appropriate in all respects to dispose of this proceeding and that the appeal of counsel supporting the complaint should be denied.

It is ordered, That the appeal of counsel supporting the complaint be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision be, and it hereby is, adopted as the decision of the Commission.

IN THE MATTER OF

SCOTT MITCHELL HOUSE, INC., ET AL.

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

Docket 8591. Complaint, Aug. 22, 1963—Decision, Sept. 24, 1964

Order dismissing for failure of proof, complaint charging Yonkers, N.Y., distributors of various articles of merchandise with representing falsely, in promotional materials including newspaper and magazine advertising, that light bulbs and grinding mills were unconditionally guaranteed for stated periods, that the "Magi-Carver" electric knife had a substantially superior performance to the conventional carving knife, and that the Robinia Tree was suitable for shade and ornamental purposes.

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 Scott Mitchell House, Inc., a corporation, and Juanita Linet, individually and as an officer of said corporation, and David Wittels, individually and as General Manager 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 Scott Mitchell House, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 415 South Broadway, in the city of Yonkers, State of New York.

Respondent Juanita Linet is an officer of the corporate respondent and Respondent David Wittels is general manager 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 various articles of merchandise such as electric light bulbs, grinding mills, knives, trees and other articles of merchandise to the public by mail.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, 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 merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their aforesaid merchandise, respondents have made numerous statements and representations in promotional materials including advertisements inserted in newspapers of general circulation and magazines respecting the guarantee, performance and quality of said merchandise.

Typical, but not all inclusive of said statements and representations, are the following:

5 yr. Guarantee on Regal Lite Bulbs

Blender-Liquifier and Grinding Mill * * * fully guaranteed for 1 year

Amazing "Magi-Carver" Electric Knife. Takes the chore out of slicing and carving

Now! A Flowering Shade Tree that Grows Roof-High in Just One Single Year

But this year, thanks to Robinia, instead of slaving half a life time playing nursemaid to a tree * * * you are actually going to grow a beautiful, soaring tree, incredible, as it may seem, in just one year! And remember * * * Robinia's almost unbelievable growing power has been demonstrated in Botanical Gardens * * * on State Parkways * * * by professional landscapers on the grounds of million-dollar estates. Is it any wonder it has been hailed in banner headlines from coast to coast.

PAR. 5. Through the use of the aforesaid statements and representations and others of similar import and meaning not specifically set out herein, respondents have represented, directly or by implication, that:

(a) Said light bulbs and grinding mills are unconditionally guaranteed for the stated period;

(b) That the "Magi-Carver" knife by virtue of its electrical operation has a performance substantially superior to the conventional carving knife;

(c) That the Robinia tree has characteristics which makes it suitable for shade and ornamental purposes.

PAR. 6. In truth and in fact:

(a) Said light bulbs and grinding mills are not unconditionally guaranteed for the stated period. The "guarantees" referred to are subject to numerous conditions and limitations not disclosed in the advertisments.

(b) The "Magi-Carver" knife by virtue of its electrical operation does not have a performance substantially superior to the conventional carving knife.

(c) The Robinia tree does not have characteristics which make it suitable for shade and ornamental purposes.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

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. James A. Ryan and *Mr. Charles W. O'Connell* for the Commission.

Mr. Sidney Schreiberg of New York, N.Y., for the respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

MAY 1, 1964

The Federal Trade Commission, by complaint dated August 22, 1963, has charged that the respondents, Scott Mitchell House, Inc., Juanita Linet and David Wittels have engaged in false, misleading and deceptive advertising in the conduct of a mail-order business operated by them (Federal Trade Commission Act, Section 5, 15 U.S.C.A. Par. 45). While admitting generally that they have engaged in advertising "substantially as set forth" in the complaint, the respondents deny those allegations which are to the effect that the advertising was false, misleading and deceptive. The subject matter of the advertising and the allegations with respect thereto, as will appear in greater detail below, involve guarantees on electric light bulbs and a blender-liquefier-grinding mill, a representation as to the performance of a battery-operated carving knife, and a representation as to the shade and ornamental characteristics of a locust tree. The tree is technically known as the Robinia, *pseudacacia*.

The respondents are Scott Mitchell House, Inc., a New York corporation conducting a mail-order business from 415 South Broadway, Yonkers, New York, Juanita Linet, its president and a member of its board of directors, and David Wittels, its general manager. Mrs. Linet is a housewife. She has retained the offices mentioned in name only, having abdicated all her functions to her husband, Abraham Linet, and to Wittels. Such abdication, the examiner would rule should it become necessary in this case, is no reason to relieve her from charges of false and deceptive advertising if, in fact, an order became appropriate. Respondent's attorney agrees (Tr. p. 147). Wittels, by reason of his acceptance of full responsibility for the advertising practices of the company, also would be subject to an order, if entered in this proceeding (Tr. p. 259). In fact, this was not in issue. Nor is there any issue as to interstate commerce and competition in commerce, the allegations as to those also having been admitted.

The False Guarantee Charge

The advertising claimed to be deceptive is portrayed in the complaint as follows:

"5 yr. Guarantee on Regal Lite Bulbs"
"Blender-Liquefier and Grinding Mill * * * fully guaranteed for 1 year"

Each of these quotations is from separate box advertisements, each containing much additional text, arranged with other boxes under a bannerhead clearly and unmistakably showing Scott Mitchell House, Inc., as the offeror and advertiser.

It is charged "* * * [S]aid light bulbs and grinding mills are (represented as) unconditionally guaranteed for the stated period * * *" when, in truth and in fact, "* * * said light bulbs and grinding mills are not unconditionally guaranteed for the stated period. The 'guarantees' referred to are subject to numerous conditions and limitations not disclosed in the advertisements." The complaint does not make clear, and no bill of particulars was filed for the purpose of setting out, what, if any, conditions and limitations were not disclosed in the advertisements. *Cf.* Administrative Procedure Act, Section 5(a), 60 Stat. 239, 5 U.S.C. 1004(a). It appears, however, from Commission counsel's proposed findings, that he contends that a requirement that the grinding mills be returned before the guarantee would be honored was not disclosed in the advertisement, that the purchaser was required to pay postage in returning the product and that the advertisements failed to reveal the identity of the guarantor.

In making these contentions, he relies on the Commission's Guides Against Deceptive Advertising of Guarantees. They provide that an advertisement should show "What, if anything, anyone claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, such as return of the product and payment of service or labor charges; * * * and, The identity of the guarantor should be clearly revealed in all advertising, * * *." The Guides are not substantive law. They put the public and advertisers on notice as to "the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the word and phrases therein set out." *Gimbel Brothers, Inc.*, Docket No. 7834 [61 F.T.C. 1051, 1073], Slip opinion, pp. 15, 16, July 26, 1962.

That the identity of the guarantor was not revealed in the advertising is not charged in the complaint. This is hardly "a condition" or "limitation" unless someone other than the advertiser is the guarantor. Even if failure to disclose identity of guarantor had been charged, the examiner is of the opinion that Scott Mitchell's obligation is clear. The reason given in the Guides for the requirement that the identity of the guarantor be disclosed is, "* * * Confusion of purchasers often occurs when it is not clear whether the manufacturer or the retailer is the guarantor." The confusion is the "run-around" resulting when a claimant under the guarantee goes to his vendor for performance and is told that the manufacturer and not the vendor is the guarantor. In these advertisements, Scott Mitchell House, Inc., the respondent in this proceeding, is the guarantor. It is the offeror and seller and there is nothing in either advertisement or in actual practice which suggests that someone else is the guarantor. It agrees that if the bulb does not last five full years, the buyer will "get a brand new bulb with the same guarantee." It says that the blender-liquefier is "Fully guaranteed for 1 year." It says, also, as to the 10-day test period, if the buyer is "not completely satisfied that this is the finest appliance (he's) ever owned (he may) return it for a complete money-back refund." There is nothing confusing about either of these advertisements with respect to the identity of the guarantor, which is clearly disclosed at the top of the "spread." The testimony is to the same effect (Tr. pp. 268–269, 271–273).

Heavenly Creations, Inc., a recent case, Docket No. 8448, February 25, 1964 [64 F.T.C. 978], involved an advertisement which did, in fact, create a confusion as to who might have been represented as the guarantor. Immediately following the words of guarantee, the product advertised was described as "Made in U.S.A. by the International Silver Co." The Commission, in modifying the initial decision, pointed out that "the deception *charged in the complaint* and found by the examiner involved, not failure to disclose the guarantor's identity, but falsely stating the guarantor's identity." (Page 4, Commission's Opinion. Emphasis mine) [64 F.T.C. 1008]. While there is reference to the bulbs as having been "made of Corning glass" and the blender-liquefier-grinding mill as a Moulinex article "manufactured by one of France's largest appliance makers * * *," these references are not in any way related to the guarantees and it is obvious that any claims under the guarantee are to be made to the vendor. Moreover, the complaint, as already noted, did not charge either a failure to disclose the guarantor's identity or a deception with respect thereto.

As to whether the terms of the guarantee were not fully disclosed in the advertisement in that, as contended by Commission counsel, the purchaser was required to return the product or pay a service charge or a labor charge or do anything before the guarantor would fulfill his obligation, the examiner cannot agree that the respondents engaged in deception in any of these respects.

The bulb advertisement said nothing about a return and imposed no conditions. The only testimony related to this charge is that of respondent Wittels. He said there was no other guarantee but that set forth in the advertisement, that the bulb did not have to be returned by the purchaser in order to get satisfaction, that the new bulb is sent to the customer postpaid and without charge, and all that the customer has to do is to notify Scott Mitchell that the bulb has burnt out (Tr. pp. 267–269).

The remaining guarantee charge involves the blender-liquefier-grinding mill. The advertisement sets forth (1) that this appliance is fully guaranteed for one year and (2) that if the purchaser is not satisfied, he may return it for a complete money-back refund after trying it for 10 days. In pressing this charge, Commission counsel asserts that "it was necessary to return the product and the purchaser was responsible for the postage involved." His conjunctive reference to the requirement that the buyer pay the postage incurred in returning the article to Scott Mitchell suggests that he does not press seriously the mere fact that it had to be returned for performance of the guarantee. After all, this article did cost about $10 or more (Commission Ex. 2 and Tr. p. 271). There is no likelihood that any confusion would result because the entire transaction is a mail-order transaction. There are no relations other than by mail. The situation might be different if the article were purchased in a store and the return for performance had to be made to a distant place other than the store. Nor would any person except one motivated by unscrupulous design expect performance of the guarantee without returning the article. There is no testimony that anyone was misled. This may be a negligible factor because the Guides suggest that none is necessary when they are applicable. But, it should be observed the guide is in the conjunctive. It says, "* * * such as return of the product and payment of service or labor charges; * * *."

The hearing examiner's attention has been directed to only one case on the basis of which it might be argued that an undisclosed requirement for payment by the purchaser of his expenses incurred in returning the article for performance of the guarantee was a breach. This case resulted in a consent order, *Roberts Electric Company*, 59 F.T.C. 848, October 17, 1961. While he is of the opinion that a Commission decision based on a mere consent is not a precedent in the same sense as one made in a litigated case, he is further of the opinion that there is no substantial evidence in this record to justify a finding and conclusion that the respondents imposed upon purchasers the obligation to pay the expense for returning the purchased article before performance of the guarantee. Commission counsel's only basis for reliance on his request for such a finding is the testimony of respondent Wittels. This, the hearing examiner finds, refutes rather than supports counsel's position. While, in response to a question as to who pays the postage in returning the article, Wittels did say, "The customer would have to," there is no evidence whatsoever that any customer who did not pay it was denied performance of the guarantee. On being pressed further by Commission counsel, the following (Tr. p. 271) transpired:

Q. You say that the purchaser pays the postage? *A.* Well, he would have to, to get it back to us, yes.

Q. Yes. *A.* Although many people do send it in collect.

Thus, not only is there no evidence of failure to perform the guarantee because of a requirement that the postage for returning the article to Scott Mitchell be paid by the claimant, but the testimony is clearly pregnant with the conclusion that such persons as send the article "in collect" also obtain performance. There was no followup of this testimony with any additional interrogation as to what, if anything, would happen if the articles were returned collect. The hearing examiner cannot assume that performance of the guarantee would be denied and it is not unreasonable to assume, from the manner in which the testimony was elicited, that it would be performed in that event as well.

It should not be overlooked that this case does not involve conditions such as time limit of the guarantee, service charges, handling charges, etc. None of these appears here. For these reasons, the examiner cannot find or conclude as proposed in Commission counsel's Eighth Proposed Finding that, "The light bulbs and grinding mills are not unconditionally guaranteed. The 'guarantee' referred to is subject to numerous conditions and limitations not disclosed in the advertisement."

The Performance of the Magi-Carver Electric Knife

The advertisement which gives rise to the charge of deception as to the performance of the Magi-Carver Knife, in addition to other material contained in its body, leads off with the words quoted in the complaint:

> Amazing "Magi-Carver" Electric Knife. Takes the chore out of slicing and carving

Some additional statements contained in the advertisement and not quoted, but which ought to be read together with the quoted material, are:

> Stainless steel power knife is battery operated and has power plus. Eliminates the annoyance of a blade sliding around without cutting, takes the effort out of carving turkeys or roasts. Perfect for slicing meats, cheese, vegetables or anything. A must in every kitchen. (Commission Ex. 2)

The complaint alleges in the innuendo that the representation quoted means: "That the 'Magi-Carver' knife by virtue of its electrical operation has a performing substantially superior to the conventional carving knife;" whereas "In truth and in fact * * * The 'Magi-Carver' knife by virtue of its electrical operation does not have a performance substantially superior to the conventional carving knife" (Complaint, Paragraphs Five and Six). (The examiner does not reach the question whether the innuendo pleaded follows fairly the advertising attacked.) Basic ingredients of the proof of a charge such as this would seem to be, first, proof that the directions for the operation of the knife were followed by the persons who used it and contended that its performance was not substantially superior to that of the conventional carving knife, and, next, an actual demonstration of the performance of the knife, plus, possibly, but perhaps not necessarily, a simultaneous demonstration of the performance of a conventional carving knife. Neither of these ingredients appears in the evidence submitted in support of the charge. The knife was offered and received in evidence (Commission Ex. 5–A), and along with it there also was offered and received a set of printed instructions (Commission Ex. 5–C). After preliminary instructions for setting up the knife and getting it to operate by moving the switch forward, the instructions say:

> For best results CUT FORWARD. DO NOT tug back and forth. Clean and even slices will result from a firm forward cutting motion. If the object being carved is large or tough, lift the blade slightly and repeat the forward cutting procedure as many times as required.

Neither of the witnesses called by Commission counsel testified that he or she, prior to testing or using the knife, attempted to follow the instructions or even read them. It is not proper to attempt to judge the performance of a mechanical contrivance without making certain in advance that the operator has familiarized himself with the instructions for its operation and has followed them in the test or use. Although the examiner took note of the failure to submit the knife to an actual demonstration in the hearing room, Commission counsel did not avail himself of the opportunity to do so for the purpose of actually demonstrating performance (Tr. p. 128). True, a similar observation and invitation was made for the benefit of respondents' attorney who chose not to accept it (Tr. p. 329). He, however, did not have the initial responsibility for demonstrating performance. That was the responsibility of the Commission attorney and, consequently, the failure of respondents' attorney to do so is of no consequence.

For the purpose of proving this charge, Commission counsel called two witnesses, one, a chef in a Washington restaurant, and the other, a lady who had purchased the knife. Apart from the basic deficiencies of proof just mentioned, the testimony of neither of these witnesses impressed the examiner as being reliable or sufficiently substantial to justify a conclusion that the knife's performance was represented in a deceptive manner. The chef appeared to be somewhat belligerent and, in his testimony, seemed to resent the knife. For example, in his anxiety to testify that the knife did not assist him at all in the cutting of meat, he did not give Commission counsel an opportunity to finish his question. Commission counsel inquired, "Did that assist * * *, do you feel that assisted you in the * * *." The witness interrupted the question in his haste to answer "None whatsoever. Whatsoever." (Tr. 108.) He testified that he had used the knife that morning on "A roast beef. Tender roast sirloin of beef." All that he noticed was a little vibration, a little noise, and that "It felt like (he) was holding a flashlight or something, handled it awkward. It is larger than the ordinary slicer." He was looking for more than the advertising offered. There was nothing in the advertising to suggest that the knife would work by itself. He concluded his testimony by saying he helps his wife at home, knows what the conventional carving knife is, and couldn't say this one was as good. He said, "It isn't good for slicing" and that he couldn't use it for slicing because "it is awkward and clumsy to handle. For an electric knife I would think we would have something like an electric saw, revolving chain or something to assist us. No assistance whatsoever in that." (Tr. pp. 107–109.) On cross-examination, when asked whether the knife annoyed him by its vibration, he answered, "I was looking for a miracle to happen. I was trying to see what would happen with the knife." (Tr. p. 120.) The attitude of this witness is quite understandable. After all, he is an experienced, professional meat carver and is accustomed to special knives developed for particular types of cutting, all of which are continually maintained in razor-sharp condition. This knife was not produced or advertised for the professional butcher or chef. This knife obviously is directed to the ordinary uses to which such a knife may be put in the home. The witness's resentment of and prejudice against the knife and his irrelevant objections to it, coupled with his complete failure to show that he had attempted to follow the instructions for its operation, renders his testimony of no value in this proceeding.

Next, we have the housewife who purchased the knife. Here, again, we find no effort to show a sincere desire or genuine wish that the knife perform in the manner advertised. All that this witness did was to try it once at home on a roast beef. She testified, "The results were that it was nothing that was claimed for it. It certainly didn't ease any chore at all. It didn't help anything. I just felt a vibration in my hand from the batteries; that was all." And, after letting her husband use it, she packed it up and sent it to the Federal Trade Commission. While she said repeatedly that the knife "cut as a conventional carving knife without the extra that it was supposed to give," she also stressed several times her opinion that it was constructed flimsily and not of good quality, matters which were not in issue at all (Tr. pp. 217–224). It developed on cross-examinaton that this witness works for a company that either imports or manufactures a carving knife with a guide on it and also a frozen-food saw; also that the witness, despite the fact that she was "angry" with the knife, made no effort whatsoever to obtain any satisfaction from the respondent, but complained directly to the Federal Trade Commission (Tr. pp. 227–228, 234). (That she had made the complaint was disclosed by her in her direct testimony. Her letter of complaint, demanded by defense counsel during cross-examination, was not produced by Commission counsel. In view of the result below, the examiner does not reach the question whether the rule of *Jencks* v. *United States*, 353 U.S. 657 at 672 ought to be invoked. But, see *Alexander* v. *United States*, —— U.S. App. D.C. ——, —— F. 2d ——, No. 18124, decided April 16, 1964, particularly dissenting opinion of Circuit Judge Washington.)

It does not appear what this witness did to prepare herself to use the knife. Certainly, there is no testimony either that she read the instructions or that she attempted to follow them. Considering her testimony as a whole and in retrospect, and assuming that her participation in this case had no relation whatsoever to her employment by a company which may be competitive with the respondent, the examiner concludes that the best that can be said for her testimony is that she was disappointed in that she received a knife which did not rise to her expectations in sturdiness or quality and not that the knife did not perform in the manner in which it was advertised. Thus, separate from the lack of proof as to following directions and of the actual performance of the knife, the examiner is unwilling to accept her testimony for the purpose of supplying reliable evidence of probative value in support of the charge.

Other than the testimony of the chef and the housewife there is no evidence to support the charge of deception with respect to the knife's performance.

The Robinia Tree

The final charge concerns a locust tree bearing the technical name "Robinia." Closer reading of the advertisement (Commission Ex. 4) shows that the variety of Robinia involved is *pseudacacia*.

The language from the advertisement quoted in the complaint as being typical of the alleged false advertising is:

Now! A Flowering Shade Tree that Grows Roof-High in Just One Single Year But this year, thanks to Robinia, instead of slaving half a life time playing nursemaid to a tree * * * you are actually going to grow a beautiful, soaring tree, incredible, as it may seem, in just one year! And remember * * * Robinia's almost unbelievable growing power has been demonstrated in Botanical Gardens * * * on State Parkways * * * by professional landscapers on the grounds of million-dollar estates. Is it any wonder it has been hailed in banner headlines from coast to coast.

The innuendo is, "That the Robinia tree has characteristics which makes (sic) it suitable for shade and ornamental purposes" and the deception alleged is that "In truth and in fact * * * The Robinia tree does not have characteristics which makes (sic) it suitable for shade and ornamental purposes."

In the consideration of this charge, the pleader has limited us to some extremely definite and narrow wording. Thus, in order to make a finding of violation, it is necessary to find that this tree, in fact, "does not have characteristics" which make it suitable for shade and ornamental purposes. The pleader has assumed the obligation to prove that the tree involved has no characteristics which would make it suitable for shade and ornamental purposes. Consequently, given the assumption that we can determine what is suitable for shade and ornamental purposes, if we find that the Robinia tree has any such characteristics, the charge must be dismissed and, if we find that the tree does not have any such characteristics, the charge must be sustained.

For the purpose of supporting this charge, after having the advertisement received in evidence, counsel called three witnesses. The first, the Secretary of a nurserymen's trade association; the second, a salesman employed by a District of Columbia florist and nursery; and the third, the Director of Horticulture for the New York City Department of Parks. These witnesses were asked many questions and gave much testimony about undesirable and objectionable features of the Robinia *pseudacacia* tree, about its growing habits and about its susceptibility to borers. These, however, are all entirely irrelevant because the charge was *not* that the tree has objectionable characteristics. Similarily, many questions were asked and much testimony was given with respect to possibly deceptive statements contained within the advertisement but not charged in the complaint. While it is entirely possible that some of the statements did stretch or distort the truth, because of the failure so to charge, such testimony is irrelevant. [While it would not absolve them, it may be noted that respondents did not prepare the advertisement. This was prepared by the nursery for which they acted and they adopted it (Tr. 149, 278).] The quotations from and references to the testimony to which I shall now resort are all testimony of witnesses called in support of the complaint. The quotations deliberately exclude most of the irrelevant testimony and include mainly that demonstrating charactertistics which make the tree suitable for shade and ornamental purposes because, as already stated, the charge is that the tree had none. *Cf. Mary Carter Paint Co., Inc.*, Docket No. 8290, Slip opinion, pp. 3–4, June 28, 1962 [60 F.T.C. 1827]; also, second decretal provision, Final Order, *Sacks Woolen Co., Inc.*, Docket No. 8436, Nov. 27, 1962 [61 F.T.C. 1226, 1236]. (Respondents continually objected to the irrelevant testimony and their objections were in large sustained Tr. 169, 182, 191.)

The trade association executive testified, "The leaflets are fairly small, so that it does give sparse shade." (Tr. p. 35): "in this area it is blooming in late May." (Tr. p. 36); * * * for home planting (a desired characteristic), if planted to achieve a desired view or a desired object, it may be for its flowering or may be for some other effect that you want it, and usually it is because of the color of the leaves, the color of the flowers, the shape of the tree. * * *" (Tr. p. 48); in its flowering state, "It blooms, well, generally it blooms May to June. In this area it blooms in late May, late season would be in early June. In Michigan it blooms in June, possibly mid-June." (Tr. p. 81); "It is among a group of trees, a group of species, that do grow well but this one certainly would not be a super-growing species, particularly in the tree stage once it has become branched * * * By tree stage I mean once it has branches and is recognized as a tree, in contrast to it having a single stem, or if I may use the nursery term, being a whip." (Tr. p. 83): "The layman would think of a tree as a plant with a central stem and then branches, so that you get what is commonly thought of as a tree shape.", and this particular tree "would begin to approach this at the ages of somewhere beyond 3 years. It is possible with care for it to begin to approach it in 3 years." (Tr. p. 85); if this tree were permitted to grow without pruning or trimming "It would in time branch and develop into the shape that is characteristic of that tree * * *" (Tr. pp. 86–87); "Bailey's Encyclopedia of Horticulture which is over 3,000 pages has many illustrations of trees in it * * *" (Tr. p. 88) and is one of various books to which the witness refers in his work. The tree "starts losing its leaves in September. By the first of October in this area it has completely lost them. Further north, it would be a little earlier. Then, it is just the bare tree, branches, from then on through the winter, until the buds and leaves begin coming out, the tree starts budding and the leaves begin coming out the following spring." (Tr. 93); "In this area (Washington, D.C.) it flowers in late May and it is in flower for approximate 10 days to 2 weeks." During the winter months, it is completely bare, but there are seed pods on the tree, these being three or four inches long, approximately an inch wide, brown in color, and the quantity of them depends on the amount of blooming in any particular year. (Tr. p. 94); "The trunk is dark brown, very dark brown to black." (Tr. p. 95); when asked as an expert whether "this Robinia tree has no characteristics which make it suitable for shade and ornamental purposes," he testified, "The only characteristics that would approach this would be its blooming * * * Under some people's opinions it would be possible for this tree to be considered ornamental in the sense that it does have blossoms and is showy at that particular time, and even within the species there are varieties * * * This one is not offered in the trade for ornamental purposes." (Tr. pp. 97–98); "The fact that the tree does have bloom which is in contrast to the foliage on the tree at the same time, this would be the only ornamental characteristic that I would see in the tree * * * It can cast sparse shade." (Tr. p. 100); "Except for evergreen trees * * * all trees in the winter time lose their leaves." (Tr. p. 103.) Nurserymen producing shade trees advertised the Robinia *pseudacacia* as shade trees (Tr. pp. 104–105).

The salesman employed by the Washington florist and nursery testified as follows: The Robinia *pseudacacia* "has a blackish fissured bark that is from brown—dark brown to black * * *" with "* * * small leaf growing on a central stem. And it flowers sometimes, around here by May–June, late May generally, and not reliably. It will flower, oh, about every 3 years, I think, it is considered to generally give a good display." (Tr. p. 54.) The tree is in bloom "Generally, late May, sometimes early in June, depending on your season * * * It gives a light filtered shade * * * it has compound leaves, lots of small leaves, and the sun will come through it and you get a dappled shade, a mottled shade.", it's greatest shade being given "probably June, July, August." (Tr. p. 57); a tree in his mother's yard, which had been a sprout from an old tree that had been cut down, after having been cut off several times by a mowing machine, is now "about 20 feet high, 20, 25 feet high. It is not as full as this (pointing to a tall, well-shaped, full-branched and leafy tree depicted in the advertisement) but it is about half that full. And that is in 5 or 6 years." (Tr. pp. 61–62); "It gives a little bit of shade. It is filtered shade.", and shade being "nice on a hot day", it casts shade in July and August. (Tr. p. 62): and in 28 years of employment as a tree salesman, this witness had sold only one Robinia tree (Tr. p. 60).

The last witness called to testify in support of the complaint was a horticulturist, the Director of Horticulture for the Department of Parks of the city of New York. He has been with the Park Department for about 25 years. Respondents concede his qualifications as an expert (Tr. p. 169). He testified that he is familiar with the locust tree, Robinia *pseudacacia*, that "a developed specimen has a very, very deep furrowed bark on the trunk. The branching up above is rather limited because they are usually dying back. The foliage is a compound very fine leaf. It does have a flower, a white pea-shaped flower, which hangs in clusters of three or four inches. It lasts about two weeks." (Tr. p. 164); "The foliage falls in the fall. In this area (New York), they are quite thin in September. It is not a heavy foliage tree * * * it grows about as far west as Missouri, and about as far south as Georgia. It grows in New York State, Pennsylvania." (Tr. p. 165.) Trees which are used for shade and ornamental purposes have certain characteristics which are "a good deep-rooting root system: a single trunk, well developed, with a good branching habit: good foliage for shade, and above all, not susceptible to disease or insects that were difficult or hard to control." The Robinia does not have these characteristics (Tr. pp. 167, 168); "It doesn't develop a good branching habit until it gets at least five to ten years old. The foliage is very thin; it is not a heavy shade tree * * *" (Tr. p. 168). The tree would reach the tree stage, that is have the appearance of a tree in "say eight or ten years," but "it would have leaves when it was a sucker. Even though it was a whip, it would have some foliage on it. But it would be very light. It would not have the appearance of a shade tree for a number of years. It would depend upon the pruning attention that it was given * * * With proper attention, from five to ten years, * * * it would give the appearance of a tree," and its flowers "might have a blossom or two after three years * * * (with) extensive flowering (after) at least five years." (Tr. p. 176) It might have a blossom during the first year of its growth. It is in bloom in New York in "the latter part of May and early June * * * it might develop faster * * * under its natural conditions" in various parts of the United States (Tr. p. 177). It blooms for "About 2 weeks" and "it grows in pretty poor soil. It is very tolerant of poor soil and arid conditions. So far as I know, its range, as I indicated before, is as far south as Georgia * * * There are some that have been growing in the parks, and those are kept. But they require attention to keep them in shape." (Tr. pp. 179–181.) The witness is familiar with Bailey's Cyclopedia of Horticulture and knows Bailey to have been a professor at Cornell University. He is familiar with a statement quoted by Commission counsel from that work and agrees with it (Tr. p. 181). Shown the picture in the advertisement, a high, thickly-branched, well-leaved and nicely-shaped tree, the witness agreed that the tree "could grow that high" and said "this is a well-developed tree. In looking at the picture, I can only judge it to be at least five or six years old, perhaps eight or ten. It is very difficult to tell from this picture how old it is. But it is a full, developed tree." (Tr. p. 186.) When asked as to whether the tree pictured was a Robinia, he said "It could be a robinia" and later said that the tree as pictured "is at least eight years old." (Tr. p. 187.) There are "faster-growing trees, and that is what I am going by. When you say 'super-growing,' it means faster than anything else." (Tr. p. 188.) It "is possible, depending on what size it was when shipped," "that at the end of the first year this tree could be from seven to ten feet high." He agrees that Bailey's Cyclopedia is "an authoritative, well-thought-of work in the field of horticulture" and that "statements in it (are) likely to be true." When confronted with a quotation from Bailey's, The Standard Cyclopedia of Horticulture, "The locusts are all handsome shrubs and trees with bright green and graceful pinnate foliage, and show white, pink or purple papilionaceous flowers," he disagreed with the portion of it which used the word "all," saying he would except "black and yellow locusts." (Tr. pp. 196–199.) He agreed, however, with other quotations from Bailey about the Robinia *pseudacacia* as to the areas in which it would grow and the soils and locations as well as with the transplanting habits (Tr. pp. 199–200). He agrees with Bailey that the locust involved in this case grows to a height of 80 feet and that, if Bailey said it has become extensively naturalized in Europe he would agree with that, too (Tr. p. 201). To grow to a height of 80 feet, the Robinia "would have to be more than fifty years old * * * it might be seventy-five * * *" Bailey's "gives you the top size that the tree can reach" and that would be "under natural conditions." (Tr. p. 211.)

All this leaves only for additional consideration the description of the tree found in the authoritative work, Bailey's Standard Cyclopedia of Horticulture, The Macmillan Company, 1930. This work first was injected into the case by complaint counsel's witness, the trade association executive (Tr. p. 88). That having been done, the hearing examiner decided it would be well to look at it and, by notice dated February 11, 1964, filed on that day and mailed on February 12, he informed the parties of his intention to take official notice of the material concerning the Robinia tree as the same was set forth on Pages 2966 and 2967 thereof. (See, also, Tr. pp. 142–143.) This material is now pictured here.*

Now, to review all that has been said, as well as much of the testimony to which no reference has been made because it involved matters not alleged in the complaint, we have a tree with respect to which all the witnesses called in support of the charge unanimously recited

*Pictorial exhibit omitted in printing.

objectionable features. Such objectionable features as were the subject of testimony were not within the issues delineated by the complaint. As the most qualified of the witnesses conceded, some or perhaps many of these objectionable features are common to all plants, and all plants require more or less attention and care. That the Robinia may have a greater accumulation of objectionable features or may require more care, or may be more subject to the hazards of nature were not charged in the complaint. All that was charged (and it begins to sound like a monotonous refrain or broken record) was that the Robinia tree does not have characteristics which make "it suitable for shade and ornamental purposes." At best, this is a subjective test. What some people may regard as suitable for shade or ornamental purposes, others may not. Some people have preferences for color, some do not. Some have preferences for leafage, others prefer showy flowers and bloom. Some want a lot of shade, others want "dappled or mottled shade." Some demand shape. This examiner believes there is nothing more beautiful than a coating of ice on the bare wood of the branches of a tree in the wintertime or the bare branches of a tree silhouetted against the snow. There was no consumer testimony and surely we do not need experts to tell us of the whims and caprices of people. *Top Form Mills, Inc.*, Docket No. 8454, Slip opinion of the Commission, May 10, 1963, Page 4. A quick review of what was said by each of these three witnesses shows that the Robinia does, during times of the year, display flowers, blooms, buds and pods and that, in fact, it does cast shade. The acknowledged authoritative work on horticulture says that the Robinia are "Ornamental woody plants grown chiefly for their handsome white, pink, or purple flowers and the graceful foliage * * * The locusts are all handsome shrubs and trees with bright green and graceful pinnate foliage and showy white, pink, or purple papilionaceous flowers in usually pendulous or nodding racemes followed by pods attractive in some species by the dense covering of purple hairs. *R. Pseudacacia* and *R. viscosa* are hardy as far north as Ontario, and most other cultivated species as far north as Massachusetts. They are not particular as to the soil and they do well even in poor sandy soil and dry locations. They stand transplanting well and grow rapidly while young * * * *R. Pseudacacia*, on account of its heat- and drought-resisting qualities, together with its ornamental merits, has become a favorite street tree for cities, particularly in Europe;" The *pseudacacia* comes in many varieties, with none of which the tree in issue was specifically identified and from none of which the tree was distinguished in the evidence. For example, the *stricta* "is a broadly pyramidal form," the *pendula* has "somewhat pendulous branches," the *Ulriciana* has "spreading slightly pendulous branches and large drooping" leaves, the *aurea* has yellow foliage, the *purpurea* has "Young foliage purple," the *semperflorens* is "Flowering during the whole summer," the *Decaisneana* has "light rose-colored" flowers.

With a record such as this, the hearing examiner cannot make a finding that the Robinia *pseudacacia* "does not have characteristics which make it suitable for shade and ornamental purposes" and, therefore, this charge has not been sustained.

The foregoing should be regarded as the hearing examiner's reasons for his rulings on the Proposed Findings of Fact submitted by both counsels. Commission counsel's proposed findings, First, Second, Third, Fourth, Fifth, Seventh and Eleventh are found. His proposed Sixth, Eighth, Ninth and Tenth findings are rejected. His proposed conclusions and his proposed order are rejected. Respondents' proposed findings 1, 2, 3, 4, 5, 6, 7, 8, and 9 are substantially the same (with certain additions appearing in the evidence) as similar proposed findings submitted by counsel supporting the complaint and they, too, are found. Because of the limitations of proof, I am unable to make the conclusions of law numbered I and II, submitted on behalf of the respondent, but do agree with the third conclusion, that the complaint should be dismissed because of a failure of substantial, reliable evidence of probative value in support thereof. Consequently, the following is my

ORDER

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

ORDER DISMISSING COMPLAINT

On August 22, 1963, the Commission issued a complaint charging respondents in the above-captioned proceeding with unfair and deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act. After full evidentiary hearings, the hearing examiner ordered the complaint dismissed for failure of proof. Complaint counsel have appealed. The Commission, upon examination of the record, has concluded that the allegations of the complaint have not been proved and that the complaint should therefore be dismissed.

One of the charges in the complaint was that respondents falsely represented "That the Robinia tree has characteristics which make it suitable for shade and ornamental purposes." The record shows that, while the Robinia tree may have some such characteristics, it is not in fact a suitable tree for shade and ornamental purposes, but has many disadvantages for such use. Although the representation that the tree has characteristics which make it suitable for shade and ornamental purposes may be literally true, it is, standing alone, misleading. Counsel for respondents conceded during the oral argument before the Commission that they were under a duty affirmatively to disclose the disadvantages of their product in this respect so as to dispel the misleading impression created by their representation. Failure to make such affirmative disclosure was, in the circumstances, 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 wachmakers, 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 subquality 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 prepetrated 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 (CADC, 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 *instrumentalities 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

(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 jurisdiction 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 (CADC, 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 manufactured 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 charge[4] 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 1½/1000 (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-

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[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 1½/1000 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

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[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

[16] Tr. 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 1½/1000 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 1½/1000 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.*

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[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

$1\frac{1}{2}/1000$ 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

Docket C-837. Complaint, Sept. 24, 1964—Decision, Sept. 24, 1964

Consent order requiring two manufacturers of railroad signaling and control systems and railroad signaling equipment—whose combined sales of such products during the past 30 years amounted to 90% or more of the total industry sales—to cease their planned common course of action pursuant to which they fixed and maintained agreed upon prices, terms and conditions of sale; allocated markets and customers and agreed not to compete for them; exchanged price information; designated products to be manufactured by a competitor; submitted collusive and non-competitive bids; maintained patent interchange licensing agreements; and entered into contracts requiring purchasers to buy from them all or a fixed percentage of the latters' requirements; to cease discriminating in price between different purchasers of their aforesaid systems and equipment by granting cumulative annual volume discounts which were substantial enough to cause purchasers to buy all of their requirements from one respondent in order to qualify for the maximum discounts; and requiring General Railway Signal Company to divest itself within one year of all its properties and rights, tangible and intangible, in a competitor it controlled—all with provisions as set forth in the order below.

Complaint

The Federal Trade Commission, having reason to believe that the respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45) and Section 2(a) of the Clayton Act (U.S.C., Title 15, Section 13), as amended, 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 with respect thereto as follows:

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act:

Paragraph 1. Respondent General Railway Signal Company, hereinafter referred to as General, is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 801 West Avenue, Rochester 2, New York.

Respondent Westinghouse Air Brake Company, hereinafter referred to as Westinghouse, is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business located at 3 Gateway Center, Pittsburgh 22, Pennsylvania.

Par. 2. Respondents General, acting directly, and Westinghouse, through its Union Switch & Signal Division located at 1789–1807 Braddock Avenue, Swissvale, Pittsburgh, Pennsylvania, are engaged in the manufacture, sale, sale and installation of mechanical, electrical, and electronic systems for control of traffic on railroads and subways. The systems include Centralized Traffic Control Systems (CTC), Automatic Classification Yards, Interlocking Systems and related signal components such as switch machines, signals, rectifiers, relays, track circuits and car retarders. These products are hereinafter collectively referred to as railroad signaling and control systems and railroad signaling equipment.

PAR. 3. Respondents General and Westinghouse are in competition with other corporations, partnerships, individuals and with each other in the manufacture, sale, sale and installation of railroad signaling and control systems and railroad signaling equipment in interstate commerce, except to the extent that such competition has been hindered, lessened, restricted, restrained and eliminated by the unfair methods of competition and unfair acts and practices hereinafter set forth.

Said respondents, in the course and conduct of their business as aforesaid, are now, and have been, engaged in interstate commerce in the manufacture, sale, sale and installation of such products in that each respondent has been and is now selling its products to purchasers thereof located in states other than the state of manufacture of said products. Respondents have, directly or indirectly, caused said products to be transported from the state of manufacture to said purchasers located in other states, or in the District of Columbia. There is now, and has been, a constant course and flow of trade and commerce in said products between respondents and purchasers thereof located in various States of the United States and the District of Columbia.

PAR. 4. Modern signaling and control systems such as block, interlocking, traffic control, special control and the like have as their object the safe and efficient movement or control of locomotives, cars, trains or switches. A centralized traffic control system through remote control of railway signals and switch machines permits train operation at distant points by direct signal indication. Other systems such as Automatic Classification Yard Control permit automatic programming and routing of cars onto multiple classification tracks so that they will couple at a minimum of speed and impact. Interlocking systems, an arrangement of signals, switch machines and control equipment provide a means for automatic direction and control of train movements through a given area.

The basic hardware of all system installations, the signaling components such as switch machines, signals, rectifiers, relays, and retarders are required in multiple quantities depending on the size and complexity of the system. Such products represent, therefore, a major portion of the dollar cost of a system installation.

Railroad signaling and control systems and railroad signaling equipment sales in the United States during the past 10 years have ranged from approximately $30,000,000 to $60,000,000 per year. Sales of such products by respondents during the past 30 years have amounted to 90% or more of the total industry sales of such products.

Railroad signaling and control systems and railroad signaling equipment are essential for the safe and efficient movement or control of locomotives, cars, trains or switches, as well as the protection of life and property, on railroads and subways.

PAR. 5. Commencing during or about 1916, and continuing to the present time, respondents General and Westinghouse have been engaged in unfair methods of competition and unfair acts and practices in commerce in the manufacture, offering for sale, sale, sale and installation of railroad signaling and control systems and railroad signaling equipment in that they have, through conspiracy, combination, agreement, course of dealing, and planned common course of action, and as a part thereof, done and performed the following:

(a) Fixed and maintained prices, terms and conditions of sale;

(b) Agreed to divide markets and customers;

(c) Agreed not to compete for markets and customers;

(d) Submitted collusive and non-competitive bids;

(e) Foreclosed access to substantial markets to competitors and potential competitors;

(f) Attempted to monopolize and have monopolized the manufacture, sale, sale and installation of railroad signaling and control systems and railroad signaling equipment.

In furtherance of, and in conformity with the aforesaid combination, conspiracy, agreement, course of dealing, and planned common course of action in restraint of trade and commerce, respondents General and Westinghouse have engaged in unfair methods of competition and unfair acts and practices such as, but not limited to, the following:

1. Patent interchange licensing agreements have been in effect continuously between respondents General and Westinghouse since on or about May 4, 1916. The parties to this 1916 agreement were General, Union Switch & Signal Company, now operated as a division of respondent Westinghouse, Federal Signal Company and Hall Switch & Signal Company. Each party to the agreement was then engaged in the manufacture, sale, sale and installation of railroad signaling and control systems and railroad signaling equipment.

In this agreement the parties thereto assumed that all United States patents, patent applications and inventions for signaling, as "signaling" was defined therein, owned or controlled by the parties, or under which they had the right to grant licenses, were of an aggregate value represented by the number 1,000. Each party was then assigned as a royalty basis, a percentage of the aggregate value allegedly equivalent to the relative value of the patents, patent applications and inventions on signaling then owned or controlled by each party.

Each party's royalty basis thereafter became its sales position, since whenever a party's net sales of signaling exceeded its royalty basis it was required to pay 20% of the excess to those parties whose net sales of signaling fell below their respective royalty basis. Said agreement also provided that each party would license the others under all existing patents owned by said parties, and licenses also would be issued under future patents issued to any party during the life of the agreement. Additionally, each was required to render to the others monthly sworn statements showing net sales, including names of the purchasers, net selling prices, and the character of the system or apparatus sold and installed.

Subsequent to this agreement respondents General and Westinghouse, during 1924 or thereabouts, acquired by purchase or otherwise, respectively, Federal Signal Company and Hall Switch & Signal Company. As successors in interest to the aforenamed companies, General and Westinghouse extended and continued in all respects, the patent interchange licensing agreement.

The 1916 agreement was replaced by a new agreement entered into by General and Westinghouse on January 1, 1952. This agreement provided for the interchange of non-exclusive licenses under any existing patents owned or controlled by the parties, and under any patents acquired in the future. Royalties were required to be paid on all "sales" of railroad signaling equipment, including all charges for labor and other services rendered to customers. Monthly royalty reports were exchanged which reports included names of customers and dollar sales to each customer.

On August 31, 1962 General and Westinghouse cancelled the 1952 agreement and entered into a new agreement whereby each granted to the other a non-exclusive license, without right to sublicense, under all United States and Canadian patents owned by each company as of the date of the agreement or subsequently issued on applications for patents pending as of the date of the agreement. The terms of the agreement do not provide for royalty payments or the reporting of sales information.

2. Respondents General and Westinghouse had in effect with their respective customers for a period in excess of twenty years, contracts of the requirements type which, considered together with discount arrangements then in effect, resulted in the elimination of competition and a division of customers between said respondents, and had the further effect of hindering and foreclosing entry into the signal equip-

ment market by competitors and potential competitors. These contracts were revised approximately ten years ago.

3. Respondents General and Westinghouse currently have in effect cumulative volume discount schedules which, considered together with the requirements contracts and discount arrangements previously in effect, have served to create and maintain and continue to create and maintain a division of customers between them by acting as an inducement to said customers to continue purchasing from whichever respondent is their present supplier in order to obtain the maximum discounts. Said volume discount schedules have the further effect of hindering and foreclosing entry into the signal equipment market by competitors and potential competitors.

4. Respondents General and Westinghouse have communicated and do now communicate between and among themselves and have filed and exchanged with each other detailed sales information including names of all customers and particulars of sales to each customer. Respondents have cooperated and assisted each other through arrangements made and carried out whereby plant visitations of key personnel were made during which information relating to the production, engineering, and administrative procedures and policies of each were made known to the other. Through and by means of such acts, practices and methods respondents have and are now kept informed of the activities of each other and are thus furnished with, or made aware of, information of a most confidential nature.

5. A substantial portion of the sales of railroad signaling equipment is represented by the sale and installation of railroad signaling and control systems. These systems or projects are frequently awarded on the basis of secret bids. Respondents General and Westinghouse have at various times prior hereto met, discussed and agreed upon prices which each would submit on particular bids requested by customers. In some instances respondents agreed not to submit bids or quotations. Such acts, practices and policies have effectively eliminated competition between respondents and have resulted in a division of markets and customers.

PAR. 6. Respondent General has formulated, directed and controlled the acts, practices and policies of Railroad Accessories Corporation, hereinafter referred to as RACO, a corporation organized and existing under the laws of the State of New York, with its office and place of business located at 5 Tenakill Park, Cresskill, New Jersey. This control has been exercised through stock ownership, stock options, and interlocking directors. Said interlocking directors resigned from the RACO Board of Directors during July 1962.

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RACO is engaged in the manufacture and sale of maintenance of way equipment and signal accessories used on railroads and subways. Signal accessories include such items as lightning arresters, switches, fuse blocks, snow shields and equalizers used for protection of signal equipment against power surges.

RACO has been and is now in competition with respondents General and Westinghouse in the manufacture and sale of railroad signaling equipment. RACO does not engage in the installation of railroad signaling and control systems. Competition between RACO and respondents General and Westinghouse has been hindered, lessened, restricted, restrained and eliminated by respondent General which, in the exercise of its control, has designated the products to be manufactured by RACO and has acted, or otherwise caused RACO to fail or refuse to independently compete in the manufacture and sale of railroad signaling equipment.

PAR. 7. The acts and practices of the respondents, as hereinbefore alleged, have had and do have the effect of hindering, lessening, restricting, restraining and eliminating competition in the manufacture, sale, sale and installation of railroad signaling and control systems and railroad signaling equipment; have foreclosed markets and access to markets to competitors and potential competitors; have created and maintained in respondents a monopoly in the manufacture, sale, sale and installation of railroad signaling and control systems and railroad signaling equipment; are all to the prejudice of customers of respondents, to competitors of respondents, and to the public interest; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

COUNT II

Alleging violation of Section 2(a) of the Clayton Act, as amended:

PAR. 8. Paragraphs One through Four of Count I hereof are incorporated by reference and made a part of the allegations in Count II herein.

PAR. 9. In the course and conduct of their business in commerce, respondents General and Westinghouse have sold, or offered for sale, railroad signaling and control systems and railroad signaling equipment to purchasers thereof, some of whom have been and are in competition with each other, and with customers of competitors of respondents. Said respondents have been and are now in competition with other corporations, partnerships, and individuals engaged in the manufacture, sale, and sale and installation of railroad signaling and control systems and railroad signaling equipment.

PAR. 10. Respondents General and Westinghouse have been, for a period of many years, at least since 1948 and continuing to the present time, discriminating in price between different purchasers of their railroad signaling and control systems and railroad signaling equipment of like grade and quality by selling to some of their purchasers at substantially higher prices than to other of their purchasers. Said discriminations in price result from cumulative annual volume discounts which are allowed to purchasers pursuant to written contracts or other agreements and understandings.

Respondent General, pursuant to written contracts or other agreements and understandings with purchasers, has been and is now granting to its purchasers the following discounts on total purchases per calendar year:

	Percent
$100,000 or less	5
Over $100,000 but less than $200,000	6
Over $200,000 but less than $300,000	7
Over $300,000 but less than $400,000	8
Over $400,000 but less than $500,000	9
Over $500,000	10

Respondent Westinghouse, pursuant to written contracts or other agreements and understandings with purchasers, has been and is now granting to its purchasers the following discounts on total purchases per calendar year:

	Percent
Up to $400,000	5
Over $400,000	10

The aforesaid discounts granted by respondents General and Westinghouse are substantial enough to cause purchasers to buy all or substantially all of their requirements of said products from one respondent in order to qualify for the maximum discounts offered by that respondent.

PAR. 11. The effect of the discriminations in price between different purchasers of railroad signaling and control systems and railroad signaling equipment, as hereinbefore alleged, has been and may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents are engaged, or to injure, destroy or prevent competition between respondents and their competitors. In addition, such discriminations in price have a dangerous tendency to hinder competition and to create or further a monopoly in respondents in the manufacture, sale, sale and installation of railroad signaling and control systems and railroad signaling equipment.

PAR. 12. The foregoing alleged discriminations in price made by respondents General and Westinghouse are in violation of the provisions of Section 2(a) of the Clayton Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 5 of the Federal Trade Commission Act and with violation of subsection (a) of Section 2 of the Clayton Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law had been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated Section 5 of the Federal Trade Commission Act and subsection (a) of Section 2 of the Clayton Act, as amended, and having determined that complaint should issue stating its charges in those respects, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent General Railway Signal Company is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 801 West Avenue, Rochester 2, New York. Respondent General Railway Signal Company formulates, directs and controls the acts, practices and policies of Railroad Accessories Corporation, a corporation organized and existing under the laws of the State of New York, with its office and place of business located at 5 Tenakill Park, Cresskill, New Jersey.

Respondent Westinghouse Air Brake Company is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business located at 3 Gateway Center, Pittsburgh 22, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents General Railway Signal Company, a corporation; Westinghouse Air Brake Company, a corporation; and their respective officers, agents, representatives and employees, successors or assigns, directly, indirectly or through any corporate or other device, in connection with the manufacture, offering for sale, sale, distribution or sale and installation in commerce, as "commerce" is defined in the Federal Trade Commission Act, of railroad signaling and control systems or railroad signaling equipment, do forthwith cease and desist from entering into, cooperating in, carrying out or continuing any combination, conspiracy, understanding, agreement, planned common course of action or course of dealing between said respondents, or between any one or more of said respondents and any other person, persons or business entity not a party hereto, to do or perform any of the following acts, practices or things:

(1) Establish, fix, maintain or agree upon prices, terms or conditions of sale;

(2) Establish, fix, maintain or agree upon prices, terms or conditions of sale to be used in submitting bids or quotations to any purchaser or prospective purchaser;

(3) Submitting collusive bids or quotations;

(4) Bid or quote, refrain from bidding or quoting, or causing another to bid or quote or refrain from bidding or quoting to any purchaser or prospective purchaser;

(5) Allocate or divide territories, markets, or customers;

(6) Exchange, distribute or circulate any information concerning prices, discounts, allowances, terms or conditions of sale, bid, or any other pricing information of any nature whatsoever prior to such information becoming available to respondents' customers or to the public;

(7) Manufacture, sell, or refrain from manufacturing or selling any railroad signaling and control systems or railroad signaling equipment.

It is further ordered, That respondents General Railway Signal Company, a corporation; Westinghouse Air Brake Company, a corporation; and their respective officers, agents, representatives and employees, successors or assigns, directly, indirectly or through any corporate or other device, in connection with the manufacture, offering for sale, sale, distribution or sale and installation in commerce, as "commerce" is defined in the Federal Trade Commission Act, of railroad signaling and control systems or railroad signaling equipment, do individually and independently forthwith cease and desist from:

(1) Attending meetings other than bid openings at which any other respondent or vendor of railroad signaling and control systems or railroad signaling equipment are present, at which the prices, terms or conditions for the sale of railroad signaling and control systems or railroad signaling equipment are discussed;

(2) Attending meetings at which any other respondent or vendor of railroad signaling and control systems or railroad signaling equipment are present, at which the prices, terms or conditions for the sale of railroad signaling and control systems or railroad signaling equipment to be bid are discussed;

(3) Holding or participating in any discussions by telephone or otherwise with any other respondent or vendor of railroad signaling and control systems or railroad signaling equipment, pertaining to prices, terms or conditions of sale of railroad signaling and control systems or railroad signaling equipment;

(4) Sending to, requesting from, or exchanging with any other respondent or vendor of railroad signaling and control systems or railroad signaling equipment any information, written or oral, pertaining to prices, terms or conditions of sale of railroad signaling and control systems or railroad signaling equipment prior to such information becoming available to respondents' customers or to the public;

(5) Formulating or submitting any bid on railroad signaling and control systems or railroad signaling equipment to a purchaser or prospective purchaser the prices or terms and conditions of sale of which are based in any way upon information obtained in a manner prohibited by (1), (2), (3) or (4) above; and

(6) Entering into or utilizing contracts with purchasers whereby said purchasers are required to purchase all or any fixed percentage of their requirements of railroad signaling and control systems or railroad signaling equipment from any respondent; provided, however, that respondents may use such agreements when specifically requested by any governmental or quasi-governmental agency.

Provided, *however*, That:

(1) Nothing contained in the foregoing paragraphs of this Order shall apply to any transaction between a respondent and

its subsidiaries, agents, representatives or employees. For the purposes of this paragraph Railroad Accessories Corporation shall not be construed as a subsidiary of General Railway Signal Company.

(2) Nothing contained in the foregoing paragraphs of this Order shall be construed as prohibiting any respondent from entering into a bona fide offer, agreement or transaction with any other person, persons, or business entity to purchase or sell railroad signaling and control systems or railroad signaling equipment at prices, terms or conditions of sale independently determined and offered and independently accepted.

(3) Nothing contained in the foregoing paragraphs of this Order shall be construed as prohibiting any respondent from formulating or submitting a joint bid on railroad signaling and control systems or railroad signaling equipment with any other person, persons or business entity to any governmental or quasi-governmental agency if such joint bid is expressly requested by such purchaser and if such joint bid is expressly made known to such purchaser by the time of the official opening of the bid or the date of contract of sale, whichever is earlier, providing that, for a period of ten (10) years from the effective date of this Order any respondent submitting such a joint bid on railroad signaling and control systems or railroad signaling equipment shall notify the Commission of each such joint bid within thirty (30) days after the official opening of the bid or the date of the contract of sale, whichever is earlier.

It is further ordered, That respondents General Railway Signal Company, a corporation; and Westinghouse Air Brake Company, a corporation, shall forthwith:

(1) Cancel, nullify and refrain from renewing any contracts, agreements or understandings between said respondents which in any manner provide for the exchange of or the furnishing of names of customers or other sales information, or the exchange of plant, technical, cost, administrative or any other information of a confidential nature;

(2) Execute and deliver each to the other, to the extent, if any, that they have not heretofore done so, an unrestricted, non-exclusive, royalty-free license to make, have made, use, sell, lease or otherwise dispose of railroad signaling and control systems or railroad signaling equipment under, and for the full unexpired term of all of each respondent's United States patents unexpired as of August 31, 1962.

It is further ordered, That respondents General Railway Signal Company, a corporation, and Westinghouse Air Brake Company, a corporation, individually and independently shall grant to any domestic applicant making written request therefor an unrestricted, nonexclusive license to make, have made, use, sell, lease or otherwise dispose of railroad signaling and control systems or railroad signaling equipment under, and for the full unexpired term of any of each respondent's United States patents, as may be requested by said applicant.

Any license granted pursuant hereto shall be unrestricted except as hereinafter provided:

(1) The license may be nontransferable;

(2) A reasonable royalty may be charged, which royalty shall be nondiscriminatory as among royalty-paying licensees procuring the same rights under the same patents, provided that the royalty charged an applicant who grants in exchange a patent license to a respondent may reflect the fair value of such license;

(3) Reasonable provision may be made for periodic royalty reports by the licensee and inspection of the books and records of the licensee by an independent auditor, an independent engineer or any person acceptable to both licensor and licensee, who shall report to the licensor only the amount of the royalty due and payable;

(4) The license may require the licensee properly to affix appropriate statutory patent notices;

(5) Reasonable provision may be made for cancellation of the license upon failure of the licensee to make the reports, pay the royalties, permit the inspection of his books and records, or affix the statutory patent notices as hereinabove provided; and

(6) The license must provide that the licensee may cancel the license in whole or as to any specified patents at any time after one year from the initial date thereof by giving thirty (30) days notice in writing to the licensor.

Provided, however, That:

Nothing contained herein shall prevent any applicant or licensee from attacking in any manner the validity or scope of any patent required to be licensed by the provisions of this Order nor shall this Order be construed as importing any validity or value to any of said patents.

It is further ordered, That respondents General Railway Signal Company, a corporation; Westinghouse Air Brake Company, a corporation; and their respective officers, agents, representatives and employees, individually and collectively, refrain from making any assignment, sale or other disposition of any of the patents required to be licensed pursuant to the provisions of this Order which would deprive said respondents of the power or authority to license such patents unless said respondents sell, transfer or assign such patents upon the condition that the purchaser, transferee or assignee shall observe the requirements of this Order so far as they pertain to such patents; provided however, that said respondents may donate, assign or dedicate any such patent, or patents, to the general public in lieu of the licensing requirements of this Order.

It is further ordered, That respondents General Railway Signal Company, a corporation, and Westinghouse Air Brake Company, a corporation, shall each in respect to any patent licensed by it to any licensee pursuant to this Order, furnish at cost to such licensee upon his request a full, clear, concise and exact written description of the invention disclosed in such patent, and of the manner and process of making and using it, sufficient to enable a person reasonably skilled in the manufacture of railroad signaling and control systems or railroad signaling equipment to make and use the invention.

It is further ordered, That respondents General Railway Signal Company, a corporation, and Westinghouse Air Brake Company, a corporation, shall forthwith file with the Commission in writing a listing of each of the patents required to be licensed by the provisions of this Order, identifying each by patent number, inventor's name, and title of patent.

It is further ordered, That respondents General Railway Signal Company, a corporation, and Westinghouse Air Brake Company, a corporation, shall, for a period of ten (10) years after service of this Order upon them, cease and desist from:

(1) Selling, or offering for sale, to each other railroad signaling and control systems or railroad signaling equipment, at prices, discounts or terms and conditions of sale not available to other competing vendors of such products;

(2) Selling, or offering for sale, to each other railroad signaling and control systems or railroad signaling equipment not available to other vendors of such products; and

(3) Granting to each other licenses under future United States patents covering railroad signaling and control systems or railroad signaling equipment unless licenses on similar terms and conditions are available to other vendors of such products.

It is further ordered, That respondent General Railway Signal Company, a corporation, and its officers, agents, representatives and employees, shall, within one year after service upon it of this Order, divest itself absolutely, in good faith, of all stock, assets, properties, rights and privileges, tangible or intangible, of Railroad Accessories Corporation. Pending divestiture, General Railway Signal Company shall not make any changes in the plants, machinery, buildings, equipment or other property of Railroad Accessories Corporation which shall impair its present capacity for the manufacture, sale and distribution of railroad signaling and control systems or railroad signaling equipment.

General Railway Signal Company in such divestiture shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights or privileges to any one who, at the time of such divestiture, is a stockholder or officer, director, representative, employee, or who is connected with, or under the control or influence, directly or indirectly, of General Railway Signal Company or Westinghouse Air Brake Company.

It is further ordered, That respondent General Railway Signal Company may, in lieu of the divestiture provisions of the preceding paragraph, transfer to an independent Voting Trustee, which shall not be under the direct or indirect control, domination or influence of General Railway Signal Company, all of the capital stock of Railroad Accessories Corporation as is presently held by General Railway Signal Company or may be acquired by it within one year after service upon it of this Order under any now outstanding option, or at any time thereafter by receipt of stock dividends or exercise of preemptive rights; and respondent General Railway Signal Company shall maintain in existence the voting trust so created, or a successor thereof, so long as General Railway Signal Company shall continue to hold any of the outstanding capital stock of Railroad Accessories Corporation.

Said Voting Trustee shall have full independent discretion to vote the trusteed stock and respondent General Railway Signal Company and its officers, agents, representatives and employees may not consult, advise or otherwise participate in any manner except as to any decision relating to the merger or consolidation of Railroad Accessories Corporation with another corporation, or the sale of said trusteed stock, or the sale of all or substantially all of the assets of Railroad Accessories Corporation, or in the event of the appointment of a successor Voting Trustee. Respondent General Railway Signal Company and its officers, agents, representatives and employees shall not acquire additional stock in Railroad Accessories Corporation other than as heretofore provided, and any sale of said trusteed stock shall be subject to the provisions of the preceding paragraph of this Order.

It is further ordered, That respondents General Railway Signal Company, a corporation; Westinghouse Air Brake Company, a corporation; and their respective officers, agents, representatives and employees, successors or assigns, directly, indirectly or through any corporate or other device, in connection with the manufacture, offering for sale, sale, distribution, sale and installation in commerce, as "commerce" is defined in the Clayton Act, of railroad signaling and control systems or railroad signaling equipment, do forthwith cease and desist from:

(1) Granting any annual or other cumulative volume discount;

(2) Entering into or maintaining any contract or agreement providing for any of the discounts prohibited by (1) above.

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

IN THE MATTER OF

BRITE MANUFACTURING CO. ET AL.

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

Docket 8325. Complaint, Mar. 15, 1961—Decision, Sept. 25, 1964

Order clarifying desist order of June 18, 1964, 65 F.T.C. 1067, which required Providence, R.I., distributors of watchbands made in whole or in part in Japan, to cease selling the watchbands so packaged or displayed as to conceal the name of the place of origin—by affirmatively setting forth the manner of compliance.

ORDER MODIFYING ORDER TO CEASE AND DESIST

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

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

Offering for sale, selling or distributing any such product packaged, or mounted in a container, or on a display card, without disclosing the country or place of foreign origin of the product, or substantial part thereof, on the front or face of such packaging, container, or display card, so positioned as to clearly have application to the product so packaged or mounted, and of such degree of permanency as to remain thereon until consummation of consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

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

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

IN THE MATTER OF

HARRY D. COOPER & CO., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-838. Complaint, Sept. 28, 1964—Decision, Sept. 28, 1964

Consent order requiring Boston, Mass., manufacturers of wool products to cease violating the Wool Products Labeling Act by labeling fabrics falsely as containing 85% reprocessed cashmere, 15% nylon; failing to disclose on labels the percentages of the various fibers contained in wool products and to identify the manufacturer, etc.; using the term "cashmere" in lieu of the word "wool" on labels without setting forth the correct percentage of the cashmere; and abbreviating required information on labels.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Harry D. Cooper & Co., Inc., a corporation, and Harry D. Cooper, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 Harry D. Cooper & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts.

Individual respondent, Harry D. Cooper is an officer of said corporation and formulates, directs and controls the acts, policies and practices of corporate respondent, including the acts and practices hereinafter referred to.

Respondents are manufacturers of wool products with their office and principal place of business located at 35 Harrison Avenue Extension, Boston, Massachusetts.

Par. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, introduced into commerce sold, transported, distributed, delivered for shipment, shipped and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

Par. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were fabrics stamped, tagged or labeled as containing 85% reprocessed cashmere, 15% nylon whereas in truth and in fact, said fabrics contained substantially different amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain fabrics with labels on or affixed thereto which failed to disclose:

(a) The percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) woolen fibers; (2) each fiber other than wool present in the wool product in the amount of 5% or more by weight; (3) the aggregate of all other fibers.

(b) The name or other identification issued and registered by the Commission of the manufacturer of the wool products or one or more persons subject to Section 3 of the Wool Products Labeling Act of 1939 with respect to such wool products.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder, in that:

1. Words and terms used in required information descriptive of fiber content were set out in abbreviated form on the stamp, tag, label or other means of identification on or affixed to wool products in violation of Rule 9 of the aforesaid Rules and Regulations.

2. The term "cashmere" was used in lieu of the word "wool" on labels affixed to wool products without setting forth the correct percentage of the cashmere, in violation of Rule 19 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

PAR. 6. The acts and practices of the respondents as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Harry D. Cooper & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 35 Harrison Avenue Extension, Boston, Massachusetts.

Respondent Harry D. Cooper is an officer of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Harry D. Cooper & Co., Inc., a corporation, and its officers, and Harry D. Cooper, individually and as an officer of said corporation and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment in commerce, of wool fabric or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

3. Setting forth words and terms in required information under Section 4(a) (2) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder in abbreviated form on labels affixed to wool products.

4. Using the term "cashmere" in lieu of the word "wool" on labels affixed to wool products without setting forth the correct percentage of the cashmere present.

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

ARIZONA VALLEY DEVELOPMENT COMPANY, INC., ET AL.

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

Docket C-839. Complaint, Sept. 28, 1964—Decision, Sept. 28, 1964

Consent order requiring two associated corporations and four individuals acting for them, engaged in selling lots or parcels of real estate in "Arizona City," Arizona, by mail and directly, to cease misrepresenting the location and accessibility of lots, nature and climate of the area, number of lots available, employment opportunities, and refund policy.

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 Arizona Valley Development Company, Inc., a corporation; Arizona City Development Corporation, a corporation; James A. McRae and John T. Foley, individually and as officers of the above corporations; J. David Knudson, individually and as a former officer of said corporations, and Richard Kolar, an individual doing business as Kolar Sales 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 Arizona Valley Development Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 301 N. Sunland Gin Road, Arizona City, Arizona.

Respondent Arizona City Development Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona. It is a wholly owned subsidiary of respondent Arizona Valley Development Company, Inc., and has its principal office and place of business located at 301 N. Sunland Gin Road, Arizona City, Arizona.

Respondents James A. McRae and John T. Foley are officers of the corporate respondents. They formulate, direct and control the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

Respondent J. David Knudson is a former officer of the said corporate respondents and participated in the formulation, direction and control of the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth, until his resignation therefrom on December 31, 1963. His address is 6225 E. Rose Circle Drive, Scottsdale, Arizona.

Respondent Richard Kolar is an individual who has done business as Kolar Sales Company with his principal office and place of business located at 593 Capri Drive, Palatine, Illinois. He acted as principal sales agent for said corporations until August 1, 1963 and as a salesman therefor until December 1963.

PAR. 2. Respondents have been engaged in the advertising, offering for sale and sale of lots or parcels of real estate located in the State of Arizona to the public in various parts of the United States by means of the United States mails and through agents and sales representatives. The said land is known as Arizona City.

PAR. 3. Respondents, in conducting the business aforesaid, have sent and transmitted, and have caused to be sent and transmitted, letters, contracts, checks, deeds and other papers and documents of a commercial nature from their places of business in the States of Arizona and Illinois to purchasers and prospective purchasers located in various other States of the United States and have thus engaged in extensive commercial intercourse, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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PAR. 4. Respondents, for the purpose of inducing the purchase of said parcels of real estate, have distributed business reply cards, form letters, reprints of newspaper articles, circulars, and other advertising material to members of the public by means of the United States mails and through agents and sales representatives. Typical of the statements, depictions and representations in said advertising material, but not all inclusive thereof, are the following:

> There are good reasons to stake your claim in this fast-growing Arizona area now * * * Important industries, fabulous resorts, * * * thriving retail and wholesale establishments * * * are to be found in Central and Southern Arizona * * * Further development of these activities is definitely heading from Phoenix to Tucson.
>
> In an area of rich farmland and glorious climate.
>
> Arizona City Climate Facts * * * Average Annual Temperature 69.7.

In addition to and in conjuction with the foregoing advertising representations, respondents' agents and sales representatives have made numerous oral statements and representations and displayed various kinds of promotional material to prospective purchasers concerning and relative to the location, climate, availability of utilities, employment opportunities, cost of building or financing homes, and other features and characteristics of the land and vicinity in and around said Arizona City.

PAR. 5. By and through the use of the above-quoted statements and depictions and by means of said oral statements and promotional literature, respondents have represented, directly or by implication, that:

1. All lots in Arizona City front on a paved road or street and are readily accessible from an established highway.
2. Said lots are situated in an area of rich farmland.
3. The number of said lots available is restricted to a small quantity.
4. Arizona City offers many employment opportunities due to the fact that government projects, industrial plants, large retail stores and other commercial establishments will soon be built or installed in the immediate vicinity.
5. Respondents' agents and sales representatives themselves were moving from Illinois to Arizona City.
6. Purchasers of said lots can obtain a refund of the purchase price if not satisfied with said lots.
7. Arizona City has a moderate climate with no extremes of heat or cold.

PAR. 6. In truth and in fact:

1. All lots in Arizona City do not front on a paved road or street and are not readily accessible from an established highway.

2. Said lots are not situated in an area of rich farmland in that the immediate vicinity of said lots does not consist of such farmland.

3. The number of said lots available is not restricted to a small quantity.

4. Arizona City does not offer many employment opportunities; and government projects, industrial plants, large retail stores or other large commercial establishments are not planned for the immediate vicinity thereof.

5. Respondents' agents and sales representatives have not moved from Illinois to Arizona City.

6. Purchasers of said lots can obtain a refund of the purchase price only under the conditions set forth in respondents' guarantee form.

7. Whereas Arizona City has a generally moderate climate, it does have occasional extremes of heat and cold.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. At all times herein mentioned, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of real estate of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforementioned false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true, and into the purchase of substantial quantities of respondents' lots by reason of said mistaken and erroneous 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.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed agreements, each containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered such agreements, hereby accepts same, issues its complaint in the form contemplated by said agreements, makes the following jurisdictional findings, and enters the following order:

1. Respondent Arizona Valley Development Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 301 N. Sunland Gin Road, in the city of Arizona City, State of Arizona.

Respondent Arizona City Development Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona. It is a wholly owned subsidiary of Arizona Valley Development Company, Inc., and has its office and principal place of business at the same address.

Respondents James A. McRae and John T. Foley are officers of the said corporations, and their address is the same as that of said corporations.

Respondent J. David Knudson is a former officer of said corporations. Until his resignation therefrom on December 31, 1963, he participated in the formulation, direction and control of the policies, acts and practices of said corporations. His address is 6225 East Rose Circle Drive, Scottsdale, Arizona.

Respondent Richard Kolar is an individual who is doing, or has done, business as Kolar Sales Company with an office and place of business at 593 Capri Drive, Palatine, Illinois. He acted as principal sales agent for said corporations until August 1, 1963, and as a salesman therefor until December 1963.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Arizona Valley Development Company, Inc., a corporation, and its officers; and Arizona City Development Corporation, a corporation, and its officers; and James A. McRae and John T. Foley, individually and as officers of said corporations;

and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale and sale of real estate, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication:

1. That all lots of said land in Arizona City front on a paved road or street or are readily accessible from an established highway; provided, however, that the location of said land with respect to established highways may be stated and shown.

2. That the immediate vicinity of Arizona City consists of rich farmland.

3. That the number of lots available in Arizona City is restricted to a small quantity.

4. That Arizona City offers many employment opportunities or that Government projects, industrial plants, large retail stores or other large commercial establishments are to be built or installed in the immediate vicinity unless such establishments are under construction or bona fide contracts therefor have been entered into.

5. That respondents' agents or sales representatives are moving from Illinois or any locality to Arizona City.

6. That purchasers of said lots can obtain a refund of the purchase price unless the conditions pertaining to such refund are disclosed.

7. That Arizona City has a moderate climate unless disclosure is made of the highest and lowest seasonal temperatures.

B. Misrepresenting in any manner the location, climate, employment opportunities, or any other material feature of said land and its development.

It is ordered, That respondents J. David Knudson, individually and as a former officer of the Arizona Valley Development Company, Inc., a corporation, and the Arizona City Development Corporation, a corporation; and Richard Kolar, individually and doing business as Kolar Sales 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 and sale of real estate, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication:

1. That all lots of said land in Arizona City front on a paved road or street or are readily accessible from an established highway; provided, however, that the location of said land with respect to established highways may be stated and shown.

2. That the immediate vicinity of Arizona City consists of rich farmland.

3. That the number of lots available in Arizona City is restricted to a small quantity.

4. That Arizona City offers many employment opportunities or that Government projects, industrial plants, large retail stores or other large commercial establishments are to be built or installed in the immediate vicinity unless such establishments are under construction or bona fide contracts therefor have been entered into.

5. That respondents' agents or sales representatives are moving from Illinois or any locality to Arizona City.

6. That purchasers of said lots can obtain a refund of the purchase price unless the conditions pertaining to such refund are disclosed.

7. That Arizona City has a moderate climate unless disclosure is made of the highest and lowest seasonal temperatures.

B. Misrepresenting in any manner the location, climate, employment opportunities, or any other material feature of said land and its development.

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

IN THE MATTER OF

PATRICIA STEVENS, INC., ET AL.

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

Docket C-840. Complaint, Sept. 29, 1964—Decision, Sept. 29, 1964

Consent order requiring a Chicago operator of schools offering courses of instruction to persons seeking jobs as professional models, fashion advisers, buyers, airline stewardesses, secretaries and receptionists, and careers in radio, the movies, television and other fields, along with its corporate associate which granted franchises to schools throughout the United States wherein the Patricia Stevens methods of training were employed, to cease making such false claims in advertising and through agents that jobs and careers were open to all graduates of their courses; that their career placement service assured graduates of immediate employment; that their graduates were in great demand by airlines as stewardesses and by department stores as fashion advisers or buyers; that their schools were recommended by vocational counsellors, high schools, colleges, etc.; and that their contracts were cancellable at the students' option.

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 Patricia Stevens, Inc., a corporation, and Vincent Melzac, as an officer of said corporation, and Tom Fizdale, Inc., a corporation, and Tom Fizdale, individually and as an officer 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 Patricia Stevens, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 22 West Madison Street, in the city of Chicago. State of Illinois.

Respondent Vincent Melzac is the principal officer of said corporation having taken that office after a change of ownership on April 22, 1962. Since that date and at present he formulates, directs and controls the acts, practices and policies of said corporation and his address is the same as that of said corporation. The acts and practices of said corporation hereinafter alleged were pursuant to policies formulated prior to the time respondent Melzac became an officer of said corporation.

Respondent Tom Fizdale, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 22 West Madison Street, in the city of Chicago, State of Illinois.

Respondent Tom Fizdale is an officer of said corporation, Tom Fizdale, Inc. He formulates, directs and controls the acts and practices of said corporation, and his address is the same as that of said corporation.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the operation of schools, either directly or indirectly, wherein courses of instruction are offered to those seeking jobs as professional models, fashion advisers, buyers, airline stewardesses, secretaries and receptionists; and careers in radio, the movies, television and in various other fields.

PAR. 3. Both corporate respondents stem from a common source, the Patricia Stevens School System, which was owned and operated by Patricia Stevens in her lifetime. In the past, respondents have used the same type of recruitment program and in some instances identical advertising claims, and have jointly held out to the public that they were a large, single, nationwide organization, and have so represented verbally to prospective students, pointing out the enrollment with one may be continued at the school of the other in the event that the student should change his or her residence.

PAR. 4. Corporate respondent Patricia Stevens, Inc., conducts a residence school of instruction in Chicago, Illinois. It solicits students by means of advertisements in Chicago newspapers that have an interstate circulation, by direct mailings to recent high school graduates and others, in various States, by telephone and also by salesmen who travel in and solicit students from States other than Illinois. Said salesmen secure signed contracts from prospective students and remit cash deposits from them across State lines to the home office in Chicago, Illinois.

PAR. 5. Corporate respondent Tom Fizdale, Inc., grants franchises to operators of schools throughout the United States wherein the Patricia Stevens methods of training are employed. The franchise agreement entered into between corporate respondent Fizdale and said operators provide, among other things, that said operators are to expend at least 10% of their gross annual receipts in advertising and that 10% of the weekly gross receipts are to be paid to respondent Fizdale. Fizdale furnishes said schools advertising matter, instructions with reference to sales methods, lesson material and instructions to teachers in the schools.

PAR. 6. By virtue of the aforesaid acts and practices all of the aforesaid respondents have been, and are now, engaged in extensive commercial intercourse in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. In the course and conduct of their aforesaid business, and for the purpose of inducing persons to sign contracts for respondents' course of instruction, the respondents have made many statements and representations, similar in character through mail advertising, through oral representations made by salesmen and other advertising material, of which the following are typical:

Patricia Stevens training can be your stepping stone—not only can Patricia Stevens training be the magic road to an exciting life for you—but it can open, too, the exciting avenues of a thrilling new career life for you. Thousands of women of all ages all over America are proving it every day—with Patricia Stevens training. Now any glamorous career can be within your reach—fashion adviser! private secretary! advertising receptionists! a course in movies, TV, radio!

Airline training—study for an airline career and travel to fascinating places throughout the world: You learn all the skills for this exciting and interesting career and you receive the unique Patricia Stevens finishing training to qualify you for top positions such as airline stewardess and reservationist.

Jobs through Patricia Stevens Placement Service—When you graduate from Patricia Stevens our work for you has just begun. Our consistent record for placing graduates is widely known. This is one of the many reasons why our finishing schools are recommended by vocational counselors, high schools, colleges and educational departments of leading magazines. Our Career Placement Service—finds for our graduates exciting jobs in retailing, fashion, advertising, airlines, publishing and many other fascinating fields.

Jobs through Patricia Stevens Placement Service—after you have completed your fashion career training here, the Patricia Stevens Placement Service then goes to work to find you a job, the assignment in which we have been notably successful. This free service has placed girls in leading department stores, with manufacturers, with advertising agencies, with manufacturers.

That graduates of respondents' schools are in great demand by airlines and by business organizations, that hire fashion advisers and buyers.

In addition, respondents' salesmen or representatives have in many instances assured persons signing contracts with the schools that said contracts were cancellable at the option of the enrollee.

PAR. 8. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not specifically set out herein, respondents represented, directly or by implication:

1. That the jobs or careers listed in their said advertising representations were in reach of and available to their graduates regardless of their capacity or fitness for such positions or careers.

2. That anyone finishing respondents' courses of instruction will secure top positions upon graduation in the fields for which they had been trained by respondents.

3. That their schools are recommended by vocational counselors, high schools, colleges and educational departments of leading magazines.

4. That their career placement service assures their graduates of immediate employment in the field or vocation for which they had been trained by respondents.

5. That student contracts were cancellable at the option of the enrollee.

6. That graduates of respondents training courses for airline stewardesses are in great demand by airlines and that graduates of certain other courses are in great demand by department stores and other business organizations as fashion advisers, buyers and for other lucrative positions.

PAR. 9. In truth and in fact:

1. The jobs or careers listed in respondents' advertising representations are not obtainable by nor available to graduates of respondents' schools regardless of their capacity or other fitness for such jobs or careers.

2. Graduates of respondents' schools cannot secure top positions upon graduation in the fields for which they have been trained by respondents solely by taking said courses. Such positions are available only to persons who have had training and experience in such positions.

3. Respondents' schools are not recommended by vocational counselors, high schools, colleges and educational departments of magazines.

4. Students' contracts are not cancellable at the option of the enrollee.

5. Respondents cannot and do not secure employment for all their graduates.

6. Graduates of respondents' schools are not in great demand by airlines as hostesses or stewardesses, nor are such graduates in great demand by business organizations seeking to employ buyers, fashion advisers or to fill top positions. On the contrary airlines train their own hostesses and stewardesses. Also fashion advisers and buyers as well as most top positions open to men and women with business organizations generally are drawn from the ranks of such business firms and almost invariably only after years of training and experience.

Therefore, the statements and representations set out and referred to in Paragraph Seven hereof are false, misleading and deceptive.

PAR. 10. 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 courses as that sold by respondents.

PAR. 11. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' courses of instruction by reason of said erroneous and mistaken belief.

PAR. 12. 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.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Patricia Stevens, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 22 West Madison Street, in the city of Chicago, State of Illinois.

Respondent Vincent Melzac is an officer of said corporation and his address is the same as that of said corporation.

Respondent Tom Fizdale, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 22 West Madison Street, in the city of Chicago, State of Illinois.

Respondent Tom Fizdale is an officer of said corporation, Tom Fizdale, Inc., and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

PART I

It is ordered, That respondent Patricia Stevens, Inc., a corporation, and its officers, and respondent Vincent Melzac, as an officer of said corporation, 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 courses of instruction, or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That jobs are obtainable by or that careers are open to all graduates of said respondents' school in the field for which they receive said respondents' training.

2. That graduates of said respondents' school can obtain top positions in any field solely by finishing a course or courses of instruction offered by said respondents.

3. That said respondents' school is recommended by colleges or educational departments of leading magazines; or that such school is recommended by vocational counselors or high schools, either generally or specifically, unless said respondents establish that such is the fact.

4. That said respondents' career placement service assures graduates of said respondents' school immediate employment in the field or vocation for which they have been trained by said respondents; or representing that any kind of placement assistance is furnished to persons completing said respondents' course of instruction unless such assistance is so afforded.

5. That students' contracts are cancellable at the students' option unless such contracts contain a clause providing for such option.

6. That graduates of said respondents' training courses for airline stewardesses are in great demand by airlines.

7. That graduates of certain of said respondents' courses are in great demand by department stores or other business organizations as fashion advisers or buyers.

PART II

It is ordered, That respondent Tom Fizdale, Inc., a corporation, and its officers, and respondent Tom Fizdale, individually and as an officer of said corporation, 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 courses of instruction, or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That jobs are obtainable by or that careers are open to all graduates of said respondents' schools in the field for which they receive said respondents' training.

2. That graduates of said respondents' schools can obtain top positions in any field solely by finishing a course or courses of instruction offered by said respondents.

3. That said respondents' schools are recommended by colleges or educational departments of leading magazines; or that such schools are recommended by vocational counselors or high schools, either generally or specifically, unless said respondents establish that such is the fact.

4. That said respondents' career placement service assures graduates of said respondents' schools immediate employment in the field or vocation for which they have been trained by said respondents; or representing that any kind of placement assistance is furnished to persons completing said respondents' course of instruction unless such assistance is so afforded.

5. That students' contracts are cancellable at the students' option unless such contracts contain a clause providing for such option.

6. That graduates of said respondents' training courses for airline stewardesses are in great demand by airlines.

7. That graduates of certain of said respondents' courses are in great demand by department stores or other business organizations as fashion advisers or buyers.

For the purposes of this proceeding and as used in this order, the phrase "directly or through any corporate or other device", insofar as it imposes responsibility upon respondents for acts and practices engaged in by respondents' licensees or said licensees' representatives, shall be construed to impose such responsibility upon respondents for only those said acts or practices which have been participated in, or directed, authorized, ratified or condoned by respondents.

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

CHESTNUT HILL INDUSTRIES, INC.

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

*Docket C-841. Complaint, Sept. 29, 1964—Decision, Sept. 29, 1964**

Consent order requiring a Hollywood, Fla., distributor of wearing apparel to cease violating Sec. 2(d) of the Clayton Act by granting substantial allowances for the promoting and advertising of its products to certain department stores and others who purchased its products for resale while not making proportionally equal allowances available to all competitors of those so favored. The effective date of the order has been postponed until further order of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes its wearing apparel products from one state to customers located in other States of the United States. The sales of respondent in commerce are substantial.

PAR. 2. The respondent in the course and conduct of its business in commerce paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase re-

*This order was made effective on Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, Docket No. C-328, et al., Aug. 9, 1965, 68 F.T.C. 393.

spondent's said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

The respondent having executed the agreement containing a consent order which agreement contains an admission of all the jurisdictional facts set forth in the complaint to issue herein, and a statement that the signing of the said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as set forth in such complaint, and also contains the waivers and provisions required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts the same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Chestnut Hill Industries, Inc., is a corporation organized and existing under the laws of the State of Massachusetts, with its office and principal place of business located at 2025 McKinley Street, Hollywood, Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent Chestnut Hill Industries, Inc., a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

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

IN THE MATTER OF

WEAR-EVER ALUMINUM, INC.

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

Docket C-842. Complaint, Sept. 30, 1964—Decision, Sept. 30, 1964

Consent order requiring a wholly owned subsidiary of Aluminum Company of America—the industry leader in the distribution and sale of aluminum stock pots and pans at the wholesale and retail level for the past 40 years, in December 1961, respondent put into effect a plan conditioning the sale of its said products to "Regular Food Service Equipment Dealers" upon their signing an "Authorized Dealer Agreement" and their understanding that they would purchase and display an adequate stock of WEAR-EVER'S professional cutlery, produced by an indirect subsidiary of ALCOA and of which WEAR-EVER was the exclusive distributor—to cease selling its pots and pans to hotel and restaurant supply purchasers and distributors on the condition that they agree to purchase WEAR-EVER'S cutlery or any other of WEAR-EVER'S products; and to cease engaging in any franchising, etc., which had the effect of requiring purchasers to buy said cutlery or other products as a condition to being able to deal in aluminum stock pots and pans; requiring it further to promptly advise all of its officers, agents, etc., of the full text of the instant order, to disseminate the order to all its hotel and restaurant supply dealer customers in eight named northeastern states along with a disclaimer to the effect that they would not be required to agree to purchase WEAR-EVER'S cutlery in order to obtain their requirements of pots and pans; and providing further that, should ALCOA transfer its controlling interest in respondent or WEAR-EVER brand aluminum to another subsidiary or affiliate or to itself, advise

the Commission within 90 days of such action and, in effect, secure the Commission's approval, as in detail set forth below.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (U.S.C., Title 15, Sec. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent named in the caption hereof and more particularly described hereinafter, has violated the provisions of said Act, and it appearing that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent, WEAR-EVER ALUMINUM, INC., (hereinafter referred to as WEAR-EVER) a wholly owned and controlled sales subsidiary of the Aluminum Company of America, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its executive offices located at Fifth Avenue and Eleventh Street, New Kensington, Pennsylvania 15068.

ALUMINUM COMPANY OF AMERICA, (hereinafter referred to as ALCOA) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 425 Sixth Avenue, Alcoa Building, Pittsburgh, Pennsylvania 15219. ALCOA, together with its more than thirty subsidiaries, is a leading integrated producer and fabricator of aluminum and aluminum products. Among many of the various products which ALCOA fabricates and produces are aluminum cooking utensils, which include among other items: aluminum stock pots and pans. For the year ending December 31, 1962, the consolidated net sales and operating revenue of ALCOA and its subsidiaries exceeded $938,000,000.

PAR. 2. By virtue of the following facts, among others:

(a) ALCOA directly owns and controls one hundred percent (100%) of the capital stock of WEAR-EVER;

(b) ALCOA is directly responsible for manufacturing and supplying WEAR-EVER with the aluminum stock pots and pans which WEAR-EVER sells and distributes;

(c) ALCOA is indirectly responsible, as hereinafter set forth, for manufacturing and supplying WEAR-EVER, through an indirect subsidiary, Alcas Cutlery Corporation, with the professional cutlery which WEAR-EVER sells and distributes;

ALCOA controls the present and future status of WEAR-EVER as a distinct and separate corporate entity.

PAR. 3. WEAR-EVER is primarily engaged in the distribution and sale of aluminum cooking utensils, which include, among other items, aluminum stock pots and pans, at the wholesale and retail level. Said aluminum cooking utensils are manufactured by ALCOA at New Kensington, Pennsylvania and Chillicothe, Ohio.

Additionally, WEAR-EVER is engaged in the distribution and sale of professional cutlery at the wholesale level. Professional cutlery is a separate and distinct product line and is not considered as being part of the product line encompassing cooking utensils. Said professional cutlery is manufactured by Alcas Cutlery Corporation at 1116 East State Street, Olean, New York, 14760. Alcas Cutlery Corporation is an indirect subsidiary of ALCOA in that fifty-one percent of its outstanding capital stock is owned by Alcoa Securities Corporation, Pittsburgh, Pennsylvania, which in turn is a directly wholly owned subsidiary of ALCOA. WEAR-EVER is the sole and exclusive distributor of the entire cutlery output of Alcas.

WEAR-EVER's total gross dollar volume of sales of all product lines is substantial and exceeds $25,000,000 annually. Of this total dollar figure over $5,500,000 constitute annual sales of all products, except cutlery, to hotel and restaurant supply dealers located throughout the United States; and over $200,000 constitute annual sales of cutlery to the aforementioned hotel and restaurant supply dealers.

PAR. 4. For the purpose of supplying customers and making deliveries to them, WEAR-EVER ships or otherwise transports the aforementioned aluminum cooking utensils and professional cutlery, or causes the same to be shipped or transported, for sale and distribution, from the places where said products are manufactured or stored across State lines, to the customers and purchasers thereof located in the several States of the United States and in the District of Columbia. There is and has been at all times mentioned herein a continuous current or stream of trade and commerce in said products sold by WEAR-EVER between the States where WEAR-EVER's warehouses are located and among the several States of the United States and in the District of Columbia. WEAR-EVER, therefore, is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of WEAR-EVER's business, as hereinbefore described, WEAR-EVER sells aluminum stock pots and pans and professional cutlery to several hundred hotel and restaurant supply dealers. The aluminum stock pots and pans and professional cutlery are designed for use in large kitchens and cafeterias by the professional or institutional trade in the preparation and dispensing of food on a large scale basis. The hotel and restaurant supply dealers in turn re-sell the aforementioned products to hotels, restaurants, cafeterias, and food service facilities of federal, State and local governments. WEAR-EVER sells said products to hotel and restaurant supply dealers in direct competition with other manufacturers of aluminum stock pots and pans and other manufacturers of professional cutlery.

PAR. 6. For approximately the past forty years, WEAR-EVER, through one corporate device or another, has been engaged in selling aluminum stock pots and pans to hotel and restaurant supply dealers. "Wear-Ever" stock pots and pans are of recognized and accepted excellent quality and have a high degree of public and dealer acceptance. As a result, WEAR-EVER has been the leader in the industry in the sale of stock pots and pans. WEAR-EVER's leadership and reputation for superior quality is reflected, for example, in the fact that in many invitations to bid, (government and commercial) specifications designate by name, "Wear-Ever" aluminum stock pots and pans, or the equivalent thereof. A consequence of this desire for "Wear-Ever" stock pots and pans on the part of customers is that it is difficult to effectively compete as a hotel and restaurant supply dealer without being able to stock and sell said products.

PAR. 7. On or before 1950, WEAR-EVER introduced professional cutlery into their sales line. This cutlery, in contrast to "Wear-Ever" stock pots and pans, never achieved substantial public or dealer acceptance. Until December 1, 1961, sales with respect thereto were considered poor. During the period 1957 to December 1, 1961, WEAR-EVER's sales of professional cutlery were relatively static and remained at a level of approximately $200,000 per annum.

PAR. 8. Before December 1, 1961, many of WEAR-EVER's hotel and restaurant supply dealers did not stock or display "Wear-Ever" professional cutlery on a regular basis. They only ordered such cutlery as needed to fulfill limited customer requests. Their customer preferences were for professional cutlery of other competing manufacturers. Additionally, said dealers had no formal written or verbal agreement or understanding with WEAR-EVER to the effect that they were franchised or authorized dealers for WEAR-EVER's products. They purchased their requirements of each line of WEAR-EVER's products as needed.

PAR. 9. Commencing on or about December 1, 1961, and continuously since that time, WEAR-EVER, in the course and conduct of its business, has used and is now using unfair methods of competition and unfair acts and practices in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it has formulated, adopted and placed into effect a plan, scheme or policy to hinder, frustrate, suppress and eliminate competition by:

(a) Conditioning the sale of aluminum stock pots and pans by WEAR-EVER to "Regular Food Service Equipment Dealers" (those customers who stock and sell a broad line of WEAR-EVER's products) upon said dealers signing an "Authorized Dealer Agreement";

(b) Conditioning the sale of aluminum stock pots and pans by WEAR-EVER to "Regular Food Service Equipment Dealers" upon said dealers agreement or understanding that they would purchase and display an adequate stock of WEAR-EVER's professional cutlery; and

(c) Conditioning the sale of aluminum stock pots and pans by WEAR-EVER to "Regular Food Service Equipment Dealers" upon said dealers agreement or understanding that they purchase one of WEAR-EVER's cutlery display plans.

PAR. 10. Through the use of various means and methods, WEAR-EVER was and is able to influence, induce, persuade, or coerce a substantial number of "Regular Food Service Equipment Dealers" to sign an "Authorized Dealer Agreement"; to agree to purchase and display an adequate stock of WEAR-EVER's professional cutlery; and to agree to purchase one of WEAR-EVER's cutlery displayer plans as conditions precedent to said dealers being able to continue to purchase from WEAR-EVER their aluminum stock pots and pans requirements. Additionally, WEAR-EVER, through the use of various means and methods, causes or has caused a substantial number of "Regular Food Service Equipment Dealers" to understand or believe that they must sign an "Authorized Dealer Agreement"; agree to purchase and display an adequate stock of WEAR-EVER's professional cutlery; and agree to purchase one of WEAR-EVER's cutlery displayer plans before they will be able to continue to purchase their requirements of WEAR-EVER's aluminum stock pots and pans from WEAR-EVER.

PAR. 11. Said "Authorized Dealer Agreement" and conditions precedent to being able to purchase WEAR-EVER's aluminum stock pots and pans have had and do now have the effect of interfering with the "Regular Food Service Equipment Dealers" freedom to choose among competing cutlery products.

PAR. 12. All the acts, practices, methods, policies or things hereinabove alleged to be done by respondent WEAR-EVER are singularly oppressive and unfair and operate to the prejudice of the public; have a dangerous tendency to unduly restrain, suppress or eliminate competition between and among respondent WEAR-EVER's cutlery competitors; have a dangerous tendency to unduly restrain, suppress or eliminate competition in aluminum stock pots and pans and cutlery in commerce;

and constitute unfair methods of competition and unfair acts or practices in commerce within the intent and meaning of § 5 of the Federal Trade Commission Act.

Decision and Order

The Commission having heretofore determined to issue its complaint charging the respondent herein, Wear-Ever Aluminum, Inc., with violation of the Federal Trade Commission Act, and respondent Wear-Ever Aluminum, Inc. and Aluminum Company of America having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

Respondent Wear-Ever Aluminum, Inc., and Aluminum Company of America and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent Wear-Ever Aluminum, Inc., and Aluminum Company of America of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent Wear-Ever Aluminum, Inc., and Aluminum Company of America that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Wear-Ever Aluminum, Inc. (hereinafter sometimes referred to as Wear-Ever), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at Fifth Avenue and Eleventh Street, New Kensington, Pennsylvania, 15068. Said corporation is a wholly-owned and controlled sales subsidiary of Aluminum Company of America, which latter firm is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 425 Sixth Avenue, Alcoa Building, Pittsburgh, Pennsylvania, 15219.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent Wear-Ever Aluminum, Inc., and Aluminum Company of America, and the proceeding is in the public interest.

ORDER

1. *It is ordered*, That respondent, WEAR-EVER ALUMINUM, INC., its officers, agents, representatives, salesmen, employees, successors or assigns, directly or indirectly, or through any corporate or other device, in connection with the establishment of WEAR-EVER or any other Authorized Food Service Equipment Dealerships or in connection with the promotion, contracting, arranging, or offering for sale, sale or distribution of aluminum cooking utensils which are designed for use in large kitchens and cafeterias by the professional or institutional trade in the preparation and dispensing of food on a large scale basis, known in the trade as "aluminum stock pots and pans," and cutlery, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from engaging in any of the following acts, practices, or things:

A. Offering to sell or selling such WEAR-EVER "aluminum stock pots and pans" to hotel and restaurant supply purchasers, dealers, or distributors upon the condition that said purchasers, dealers, or distributors purchase or agree to purchase WEAR-EVER's cutlery or any articles other than such "aluminum stock pots and pans" which are manufactured for, sold or distributed by WEAR-EVER; or

B. Continuing or placing into effect any contract of sale, or engaging in any franchising, merchandising, or distribution plan or policy through contracts, agreements, or understandings, either expressed or implied, with hotel and restaurant supply purchasers, dealers, or distributors which has the purpose or effect of requiring said purchasers, dealers or distributors to purchase or agree to purchase WEAR-EVER's cutlery or any other articles (except such "aluminum stock pots and pans") which are manufactured for, sold, or distributed by WEAR-EVER as a condition to being able to purchase or deal in WEAR-EVER's said "aluminum stock pots and pans."

2. *It is further ordered*, That respondent corporation WEAR-EVER ALUMINUM, INC., shall within sixty (60) days after service upon it of this Order:

A. Advise promptly, in writing, all of its officers, agents, representatives, salesmen and employees engaged in negotiating the sale of such "aluminum stock pots and pans" to hotel restaurant supply dealers or negotiating merchandising or franchising agreements with said dealers the full text of this Order and that each and every person is subject to the provision of this Order as it applies to WEAR-EVER ALUMINUM, INC.;

B. Disseminate in writing to all hotel and restaurant supply dealers or distributors located in Maine, New Hampshire, Massachusetts, Vermont, Rhode Island, Connecticut, New York and the northern half of New Jersey, who are or were purchasers of WEAR-EVER ALUMINUM, INC.'s said "aluminum stock pots and pans," the full text of this Order as it applies to WEAR-EVER ALUMINUM, INC.;

C. Disseminate to all such dealers or distributors who are or were purchasers of WEAR-EVER ALUMINUM, INC.'s said "aluminum stock pots and pans" a written affirmative disclaimer to the effect that said purchasers will not be required to agree to purchase or maintain an adequate stock of cutlery which is manufactured for, sold or distributed by WEAR-EVER ALUMINUM, INC., in order to be able to obtain their requirements of said "aluminum stock pots and pans" or to become, maintain or retain their status as an Authorized Food Service Equipment Dealer or Distributor.

D. For the purposes of subparagraphs B and C of paragraph 2 of this Order, the term "purchasers" shall be deemed to include all present and former hotel and restaurant supply purchasers of WEAR-EVER ALUMINUM, INC.'s said "aluminum stock pots and pans" in the area specified in subparagraph B of paragraph 2 of this Order for the period beginning January 1, 1961, and continuing up to and including sixty (60) days after service upon WEAR-EVER ALUMINUM, INC., of this Order.

3. *It is additionally ordered*, That:

A. In the event ALUMINUM COMPANY OF AMERICA should divest, divorce or transfer, by whatever means, its complete or controlling interest in the ownership of the capital stock of respondent WEAR-EVER ALUMINUM, INC., to a subsidiary or affiliate, the ALUMINUM COMPANY OF AMERICA shall advise the Federal Trade Commission within ninety (90) days of such divestment, divorcement or transfer and shall be required to have as a necessary condition to any such transfer that the transferee file with the Commission's principal office within the aforesaid ninety (90) day period a report consenting to the jurisdiction of the Commission and to the terms, conditions, and prohibitions of this Order as it applies to the ALUMINUM COMPANY OF AMERICA or to prior intervening successors.

B. In the event ALUMINUM COMPANY OF AMERICA should divest, divorce or transfer, by whatever means, the business of selling "WEAR-EVER" aluminum stock pots and pans by WEAR-EVER ALUMINUM, INC., to another subsidiary, affiliate, or itself, the ALUMINUM COMPANY OF AMERICA shall advise the Federal Trade Commission within ninety (90) days of such divestment, divorcement or transfer and shall be required to have as a necessary condition to any such transfer that the transferee file with the Commission's principal office within the aforesaid ninety (90) day period a report consenting to the jurisdiction of the Commission and to the terms, conditions and prohibitions of this Order as it applies to WEAR-EVER ALUMINUM, INC., or to prior intervening successors to the aforementioned business of selling aluminum stock pots and pans.

It is further ordered, That the respondent WEAR-EVER ALUMINUM, INC. shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

PROSPECT BRACELET COMPANY, INC., ET AL.

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

Docket 8611. Complaint, Dec. 27, 1963—Decision, Oct. 3, 1964

Order requiring a New York City distributor of watches and watchbands to cease failing to disclose adequately the foreign origin of its imported watchbands and preticketing said product with excessive prices.

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 Prospect Bracelet Company, Inc., a corporation, and Sheldon Parker, individually and as an officer 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 Prospect Bracelet Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 188 West 4th Street in the city of New York, State of New York.

Respondent Sheldon Parker is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His 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