret and provide a guide for businessmen as to legal requirements applicable to the practices of a particular industry and provide the basis for voluntary and simultaneous abandonment of unlawful practices by industry members. And, as is true of other acts or practices deemed by the Commission to be in violation of any of the laws it administers, failure to comply with such rules may result in corrective action by the Commission under applicable statutory provisions. See *Gojer, Inc.*, Order Denying Motion to Reopen, 58 F.T.C. 1164 (1961); *Lifetime Cutlery Corp.*, Order Remanding for Additional Evidence, 56 F.T.C. 1648

¹⁶Tr. 103. See also respondents' "Response to Appeal of Commission Counsel."

(1959) ; *Northern Feather Works, Inc.*, 51 F.T.C. 1367, *aff'd*, *Northern Feather Works, Inc. v. Federal Trade Commission*, 234 F. 2d 335 (3d Cir. 1956) ; *Amasia Importing Corp. et al.*, 48 F.T.C. 37, 50 (1951).

The Commission's Trade Practice Rules for the Watch Case Industry and, in particular, the aforementioned sections dealing with the minimum thickness of rolled gold plate, were predicated upon definitions and customs already existing in the industry.¹⁷ Thus, by characterizing bezels as being comprised of rolled gold plate when in fact the thickness of the plating was less than $1\frac{1}{2}/1000$ of an inch, respondents were not only violating the Trade Practice Rules, but were also acting contrary to an established trade practice. As a result, respondents' act of misrepresentation has the capacity and tendency to deceive watch manufacturers, who, in reliance upon the custom in the industry and the Commission's Trade Practice Rules, would expect the gold plating on this bezel to be at least $1\frac{1}{2}/1000$ of an inch thick. In addition, there is present the capacity and tendency to deceive ultimate consumers, who, in reliance upon the marking "10 KRGP bezel" would expect the bezel to have gold plating of the same minimum thickness as similar bezels manufactured by others. Further, competing watch case manufacturers who correctly represent their products may be injured through a loss of customers to respondents. As the Supreme Court stated in *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934) :

The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 216; *City of Carlsbad v. W. T. Thackeray & Co.*, 57 Fed. 18. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the consumer. Dealers and manufacturers are prejudiced when orders that would have come to them * * * are diverted to others whose methods are less scrupulous. * * *

Accordingly, the Commission finds that Detra's affirmative representation that the bezel of CX 43 is composed of 10 karat rolled gold plate and thus of comparable composition to bezels manufactured by others which are similarly identified, when in fact the bezel of that exhibit is not of comparable composition, is an unfair method of competition and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act. *Cf.*, *Benrus Watch Company*, *supra*.

¹⁷ An official of a competing watch case company testified that the portion of the Commission's Trade Practice Rules for the Watch Case Industry requiring that rolled gold plate must be of a minimum thickness of 0.0015 inches before it may be so identified was predicated upon a custom already existing in the industry (Tr. 148-150).

For the aforementioned reasons, an order will issue requiring the respondents to cease and desist from all practices found by the examiner and by the Commission to be in violation of the Federal Trade Commission Act. Where the decision of the examiner is in conflict with the findings and conclusions of the Commission as expressed herein, that decision is modified accordingly. As so modified, and as modified in the accompanying order, the initial decision of the examiner is adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission on appeal of counsel supporting the complaint from the initial decision of the hearing examiner, dated April 1, 1964, and upon briefs in support thereof and in opposition thereto, and the Commission, having concluded that the appeal of counsel supporting the complaint should be granted and that the initial decision should be modified in accordance with the views expressed in the accompanying opinion, and as so modified, adopted as the decision of the Commission:

It is ordered. That the initial decision be, and it hereby is, modified by striking therefrom the order to cease and desist and substituting therefor the following:

ORDER

It is ordered. That respondents, Detra Watch Case Corp., a corporation, and its officers and Arthur D. Natanson and William Levites, individually and as officers of said corporation and Simon Kaplan, Arthur D. Natanson and William Levites, co-partners trading as Conde Watch Case Company, or under any other name or names, 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 watch cases, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale or selling watch cases

(a) which are in whole or in part composed of base metal that has been treated to simulate precious metal or stainless steel, or

(b) which are in whole or in part composed of base metal which has been plated with gold or an alloy of gold of not less than 10 karat fineness and of thickness of less than

1½/1000 of an inch throughout after completion of all finishing operations,

without clearly and conspicuously disclosing on the exterior of such cases or parts the true metal composition in a form consistent with the Trade Practice Rules for the Watch Case Industry (set forth in the Code of Federal Regulations, Title 16, Chapter 1, Part 174).

2. Offering for sale or selling watch cases which are in whole or in part of foreign origin without affirmatively disclosing the country or place of foreign origin thereof on the exterior thereof on an exposed surface or on a label or tag affixed thereto of such degree of permanency as to remain thereon until consummation of consumer sale of the completed watches and of such conspicuousness as likely to be observed and read by purchasers and prospective purchasers of the completed watches.

3. Supplying to, or placing in the hands of any dealer or other purchaser, means or instrumentalities by or through which he may deceive and mislead the purchasing public in respect to practices prohibited in paragraphs 1 and 2 above.

It is further ordered. That the initial decision of the hearing examiner, dated April 1, 1964, as above modified and as modified by the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered. That the respondents herein 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 this order.

IN THE MATTER OF

GENERAL RAILWAY SIGNAL COMPANY ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT