

Complaint

67 F.T.C.

IN THE MATTER OF

JACOBY-BENDER, INC., ET AL.

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

Docket 8587. Complaint, July 18, 1963—Decision, Feb. 11, 1965

Order dismissing a complaint which charged a New York City distributor of metal expansion watchbands to watch manufacturers and to retailers with failure to disclose the foreign origin of such bands for the reason that the respondent had discontinued the practice prior to the issuance of the complaint.

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 JACOBY-BENDER, INC., a corporation, and MAX JACOBY and WILLIAM E. STARK, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent JACOBY-BENDER, INC., is a corporation organized, existing and doing business under and by virtue of the State of New York, with its office and principal place of business located at 62-10 Northern Boulevard in the city of (Woodside) New York, Queens, State of New York.

Respondents MAX JACOBY and WILLIAM E. STARK 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.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of metal expansion watchbands to manufacturers and distributors of watches as well as to retailers 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 product, 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 in the District of Columbia, and maintain, and at all times herein mentioned have maintained, a substantial course of

trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Said watchbands consist in whole or in substantial part of components which were manufactured in, and imported from Hong Kong. When offered for sale or sold by respondents, said watchbands do not bear disclosure showing that they are substantially of foreign origin.

PAR. 5. In the absence of an adequate disclosure that a product, including metal expansion watchbands, is of foreign origin, the public believes and understands that it is of domestic origin, a fact of which the Commission takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice. Respondents' failure to clearly and conspicuously disclose the country of origin of said articles of merchandise, or, substantial components thereof, is, therefore, to the prejudice of the purchasing public.

PAR. 6. By the aforesaid practices, respondents place in the hands of watch manufacturers, distributors and retailers, means and instrumentalities by and through which they may mislead the public as to the place of origin of said watchbands or the substantial components thereof.

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 metal expansion watchbands of the same general kind and nature as that sold by the respondents.

PAR. 8. The use by respondents of the false, misleading and deceptive representations and practices hereinabove set forth, and the failure to disclose the foreign origin of their watchbands or of substantial components of their watchbands, have had, and now have, the capacity and tendency to mislead and deceive purchasers or members of the buying public in the manner aforesaid, and thereby to induce them to purchase respondents' watchbands.

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.

Initial Decision

67 F.T.C.

Mr. Herbert L. Blume supporting the complaint.

Mr. Philip K. Schwartz of *Davis, Gilbert, Levine & Schwartz*, New York, N.Y., for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

MAY 1, 1964

This case involves, generally speaking, the omission to mark or otherwise disclose the foreign origin, Hong Kong, of skeletons of metal expansion watchbands, sold in the United States, allegedly in violation of Section 5 of the Federal Trade Commission Act. The skeleton is the expansible part of a metal expansion watchband. Respondents, among other things, claim that their Hong Kong skeleton is something less than a completed skeleton.

There is a stipulation of facts herein (CX 17), executed by counsel, both of whom were very cooperative in connection with the prehearing conference procedure. This is supplemented by official notice in respect to consumer understanding and consumer preference for domestic products, as taken by the Commission in the complaint and construed by the examiner to apply to substantial parts. Respondents offered no evidence to disprove the noticed facts, but they have challenged the legality and applicability of the official notice.

Respondents have a special defense of discontinuance, which is the part of this case stressed the most. The proof in support thereof is contained in an affidavit of discontinuance filed with the Commission and executed over a year before the complaint herein was filed, and also in current affidavits submitted in lieu of testimony, as provided for in the aforementioned stipulation.

In the examiner's opinion discontinuance (including likelihood of resumption) is indeed the salient issue in this case, and it will be given extended consideration in this decision. It may be said at once, however, after careful deliberation, that the defense is not sustained. First of all, the proof in support thereof, contained in the current affidavits in lieu of testimony, is very meager except on the oblique issue of the claimed finality of the Commission's acceptance of the affidavit of discontinuance. Secondly, likelihood of resumption is not demonstrated by the proof herein, and is actually negated by the interchangeability beyond recognition of domestic and foreign skeletons, and resulting watchbands, and by respondents' present export business, from which any watchbands containing foreign skeletons may easily be diverted instead of being exported.

As to the violation charged against the respondents in the complaint, which is supported by the stipulation of facts and the official

notice taken, as aforesaid, respondents apparently do not contend that violation has not been proved, except in the following particulars, which will be disposed of at once:

(1) Respondents, as already stated, have challenged the legal basis for taking official notice, although they did not avail themselves of the opportunity to disprove the noticed facts made available to them, pursuant to § 3.14(d) of the Rules of the Commission. The official notice as taken in the complaint, paragraph 5, reads as follows:

In the absence of an adequate disclosure that a product, including metal expansion watchbands, is of foreign origin, the public believes and understands that it is of domestic origin, a fact of which the Commission takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice.

Immediately following this is another sentence containing the words "substantial components thereof," as follows:

Respondents' failure to clearly and conspicuously disclose the country of origin of such articles of merchandise, or substantial components thereof, is, therefore, to the prejudice of the purchasing public.

In a prehearing conference order, dated October 21, 1963, the examiner, in paragraph 5 thereof, called upon the respondents for any proposed proof denying the validity of this official notice, and also stated:

In this connection the hearing examiner hereby gives formal notice that he intends to take official notice as alleged in the complaint, and to clarify the same by expressly making the official notice applicable not merely to a metal expansion watchband as a whole, but to a substantial component thereof.

Further matter as to official notice is contained in the Findings of Fact 5 herein.—The examiner decides against respondents in respect to their challenge of the legal basis for taking official notice, or its applicability to substantial components, inasmuch as he feels bound by Commission precedents and policy thereon, which are directly challenged by respondents.

(2) Respondents challenge the contention that "Hong Kong" skeletons in this matter are substantial parts of the watchbands. As already stated, they contend that their Hong Kong skeletons are, and were, in any event less than full skeletons. The examiner holds, however, that respondents' Hong Kong skeletons, even if technically something less than full skeletons, are substantial parts of the watchbands. The basic facts in connection therewith are stated in Finding of Fact 4 herein, last paragraph. Reference is also made to the Trade Practice Conference Rules, *i.e.*, to those covering the Metallic Watch

Findings

67 F.T.C.

Band Industry, 16 C.F.R. § 60.4, particularly footnote 3, reading as follows:

Parts which are to be considered as substantial include the skeletons or interliners of the expansion type bands, whether of the entire length of the band or but a substantial portion of such length, and whether caps and end pieces are affixed thereto before or after the importation of such skeletons or interliners.

(3) Respondents contend that respondent William E. Stark is in no event individually liable for any violation which may be found herein, and that the complaint is incorrect in alleging that he is one of those who "formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth." Complaint counsel submitted no proof supporting this allegation in respect to respondent Stark, nor did he submit a proposed finding thereon, although he does include respondent Stark individually in his proposed order.—The examiner hereby dismisses the complaint as against respondent Stark individually.

FINDINGS OF FACT¹

1. Respondent Jacoby-Bender, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and place of business located at 62-10 Northern Boulevard in the Borough of Queens, city of New York, State of New York.

Respondent Max Jacoby is, and has been, the president of respondent corporation. He, his wife, and one Bernard Kanter, are and have been, the directors of the corporate respondent. Said respondent Max Jacoby owns and/or controls 85% of the common stock, the only voting stock. He formulates, directs and controls (and has done so in the past) the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address for the purpose of this proceeding is the same as that of the corporate respondent.

Respondent William E. Stark is and has been the production manager of respondent corporation and vice president in charge of production. His entire stock ownership consists of 3% of the common stock. He does not and has not formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth.

2. Respondent Jacoby-Bender, Inc., hereinafter called the "firm," "company," or "corporate respondent," and the respondent Max

¹ Findings 1-7 hereof correspond to One to Seven of the complaint.

Jacoby—both of whom are hereinafter referred to as the “respondents”—are now, and for some time last past, have been engaged in the advertising, offering for sale, sale and distribution of metal expansion watchbands to manufacturers and distributors of watches as well as to retailers for resale to the public.

3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their metal expansion watchbands, 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 in the District of Columbia, and maintain, and at all times herein mentioned have maintained, a substantial course of trade in said metal expansion watchbands in commerce, as “commerce” is defined in the Federal Trade Commission Act.

The corporate respondent is a large firm in the watchband industry. It manufactures four to five million watchbands a year, most of them metal expansion watchbands (CX 17A-B).

4. Many of said watchbands have consisted in substantial part of components—comprising roughly the skeleton or expansible part of the watchband—which were manufactured in, and imported from, Hong Kong and, therefore, from a foreign country. When offered for sale or sold by respondents said watchbands have not borne disclosure showing that they were of substantially foreign origin, nor has disclosure been made in any way.

The proof herein as to this relates basically to the past, commencing in 1960, but with imports halted (after Commission contacts with respondents) as per respondents’ affidavit of discontinuance of May 1962, and with sales in the United States halted, according to respondents, by the end of the summer of 1962 (RX 1D). However, although the complaint, issued in July 1963, permits, it does not require proof of “present” violation.—Moreover, any violation continues even after sales of the watchcases considered as “instrumentalities of deception” (see Finding 6).

The said Hong Kong skeletons, or the components comprising such skeletons, as integral parts of the watchbands, are definitely a substantial part of the watchbands. The unique and distinguishable feature of the metal expansion watchband is obviously its ability to expand and contract within the requirements for daily use (see CX 17C—par. 9(a)). The expansible feature exists solely by virtue of the skeleton whether it has many links or few. The essence of the skeleton is a series of link-like springs joined together, link by link, so as to exercise the proper tension and expansibility. The addition to these springs, properly joined, of the decorative metal covering,

of plates and of mechanical services, so as to make them into a finished skeleton and then incorporate them into a watchband, cannot vitiate the aforescribed essence of the skeleton.—The fact that the production cost of the skeleton is not a major cost of the watchband (CX 17D-E), is accordingly hardly controlling on the issue of whether it is a substantial part of the watchband; moreover it must be borne in mind that, due to the Hong Kong labor market as distinguished from that of the United States, labor costs in Hong Kong may be substantially less than in the United States.

5. In the absence of an adequate disclosure that a product, including metal expansion watchbands, is of foreign origin, the public believes and understands that it is of domestic origin—a fact of which the Commission took official notice in the complaint. Metal expansion watchbands containing foreign skeletons, such as those of the respondents, are fairly described as being of foreign origin, and are so understood by the purchasing public, or a substantial portion thereof, if made aware of the foreign origin. In any event, the aforesaid public belief and understanding of domestic origin of a product relates not only to a completed article such as a watchband but also to a substantial part of a product, such as a skeleton of a watchband—of which fact the examiner takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for such articles which are of domestic origin—as to which fact the Commission also took official notice in the complaint.

As stated in the preceding paragraph, metal expansion watchbands containing foreign skeletons are fairly described as of foreign origin, rather than domestic, and are so understood by the consuming public, or a substantial part thereof, if made aware of the foreign origin; thus the official notice taken by the Commission comprehends an otherwise domestic watchband containing a foreign skeleton. In any event, the aforesaid public preference for articles of domestic origin relates not only to completed articles, such as metal expansion watchbands, but also to substantial parts thereof, such as the skeleton of an expansion watchband, and there is a public preference for watchbands composed of domestic skeletons—of which fact the hearing examiner herein takes official notice.

Respondents' failure to disclose the said country of origin of "substantial components" (complaint, par. 5) of their aforescribed watchbands is, therefore, to the prejudice of the purchasing public.

6. By the aforesaid practices, respondents have placed in the hands of watch manufacturers, distributors and retailers, means and instru-

mentalities by and through which they may mislead the public, and the public may continue to be misled, as to the place of origin of such watchbands or substantial components thereof, *i.e.*, after distribution and sale of the watchbands by respondents.

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 metal expansion watchbands of the same general kind and nature as that sold by respondents. (This represents an allegation of the complaint admitted by the amended answer.)

8. Although some of such facts may be incorporated above, all the facts contained in the Stipulation Between Counsel—also referred to herein as the stipulation of facts (CX 17A-G)—are found as facts herein.

Discontinuance (and Likelihood of Resumption)

9. The affidavit of discontinuance, sworn to May 23, 1962 by respondent Jacoby, is inconclusive as to discontinuance up to that date, and is not even reaffirmed herein by Mr. Jacoby, whose current affidavit is devoted to exonerating Mr. Stark from individual liability. As to the inconclusiveness of the affidavit of discontinuance, even as supplemented by other proof as to facts up to its date, reference is made to Finding 13, and also to the extended discussion on discontinuance immediately after these Findings of Fact.

Even assuming, by resolving of doubts in respondents' favor, that the affidavit of discontinuance, by itself or otherwise, does prove discontinuance up to its date, May 16, 1962, there is no proof of discontinuance from that date on, and the proof indicates substantial likelihood of resumption. See Findings 10 to 14, inclusive.

10. The one pertinent current affidavit, December 3, 1963—sworn to by respondent Stark, not by respondent Jacoby, the firm's principal and signer of the affidavit of discontinuance—contains no proof of discontinuance as such commencing from the date of the affidavit of discontinuance, May 16, 1962, and indeed no affirmation thereon except two sentences telling what Mr. Stark told his lawyer about the subject, namely, in April 1963, when the proposed complaint herein was served.

Mr. Stark's affidavit, it may also be pointed out, contains little on discontinuance prior to May 16, 1962, and actually adds nothing, on *acts* of discontinuance, to what is contained in the affidavit of discontinuance of that date.

11. The four current affidavits, including Stark's above affidavit, submitted by respondents herein are otherwise devoted to discontin-

uance only in the oblique sense of trying to show by alleged admissions by Commission personnel and otherwise that the affidavit of discontinuance and its acceptance by them was intended by them as a closing of the matter by the Commission and that commencement of the present proceedings has violated this. Two of the four affidavits are devoted entirely to exonerating respondent Stark from individual liability, namely, his own second affidavit, and respondent Jacoby's affidavit, already referred to.

12. The stipulation of facts (CX 17), submitted February 10, 1964, contains nothing on discontinuance as such, *i.e.*, on ending imports or sales, except the statement that the firm (CX 17F,G, par. 15, 16) "discontinued its working agreement with the Kailey Company"—a Hong Kong company which made skeletons for the firm—"some time after they were aware of an investigation being conducted by the Federal Trade Commission" and that "[t]ypical of the steps" it took, the firm sent Kailey a wire, dated March 1, 1962, reading:

STOP MANUFACTURE OF SKELETONS BECAUSE OF STAMPING
RESTRICTIONS WRITING

13. The affidavits and the stipulation, however, do bring out facts not helpful to respondents, even as to discontinuance prior to May 16, 1962. They bring out that Hong Kong skeletons are indistinguishable from skeletons manufactured here by respondents (CX 17E, par. 11(b)), that they have been freely intermingled by respondents with domestic skeletons (*id.*), that watchbands containing Hong Kong skeletons are indistinguishable from those containing domestic skeletons (CX 17E, par. 11(a))—either by respondents, distributors, or consumers—and that no attempt was made by respondents to make disclosure, say, by circulars or advertising, that part of its production of watchbands utilized Hong Kong skeletons received by the firm prior to the time it allegedly stopped importing them or selling watchbands containing them (CX 17E, par. 11(d)).

Thus the discontinuance of manufacture in and importing from Hong Kong, of skeletons, as claimed by respondents in its May 1962 affidavit of discontinuance, was ineffective insofar as watchbands composed of the same were already sold and until at least the "end of the summer" would continue to be sold by respondents and thereafter by distributors. They would have the effect of "instrumentalities of deception" until all of them, after various steps of distribution, reached ultimate consumers—if not still continuing as instrumentalities of deception even in the hands of ultimate consumers.

Moreover, the stipulation of facts, February 10, 1964, shows that respondents also *export* watchbands (CX 17B, par. 4), *i.e.*, to foreign countries, outside the United States. Respondents may still, of course, lawfully import Hong Kong skeletons and incorporate them into watchbands. Moreover, they may lawfully, it may be assumed, export such watchbands, without disclosure, for sale in various foreign countries. However, such watchbands can easily, even inadvertently, be diverted to sales within the United States, *i.e.*, since such watchbands are indistinguishable from domestic watchbands.—No export business was disclosed in the affidavit of discontinuance.

These undisputed facts are gone into more fully in the discussion following these Findings, with further citations to the affidavits and the stipulation. They foreclose respondents on the question of *likelihood of resumption*, which is part of the issue of discontinuance, even assuming that discontinuance of import and sale of watchbands with Hong Kong skeletons were proved in this case.

14. There is no other proof as to discontinuance, including likelihood or unlikelihood of resumption, except as above indicated. There is no *testimony* as to discontinuance, nor was there any offer or proffer of testimony on discontinuance, except in the oblique sense heretofore noted as to the claimed finality of the Commission's acceptance of the affidavit of discontinuance, as to which respondents' attorney gave testimony which was stricken by the examiner.

DISCUSSION ON DISCONTINUANCE

Inasmuch as discontinuance is the most contested issue in this case it will be discussed and analyzed at some length, even though this may necessitate a degree of repetition in some particulars. The discussion and analysis is subdivided as follows:

A digest of the proof in respect to discontinuance, as contained in the stipulation of facts and the affidavits.

A chronology, commencing with the first contact of the Commission, December 28, 1961, until the issuance of the complaint.

Various steps in the proceeding herein.

Merits of the defense.

Proof

The following is a digest, somewhat cryptic in form, of the proof:

Affidavit of Discontinuance.

This is RX 6A, dated May 23, 1962. Sworn to by respondent Max Jacoby, principal and president of respondent corporation.

Firm is manufacturer of watchbands sold to customers among several states in commerce. (No reference to any export business in this affidavit.)

Firm has caused certain "component parts" of a portion of the total number of its metal watchbands manufactured and sold by it "to be manufactured in a foreign country" (pp. 1-2). Said component parts used by it in the manufacture of watchband "skeletons" used by it in completed watchbands. "These skeletons, when brought into the United States were commingled with other watchbands manufactured 'in toto' by the firm in New York. "Nowhere on the watch bands, nor on the packages, would a notation setting forth foreign origin appear." "Jacoby-Bender, Inc., has imported skeletons used in the manufacture of metal watch bands which watch bands may have been distributed to their customers situate among the several states in commerce" (p. 2).

"It is the intention of this company not to resume the above described practice in the future", unless properly marked or unless permitted by Trade Practice Conference Rules in effect from time to time (p. 2).

The affidavit also states (p. 3) as to discontinuance as such:

In line with this policy of the company, we have already discontinued the importation of all skeletons for incorporation in watchbands sold by Jacoby-Bender, Inc., anywhere in the United States and its territories, without proper marking. On March 1, 1962 the following telegram was sent to our supplier:

Stop manufacture of skeletons because of stamping restrictions. Writing.

On March 1, 1962, a letter was written by William E. Stark, Vice-President, Jacoby-Bender, Inc. to H. G. Kailey and Co., Ltd., our supplier in Hong Kong, further instructing that firm to discontinue manufacturing the skeletons presently being made for Jacoby-Bender, Inc., and further discontinuing the entire operation.

(The text of this letter is not revealed, nor has it ever been revealed in the evidence herein.)

The affidavit goes on to state the following as to its legal effect:

This affidavit does not constitute an admission by the company that the law has been violated.

Deponent acknowledges that this affidavit does not give him any promise of immunity, nor does it in any way preclude the Federal Trade Commission from any further action in this matter, and the said Federal Trade Commission reserves any and all rights it might have to proceed further in this matter.

Stipulation of Facts.

This is CX 17. Submitted at the hearing, February 10, 1964.

The firm is one of the large manufacturers of watchbands; annual gross over five million dollars (par. 3(a)).

"The major part of the business of the firm is connected with metal expansion watchbands." (par. 3(d)) It manufactures four to five million watchbands annually, including fabric and leather watch straps (par. 3(c)).

In addition to selling throughout the United States in "commerce" (par. 2), the firm manufactures watchbands sold "for export" (par. 4). (As already pointed out, nothing was said about export in the affidavit of discontinuance.)

The Commission's initial contact in connection with the investigation herein was made with the firm on or about December 28, 1961 (par. 4), as of which date the stipulation, in general, speaks.

On that date certain styles of the firm's watchbands "were worked on, in part, in Hong Kong" (par. 5), and "sold throughout the United States."

"For some time prior to March 1, 1962, the firm maintained a working agreement with the H. G. Kailey Co. of Hong Kong" (par. 6(a)) for making watchband skeletons or the parts thereof.

Of the 4,200,000 watchbands, for the year, manufactured by the company in the year 1960-1961, 400,000 were, in part, worked on in Hong Kong (par. 7(b)).

Pursuant to the working agreement, the firm shipped steel and certain parts to Kailey (par. 8(a)). Kailey worked according to the firm's plans and blueprints (par. 8(b)). Kailey might use end plates and top plates manufactured by the company, to which the company might add top shells in New York (par. 9(d)).

The stipulation also states as follows:

Respondents have no means of knowing from a physical inspection of said watchbands made from said parts whether they have had some work done on them in Hong Kong or not. (par. 11(a))

Such skeletons made of said parts produced in Hong Kong were commingled with similar skeletons produced by the firm in its plant in the United States, making further distinction or identification impossible. (par. 11(c))

The stipulation also states:

The firm made no disclosure on these products, or its catalogs, sales material, packaging or advertising of the nature and extent to which some of its watchbands contained parts or components produced in whole or in part in Hong Kong. (par. 11(d))

The stipulation also states that Kailey used the firm's dies or dies made according to the firm's blueprints (par. 14).

The stipulation further states:

15. With respect to watchband skeletons and parts thereof, imported from Hong Kong by the firm for sale in the United States, the firm discontinued its

Findings

67 F.T.C.

working agreement with the Kailey Company some time after they were aware of an investigation being conducted by the Federal Trade Commission with respect to the manufacture, distribution, advertising and sale of said products.

(It will be noted that the discontinuance is related to watchbands sold in the United States, nothing being said in this connection about exports. Apart from this, it may be noted that literally construed the "sale" referred to is sale of skeletons, although actually it should be sale of watchbands containing such skeletons.)

The stipulation also states the following:

16. Typical of the steps referred to in the preceding sentence is a Western Union Telegram dated March 1, 1962, addressed to "KAILEY CO. HONG KONG"

STOP MANUFACTURE OF SKELETONS BECAUSE OF STAMPING RESTRICTIONS WRITING
JACOBY BEND

(It will be noted that there is no statement as to the claimed contents of the letter as there is in the affidavit of discontinuance.)

The stipulation also contains the following:

18. There have been filed herewith affidavits of Philip K. Schwartz, Max Jacoby and W. E. Stark (2 affidavits) dated December 1963. These affidavits shall be the proof on behalf of respondents in lieu of testimony as to the matters contained therein.

The final provision of the stipulation is as follows:

20. The facts set forth in this stipulation, and in the affidavits referred to herein, and the exhibits referred to herein, shall constitute the testimony and evidence in this proceeding, and shall constitute the entire record in this proceeding, except as may otherwise be agreed upon in writing by counsel for the complaint and counsel for respondents.

This was modified by stipulation, as appears in preconference order dated January 29, 1964, permitting respondents to offer testimony in support of their affirmative defense. It was also understood that facts officially noticed—subject, however, to all of respondents' legal objections—might be considered as part of the proof.

*Respondent Stark's Affidavit*²

This affidavit is RX 1. Sworn to December 3, 1963.

"In the year 1960, JACOBY-BENDER, INC., commenced importing from Hong Kong certain unfinished metal watchband skeletons." (RX 1E) The firm furnished "Hong Kong" with the plates, and for some of its bands also furnished the top plates (right, left

² Respondent Stark also has a second affidavit, devoted entirely to exonerating himself from individual liability.

106

Findings

and center). On arrival in New York the firm attached top shells and performed other necessary operations (RX 1E).

"There was no difference in appearance or quality between the skeleton as imported and the same skeleton when made by our Company at our own plant." (RX 1F) The imported skeletons were made from United States steel and from the firm's blueprints.

There were two sizes of skeletons imported, to wit, a full skeleton and a half-skeleton (RX 1F).

"The last order for full skeletons was placed on November 22, 1961." (RX 1F) The last and only order for half-skeletons was placed in November 1961, but after part shipment it was "cancelled in 1962 as described in the Affidavit of Discontinuance."

Upon service of the proposed complaint herein, on April 19, 1963, Mr. Stark immediately went to Mr. Schwartz, the firm's lawyer, with the papers, and the latter

asked me whether we had complied with the Affidavit since it was signed. *I told him we had—fully, completely, and without exception.* He then asked me if we were still selling any bands any place in the United States. *I told him that we had discontinued all such sales and had disposed of all those watchbands by the end of the preceding summer.* (RX 1D; our emphasis.)

Apart from the aforementioned material in Mr. Stark's affidavit, there is nothing else in the four "current" affidavits about actual discontinuance after the date of the affidavit of discontinuance, or as to the practices discontinued.

(The affidavit of Mr. Jacoby, the principal and chief stockholder of respondent firm, completely skips the topic of discontinuance and limits itself to facts designed to exonerate respondent Stark from individual liability.)

Respondent Stark does cover in his affidavit the facts leading up to the affidavit of discontinuance, *i.e.*, as follows:

The visit of Mr. Sangiorgi of the New York office to the firm on or about December 28, 1961 in regard to "our expansion watchbands" (RX 1A). His further visit on January 4, 1962, stating he was investigating the importing of watchbands without disclosing imported parts, his spending hours at the firm's premises, and receiving requested information (RX 1A-B). Mr. Schwartz's letter of January 23, 1962, giving additional information (RX 1C), Mr. Jacoby's signing of the affidavit of discontinuance on May 23, 1962, said affidavit being suggested by Mr. Sangiorgi (RX 1C).

Nothing further heard from Commission until April 19, 1963, when served with proposed complaint (RX 1C).

Mr. Schwartz's Affidavit.

This is RX 4. Sworn to December 3, 1963. Mr. Schwartz, the attorney, corroborates Mr. Stark in regard to dealings with Mr. Sangiorgi. He refers to his letter of January 23, 1962 to the Commission, and material enclosed (RX 4B). States that Mr. Sangiorgi suggested the preparation of an affidavit of discontinuance and described what it should contain (RX 4B). Mr. Seidman, chief of the New York office, sent Mr. Schwartz a draft, copy of Mr. Seidman's letter being attached to Mr. Schwartz's affidavit (RX 4B). Changes were made in the affidavit and Mr. Seidman's office prepared another affidavit of discontinuance, which is the affidavit signed by Mr. Jacoby (RX 4B-C). "A copy is attached hereto and made a part hereof" (RX 4C).—The rest of the affidavit (RX 4D-G) deals with alleged statements and admissions by Mr. Seidman, Mr. Sangiorgi and Mr. Blume, complaint counsel herein, which respondents contend bear on the claimed finality of the Commission's "acceptance" of the 1962 affidavit of discontinuance. (Mr. Schwartz also testified at the hearing in regard to the above, but his evidence was stricken by the examiner.)

Chronology

"In the year 1960 Jacoby-Bender, Inc., commenced importing from Hong Kong certain unfinished watchband metal skeletons." (RX 1E)

The first contact of the Commission with respondents in regard to alleged violation was on or about December 28, 1961 (CX 17B, par. 4). Respondents appear to have been very cooperative. They furnished pertinent information and samples requested, and expressed a desire to discontinue any questionable activity (RX 1C, Stark). Respondent Stark states that they placed no orders after this first contact—that their last order was actually in November 1961 (RX 1F). Their attorney prepared and delivered to the Commission a letter dated January 23, 1962, containing additional information and material requested. A Commission representative suggested that (upon taking steps of discontinuance) they execute an affidavit of discontinuance, and he described what should be in the affidavit (RX 4B, Schwartz).

On March 1, 1962, the following wire was sent by respondents to H. G. Kailey and Co., Ltd., Hong Kong, a firm supplying skeletons of metal expansion watchbands

STOP MANUFACTURE OF SKELETONS BECAUSE OF STAMPING RESTRICTIONS WRITING

On the same day a letter was sent to that company, the exact contents of which are not revealed in the record herein, although de-

scribed in the affidavit of discontinuance later executed as "discontinuing the entire operation" (RX 6C).

Mr. Jacoby's affidavit of discontinuance was prepared by Commission personnel, after certain corrections (RX 4B, Schwartz), and sworn to by respondent Jacoby, president and principal of respondent corporation, on May 23, 1962. It refers to the "manufacture of skeletons in a foreign country" (pp. 1-2) for watchbands sold by respondent corporation to its customers in the United States, and also refers to the wire to H. G. Kailey and Co., "our supplier in Hong Kong" (p. 3). It states: "It is the intention of this company not to continue the above described practice in the future * * *" (p. 2).

Respondent Stark indicates, at least, that they discontinued all sales in the United States of watchbands with Hong Kong parts (RX 1D), and had disposed of all such watchbands by the end of the summer of 1962 (RX 1D).

Nothing was heard by respondents from the Commission or its personnel in any way until the service of the proposed complaint, April 16, 1963, again according to Mr. Stark (RX 1D), when they were served with copies of the proposed complaint herein. Respondents claim that this procedure, including the eventual service of the complaint, was a breach of faith, penalizing it as against noncooperating competitors, and that it was a complete violation of the Commission's own Rules, or the spirit thereof.

Steps in Present Proceeding

The complaint itself issued on July 18, 1963. The preamble contains the Commission's preliminary declaration of "public interest." Paragraph four of the complaint, by using the present tense, seems to imply continuance of violation (*i.e.*, in spite of the affidavit of discontinuance):

PARAGRAPH FOUR: Said watchbands *consist* in whole or in substantial part of components which were manufactured in, and imported from Hong Kong. When offered for sale or sold by respondents, said watchbands *do* not bare disclosure showing that they *are* substantially of foreign origin. (Our emphasis.)

The amended answer by way of separate defense pleads the facts concerning the affidavit of discontinuance and annexes a copy, as to which it states (par. 10) as follows:

Pursuant to this affidavit, respondents agreed to, and did, discontinue the "importation of all skeletons for incorporation in watchbands sold by JACOBY-BENDER, INC., anywhere in the United States and its territories, without proper marking." (Quotation marks *not* added.)

Findings

67 F.T.C.

The amended answer denies that the complaint is in the "public interest" and contends that issuance violates the provisions for informal administrative disposition provided for in § 1.42 of the Rules of the Commission.

At the prehearing conference respondents pressed vigorously their point that the complaint alleges violation in the present tense whereas complaint counsel was not proposing to offer any specific evidence of present violation or violation of the affidavit of discontinuance—and the complaint counsel himself informally moved to amend the complaint so as to allege violation in the past. Respondents opposed the motion on the ground that on the basis of past violation alone and discontinuance pursuant to the affidavit of discontinuance, the Commission might not have issued the complaint at all, and that accordingly the Commission might at this point withdraw or dismiss the complaint for lack of "public interest."

Particularly in view of respondents' "public interest" point, as well as the Commission's primary control over pleadings, the hearing examiner certified the motion, together with its public interest implications, to the Commission. By order of December 11, 1963, the Commission disposed of the same as follows (p. 2):

The Commission being of the opinion that the allegations of the complaint as issued herein are sufficient to include practices which may have taken place prior to the issuance thereof and that complaint counsel's request must therefore be denied; and

The Commission being of the further opinion that the record now before it is not adequate for a determination as to whether the alleged practices were in fact *discontinued with no likelihood of resumption* subsequent to the alleged affidavit of discontinuance, and that such a determination must be made upon facts fully developed in the public record:

It is ordered, That the request of counsel supporting the complaint for amendment of the complaint be, and it hereby is, denied. (Emphasis added.)

In order to support their special defense, respondents have made much of an alleged written recommendation of the New York office of the Commission that no complaint, or proposed complaint, issue against them—although this relates not so much to actual discontinuance as such as it does to the claimed effect of the affidavit of discontinuance and its acceptance by Commission personnel, and alleged admissions or declarations by them in regard thereto.

Particularly in this connection respondents made three requests, which are rather fully described in the hearing examiner's prehearing conference order dated January 29, 1964, and may be summarized as follows:

(1) Respondents made a motion for the production of the alleged document allegedly containing the recommendation of the New York

office that no complaint be issued in this case. The motion was withdrawn, but renewed at the hearing herein (and denied at the hearing by the examiner).

(2) Respondents (later) also asked for subpoenae directed to Mr. Seidman and Mr. Sangiorgi, of the New York office, so that they might testify as to the alleged document containing the alleged recommendation, and also, no doubt, as to alleged admissions or declarations made by them and bearing on the claimed finality of the affidavit of discontinuance. (The hearing examiner in due time denied this request.)

(3) Respondents also proposed to call as a witness their attorney, Philip K. Schwartz, Esq., to testify as to the alleged admissions or admissions of Mr. Seidman and Mr. Sangiorgi and to the alleged recommendation. The examiner made provision in the order whereby Mr. Schwartz would be permitted to testify at the hearing, with the understanding, however, that his testimony would be stricken. (He did testify and his testimony was stricken.)

In connection with this special defense, it was also contemplated by the prehearing conference order and understood by the parties, as follows:

(4) Respondents might offer proof in support of the defense of discontinuance, including the basic issue of discontinuance of imports and sales, in the form of affidavits, *i.e.*, in lieu of the "small stipulation" thereon they had been unable to negotiate with complaint counsel, as distinguished from the main stipulation of facts.

The prehearing conference order also provided that the case-in-chief and the defense-in-chief should be fully comprehended by the main stipulation of facts (although the stipulation also contains a few facts bearing on the special defense, such as respondents' discontinuance of its working agreement with the Hong Kong manufacturer, the commingling beyond recognition of Hong Kong skeletons with domestic ones, and respondents' export business in watchbands).

The hearing, which was somewhat pro forma in nature, was held on February 24, 1964, in New York City. The stipulation of facts as eventually signed was received in evidence as CX 17. It provides that the four affidavits submitted by respondent shall "be the proof on behalf of respondents in lieu of testimony as to the matters contained therein", and they were received as RX 1, 2, 3 and 4. The stipulation provides that the facts in the stipulation and the affidavits shall "constitute the entire record", which the examiner modified and extended, as stated above, so as to permit Mr. Schwartz to testify in behalf of respondents.

Findings

67 F.T.C.

The stipulation and the affidavits are fully summarized above, so far as pertinent.

At the hearing various other exhibits were received in evidence, including exhibits referred to in the stipulation of facts. At the hearing, also, respondents moved, on complaint counsel's proof, to dismiss the complaint, largely on the ground that "there is nothing as yet to indicate that the practice alleged in the complaint has been in existence since the early part of 1962" (TR 18:19). Inasmuch as the examiner, at the time of the hearing, had not yet read the said affidavits, as submitted, which respondents' counsel stated "set forth in detail all of the arguments" for dismissal (TR 19:23), the examiner reserved decision on the motion, without objection (TR 20:1).

As for respondents' motion for the production of the alleged written recommendation of the New York office, this motion was denied by the examiner (TR 29, 30:14).

Mr. Schwartz announced that he would testify in support of respondents' special defense, stating that he did so because the examiner had denied his request for subpoena for Mr. Seidman and Mr. Sangiorgi, and for the production of the alleged recommendation (TR 30:22).

Mr. Schwartz thereupon did testify as to such an alleged recommendation that no complaint or proposed complaint be filed against respondents, and also as to alleged admissions or declarations of Mr. Seidman or Mr. Sangiorgi, as well as of present complaint counsel, in connection with the alleged recommendation and/or the actual issuance of the complaint. A motion to strike the testimony was granted by the hearing examiner (TR 36:9).

In their proposed findings and brief, respondents, in connection with discontinuance, continue to emphasize the claimed finality of the affidavit of discontinuance and its acceptance by the Commission, and the alleged admissions or declarations by Commission personnel after respondents protested the service of the proposed complaint upon them over a year later. They emphasize this aspect of the defense, rather than discontinuance as such, that is, actual discontinuance of the importing and sale of the Hong Kong skeletons for U.S. use, up to not only the date of the affidavit of discontinuance, but thereafter as well.

Respondents' only proposed findings as to discontinuance as such, apart from naked references to the affidavit of discontinuance, are two in number.

First, No. 8 proposes a finding that on April 1, 1963 "Stark told Schwartz that the Company was then and had been complying with

the affidavit [of discontinuance] ever since it was signed * * * that the Company had discontinued selling any watchbands in the United States * * * with the imported parts; that all such sales had been discontinued and all watchbands with those imported parts had been disposed of by the end of the preceding summer"—i.e., as stated in Stark's affidavit. No finding based on this proposal is made by the examiner herein, as Mr. Stark's sworn declarations, actually consisting of only two sentences, are regarded as too indirect and inconclusive to prove much of anything, apart from being self-serving.

Secondly, No. 15 proposes that the last order for full skeletons was placed on November 22, 1961; and the last and only order of half-skeletons was placed the same month (with cancellation of part three months later) "as described in the Affidavit of Discontinuance." (These proposed findings have not been adopted as such, although they are cited in the findings as the proof of respondents and are more or less credited.)

Other proposed findings of respondents touch on the subject of discontinuance relating not to discontinuance as such but to alleged admissions, declarations and circumstances, both in 1962 and 1963, claimed to have established the finality of the affidavit of discontinuance and its "acceptance" by the Commission. (No findings are made herein as to these proposed findings.)

Respondents also state, in their prefatory remarks (p. 6) to their proposed findings: "The facts set forth in CX 17A-G are incorporated here by reference, and are made a part hereof." This refers to the stipulation of facts. (However, the stipulation adds nothing to respondents' case as to discontinuance, but rather subtracts from it, by its reference to the commingling of foreign and domestic watchbands beyond recognition, and to exporting of watchbands by respondents, the full significance of which will be set forth below.)

Respondents do not state that the four current affidavits submitted at the hearing should be incorporated in their proposed findings, as with the stipulation of facts. They do, however, state that by reason of these affidavits their proposed findings "with reference to the acts and practices of Respondents after May 23, 1962, taken from said exhibits, must be accepted as *uncontroverted evidence*" (p. 7, their emphasis). (The examiner is constrained to observe here that even though self-serving proof is uncontradicted, he is not obliged to accept it completely at face value—although no particular point is made in this decision about lack of credibility, as distinguished from the lack of substance in the affidavits.)

Findings

67 F.T.C.

In his written submission after hearing, complaint counsel argues as follows in regard to discontinuance:

(1) Even assuming that respondents fully complied and continue to comply with the affidavit of discontinuance (*i.e.*, that they discontinued the importing of Hong Kong skeletons as therein stated) there was *no full abandonment*, because they already had approximately 400,000 watchbands, unmarked, made from such Hong Kong skeletons (CX 17C, par. 7(b)), and they have made no showing that they stopped selling these watchbands already fabricated by them or that they made any disclosure as to foreign origin of the same, even by circulars or advertising, which might have disclosed at least that a substantial number of their watchbands had foreign skeletons. As to continued sales of the watchbands, respondents' dealers and ultimate retailers did not stop selling them, so far as their evidence discloses (the only possible evidence of discontinuance of sale being respondent Stark's 1963 affidavit implying that *respondents* stopped selling them "by the end of the preceding summer"). Thus, complaint counsel argues, "respondents have created a pollution of the stream of commerce" (p. 13). As to disclosure, respondents admittedly were unable to mark these watchbands having Hong Kong skeletons, inasmuch as they could not identify them—having commingled them with purely domestic watchbands, which have an identical appearance (CX 17E, par. 11(a)).

(2) Secondly, complaint counsel argues, there is no showing by respondents of lack of *likelihood of resumption* (p. 15), and whatever proof there is tends to show the contrary. Respondents are still in the same business. They are still subject to "being enticed by the exotic lure of coolie labor in Hong Kong", argues complaint counsel, particularly if their business should become bad and profits drop.

Merits of Defense

The examiner agrees in general with complaint counsel as to his conclusions, both as to the lack of discontinuance as such and as to the likelihood of resumption, but rests the conclusions on somewhat broader or more extended considerations than those set forth by complaint counsel.

To begin with, the examiner is gravely concerned by the circumstance that respondents have not only failed to produce proof of the specific items of fact referred to by complaint counsel, but they have failed to produce any proof at all, or certainly any acceptable proof, as to actual discontinuance *from the time of their affidavit of discon-*

tinuance until the hearing date—as distinguished from proof or attempted proof as to alleged Commission staff recommendations that no complaint be issued against respondents, and alleged admissions or declarations claimed to indicate the binding effect of the affidavit of discontinuance and its acceptance by the Commission.

The examiner is somewhat shocked to find, after reading respondents' affidavits, only two sentences affirming that there was such actual discontinuance, said two sentences consisting only of what the affiant, a non-principal of the corporate respondent, *told the firm's lawyer* months prior to the issuance of the complaint. Respondents herein have had able counsel, and such reticence does not smack of good faith on their part in presenting the real facts in this case on their special defense. Rather, it calls for especially careful scrutiny of their affidavit of discontinuance, as well as of the possibilities of resumption of violation.

(1) As to *abandonment* or discontinuance as such, even as evidenced in the affidavit of discontinuance of May 1962, the examiner has sufficient reservations, even though he realizes that it was prepared (after changes) by Commission personnel. There is nothing in the affidavit of discontinuance stating that Kailey and Co. is the sole Hong Kong or foreign firm from which respondent corporation imported skeletons; there is nothing in the stipulation of facts itself so stating. Moreover, the text of the letter of the same date as the telegram referring to it is not given in the affidavit of discontinuance nor in any of the affidavits or other proof in this case. Finally, although the affidavit of discontinuance states that it is the company's intention not to resume the importing of skeletons, the practice is described in the affidavit as being for sale "in the United States" (RX 6A). The respondent company is thus left free, on this wording, to import foreign skeletons for export, or at least ostensibly for export, and inadvertently or otherwise to intermingle them with domestic skeletons. As already stated a number of times, respondents admitted that domestic and Hong Kong skeletons are indistinguishable, and that watchbands made of them are indistinguishable.

As to abandonment, or discontinuance as such, from the date of the affidavit of discontinuance up to the date of issuance of complaint, or date of hearing, there is, as already fully pointed out, no proof whatever except Stark's two-sentence declaration as to what he told the firm's attorney.

(2) As to *likelihood of resumption*, in the examiner's opinion there is a sufficiently clear likelihood of resumption of violation, if one considers that respondent corporation may import Hong Kong or

Findings

67 F.T.C.

other foreign skeletons for export, or ostensibly for export, yet always available for intermingling with domestic skeletons, both types of skeletons resulting in admittedly indistinguishable watchbands, which could all be sold to the American public as being completely domestic watchbands. It has already been demonstrated that the importing of Hong Kong skeletons for export trade is compatible with respondents' affidavit of discontinuance. The export trade factor is particularly realistic when bearing in mind the stipulated fact that respondents do export watchbands (CX 17B, par. 4). Respondents have every opportunity for resuming or continuing prior violation by using foreign skeletons for unmarked watchbands sold among the several states.

Such use of Hong Kong skeletons may come about inadvertently, or even negligently, due to the like appearance of watchbands composed of either Hong Kong or domestic skeletons. It may also come about casually through a subordinate employee, perhaps under pressure to fill a large United States order. Finally, it may come about deliberately, particularly during bad times, so as to take advantage of lower costs. If there is no violation today, there may easily be tomorrow.

Although the examiner has emphasized herein respondents' failure to produce adequate proof in support of the special defense, it is somewhat doubtful that additional proof would be sufficient to change the result, at least on the question of unlikelihood of resumption. This is because of the basic facts, already fully considered, that respondents are admittedly engaged in the export of watchbands, and that watchbands, whether they contain foreign or domestic skeletons, are admittedly indistinguishable—thus making resumption of violation very easy.

Respondents' argument that they are being penalized as compared with competitors indulging in the same practices who did not sign an affidavit of discontinuance, and instead continued the practices, has little weight. This is because of the facts and circumstances of this case, and the meager proof offered in support of the defense, however, inherently appealing the argument was, even to this examiner, during the course of proceedings herein.

Nor is respondents' argument convincing that the issuance of the complaint herein, and of course an order, disowns the Commission's own policy of enforcement procedure embodied in § 1.21 and § 1.42 of the new Rules of the Commission. The examiner has indeed been impressed by this argument presented by counsel, at least as theoretically stated and as limited to the question of good Commission pol-

icy. But the examiner is not impressed in the light of the affidavits submitted by respondents and the inconsequential proof contained therein or elsewhere in connection with the discontinuance. Incidentally, it may be noted here, as quoted above, that the affidavit of discontinuance contains an express statement that it does not "in any way preclude the Federal Trade Commission from any further action in this matter."

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.
2. The complaint herein states a cause of action and this proceeding is in the public interest.
3. Respondents have not established by competent evidence or proof their affirmative defense of discontinuance of the acts and practices alleged in the complaint. Moreover, assuming discontinuance as such, there is sufficient likelihood of resumption of the acts and practices herein found to be a violation of law.
4. The acts and practices of the respondents herein found, have been to the prejudice and injury of the public and of the competitors of said respondents, and have constituted 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.
5. An order to cease and desist should issue against said respondents, to wit, Jacoby-Bender, Inc., and Max Jacoby, individually, as well as such other persons described or indicated in the below order.

COMMENTS ON ORDER

The proposed order of complaint counsel is adopted as the order in this case except as follows:

1. Respondent William E. Stark is not named individually in the below order. Instead, the wording "MAX JACOBY and WILLIAM E. STARK, individually and as officers of said corporation", has been changed to MAX JACOBY, individually and as president of said corporation.
2. The below order relates only to dealings in watchbands, and, to accomplish this, the words "or any other products" appearing in the proposed order are deleted. The examiner believes that under the particular facts in this case, particularly those bearing on the likelihood of resumption, it is unnecessary in the public interest to order that respondents cease and desist in connection with products other than watchbands.

Order

67 F.T.C.

Respondents will note that the order includes an alternative to marking or stamping the products themselves. The alternative is marking or stamping labels or tags affixed to the products. The words "likely to be" are a change from "to be likely."

ORDER

It is ordered, That respondents JACOBY-BENDER, INC., a corporation, and its officers, and MAX JACOBY, individually and as president of said corporation, and respondents' representatives, agents or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watchbands, 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 any such products which are substantially, or which contain a substantial part or parts, of foreign origin or fabrication without affirmatively disclosing the country or place of foreign origin or fabrication thereof on the products themselves, by marking or stamping 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 products, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the products.

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

3. Placing in the hands of manufacturers, distributors, retailers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out above.

It is further ordered, That the complaint be and hereby is dismissed as against respondent WILLIAM E. STARK individually.

OPINION OF THE COMMISSION

By the Commission:

This matter is before the Commission on the appeal of the respondents from the hearing examiner's initial decision. The complaint charged that respondents, by their failure to disclose the foreign origin of the skeletons of metal expansion watch bands sold in the United States, had violated Section 5 of the Federal Trade Commission Act. The hearing examiner found that the charges were sustained except as to respondent Stark individually, and entered an order prohibiting the practices alleged as against respondent corporation and respondent Max Jacoby, and dismissing the complaint as to respondent Stark individually.

Respondent Max Jacoby, during the course of the investigation and prior to the complaint, signed and submitted to the Commission pursuant to Commission procedure, an affidavit stating in effect that the practices which were subsequently alleged in the complaint had been discontinued and would not be resumed. There is no evidence in this record that respondents have failed in any way to live up to this commitment. In fact, the respondents have shown about as affirmatively as it is possible for them to do so, that the practices alleged have been entirely discontinued and will not be resumed. They stopped selling watch bands in the United States with the imported parts in 1952, and have sold none since. Respondents have demonstrated their good faith in this matter and have been completely cooperative throughout. In these circumstances, we do not believe the public interest would be well served by the issuance of an order to cease and desist.

Accordingly, it is directed that an order issue herewith vacating the initial decision and dismissing the complaint.

Commissioner MacIntyre did not concur.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This matter having been heard by the Commission upon the respondents' appeal from the hearing examiner's initial decision, and upon the briefs and oral argument in support thereof and in opposition thereto, and the Commission having determined for the reasons stated in the accompanying opinion that the initial decision should be vacated and the complaint dismissed:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated.

