

IN THE MATTER OF
MANDEL BROTHERS, INC.

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

Docket 6434. Complaint, Oct. 27, 1955—Decision, July 5, 1957

Order requiring a Chicago furrier to cease violating the Fur Products Labeling Act by misbranding, falsely advertising, or falsely invoicing its fur products.

William A. Somers, Esq., for the Commission.

Hopkins, Sutter, Owen, Mulroy & Wentz, by William G. Blood, Esq., and James J. McClure, Jr., Esq., of Chicago, Ill., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On October 27, 1955, the Federal Trade Commission issued its complaint against Mandel Brothers, Inc. (hereinafter called respondent), charging respondent with misbranding and falsely and deceptively invoicing and advertising certain fur products in violation of the provisions of the Fur Products Labeling Act (hereinafter called the Fur Act), 15 U.S.C. 69(a), *et seq.*, and Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint, together with a notice of hearing were duly served upon respondent.

The complaint alleges in substance that respondent (1) misbranded certain of its fur products by not labeling them as required under the Fur Act and the Rules and Regulations promulgated thereunder; (2) falsely and deceptively invoiced certain fur products in violation of the Fur Act and said Rules and Regulations; (3) falsely and deceptively advertised certain fur products by misrepresenting the prices as having been reduced from regular or usual prices, and by means of comparative prices, as having a certain value, in violation of the Act, the Fur Act and Rules and Regulations; and (4) failed to maintain adequate records upon which such price and value representations were based, in violation of the Rules and Regulations. Respondent appeared by counsel and filed an answer admitting the corporate and competition allegations of the complaint, but denying the jurisdictional allegations and all alleged violations of the Act, the Fur Act and the Rules and Regulations.

Pursuant to notice, hearings were thereafter held on April 12 and June 7, 1956, in Chicago, Illinois, before the undersigned hearing examiner duly designated by the Commission to hear this proceeding. Prior to the initial hearing, respondent's motion to strike the complaint upon the grounds that the Rules and Regulations promulgated by the Commission under the Fur Act were invalid, that the Fur Act was unconstitutional, that the complaint was so vague and uncertain as to make responsive pleading impossible, and that the complaint failed to allege sufficient facts concerning commerce to vest the Commission with jurisdiction, was denied.

All parties were represented by counsel, participated in the hearings and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons therefor. All parties waived oral argument and pursuant to leave granted thereafter filed proposed findings of fact, conclusions of law and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith specifically rejected.¹

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondent

The complaint alleged, respondent admitted, and it is found that respondent is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1 North State Street, Chicago, Illinois.

II. Interstate Commerce and Competition

The complaint alleged, respondent denied, and it is found that respondent is now and has been since August 9, 1952, the effective date of the Fur Act, engaged in the introduction into commerce and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products, and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as "commerce," "fur" and "fur products" are defined in the Fur Act.

¹ 5 U.S.C. § 1007(b).

Findings

54 F.T.C.

In this connection, as noted above, respondent denies that it is engaged in commerce within the meaning of the Fur Act, or that it sold, advertised, offered for sale, transported or distributed fur products made in whole or in part of fur which had been shipped and received in commerce. However, the record establishes that respondent advertised its fur products in commerce, sold fur products to customers from outside the State of Illinois and subsequently delivered such products to such customers outside the State of Illinois, and purchased and had shipped to it in the State of Illinois fur products from the State of New York.

Respondent advertised its fur products in *The Chicago Tribune*, *The Chicago American*, and *The Chicago Sun-Times*, newspapers with substantial circulation outside the State of Illinois. In addition, the record reveals a number of sales by respondent to customers outside the State of Illinois. While these sales were made at the Chicago store, respondent's officials admitted that, because no Illinois sales tax was charged, the products must have been delivered by respondent to such customers outside the State of Illinois. The foregoing facts are substantially identical to those considered by the Commission in the *Pelta Furs* case,² wherein the Commission, although in disagreement concerning the authority for Rule 44 of the Rules and Regulations under the Fur Act, unanimously agreed that the respondents therein were engaged in "commerce" within the meaning of the Act and the Fur Act.

Based upon the above undisputed facts, it is further concluded and found that respondent is engaged in commerce within the meaning of the Act, and that, in the course and conduct of its business, respondent is in substantial competition in commerce with other corporations, firms, copartnerships and individuals also engaged in the sale of fur products to members of the purchasing public.

III. The Unlawful Practices

A. *Misbranding of Fur Products*

The complaint alleged that respondent misbranded certain fur products by not labeling them as required under the provisions of Section 4(2) of the Fur Act and Rules 4, 29(a) and 29(b) of the Rules and Regulations. More specifically, Section 4(2) of the Fur Act requires labels on fur products showing: (a) the name of the animal as set forth in the Fur Products Name Guide promulgated by the Commission pursuant to Section 7 of the Fur Act; (b) that the fur is used; (c) that the fur is bleached, dyed, or otherwise arti-

² *Pelta Furs*, Docket No. 6297 (1956).

ficially colored; (d) that the product is composed of paws, tails, etc.; (e) the name or other identification of the person who manufactures or sells the product; and (f) the country of origin of any imported fur.

Counsel supporting the complaint proposed no findings, and there is no proof in the record, with respect to any violation of (b) and (d) above. Accordingly no such violations are found. With respect to (a), (c) and (f) above, there is no substantial dispute in the record. The record reveals some 12 instances of failure to label the fur products with the correct name of the animal producing the fur as set forth in the Fur Products Name Guide, some 15 instances of failure to disclose in the labels that the product was bleached, dyed or otherwise artificially colored, and some 58 instances of failure to disclose the country of origin of imported furs. With respect to the alleged violations of the aforesaid rules concerning labeling, the record establishes some 9 instances of required information being set forth in abbreviated form contrary to Rule 4, some 59 instances of mingling non-required information with required information in violation of Rule 29(a), and some 119 instances of required information being set forth in handwriting in violation of Rule 29(b).

While not disputing any of the foregoing violations, respondent argues that they are merely technical and trivial in nature, and accordingly the public interest does not warrant the issuance of a cease and desist order.

Respondent's argument is without merit. Admittedly, the misbranding found was not as serious or substantial a violation of the Fur Act as, for instance, calling muskrat mink or rabbit ermine, but the very purpose of Congress in adopting the provisions of the Fur Act and directing the Commission to promulgate rules and regulations thereunder was to prevent deception of the public by such practices. It cannot seriously be urged that violations of specific sections of an act adopted by Congress are too technical or trivial to warrant the issuance of a cease and desist order.

In addition, the Commission, as an expert body, was authorized and directed to adopt rules and regulations to carry out the purpose of the Act, namely, to prevent the deception of the public by misbranding or falsely advertising or invoicing fur products. Obviously, the use of abbreviations, handwriting, and the mingling of non-required information with required information are devices which can readily be used to deceive and mislead the public. Even though it be conceded that they may have been done innocently, in ignorance of the law, and without intention to deceive, they cannot be permitted. To dismiss respondent's misbranding as too trivial

or technical to warrant the issuance of a cease and desist order would be to open the door to deception and evasion of the Act.

Although the complaint alleged, and counsel supporting the complaint proposed a finding, that respondent failed to attach labels to its fur products showing its name, as required by subsection (e) of Section 4(2) of the Fur Act as paraphrased above, the record establishes that respondent did not in fact fail to so label its products. Mr. Camenisch, an investigator for the Commission, testified that he found no instances where respondent's name was not set out on its labels. Commission Exhibit 1 is a facsimile of the form of label used by respondent. Printed thereon in large type are the words "Mandel Brothers, Chicago." Mr. Camenisch testified that the correct name of respondent is Mandel Brothers, Inc., and apparently the proposed finding of counsel supporting the complaint is based upon the failure to include the word "Inc.," even though it is undisputed that respondent placed its name and city of location upon all of its labels. I find no merit in this proposal of counsel supporting the complaint. Subsection (e) of Section 4(2) requires that the label show plainly: "The name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product . . ., introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce." Respondent has complied with this requirement literally. In addition, it included the city where it does business, more information than necessary under the subsection. The failure to attach the word "Inc." seems to me completely without significance. Respondent plainly set forth the name under which it does business and its location. To construe the omission of Inc., which respondent does not normally use as a part of its name in doing business, as a violation of the Fur Act seems to me entirely too technical and unreasonable.

B. False Invoicing of Fur Products

The complaint alleged that respondent falsely invoiced certain of its fur products in violation of Section 5(b)(1) of the Fur Act and Rules 4 and 40 of the Rules and Regulations. Section 5(b)(1) requires that the invoices show: (a) the name of the animal as set forth in the Fur Products Name Guide; (b) the presence of used fur; (c) that the fur product is bleached, dyed or otherwise artificially colored; (d) that the fur product is composed of paws, tails, etc.; (e) the name and address of the person issuing the invoice; and (f) the country of origin of any imported fur. In support of these allegations, counsel supporting the complaint offered in evidence certain invoices issued by respondent to purchasers of its

fur products. These contained four instances of failure to set forth the correct name of the animal as contained in the Fur Products Name Guide, and six instances of failing to set forth that the fur in the product was bleached, dyed or otherwise artificially colored. With respect to subparagraph (e) as set forth above, respondent's invoices show that, while its name is set forth thereon, no address is included as required by subsection (e).

Counsel supporting the complaint proposed a finding of fact under subsection (d) above, but there is no evidence in the record that respondent's invoices ever failed to show that the fur products were composed of paws, tails, etc. when such was the fact, as required by subsection (d), and accordingly no such finding is made. Counsel supporting the complaint proposed no findings of fact with respect to subparagraphs (b) and (f) of Section 5(b)(1) as set forth above, and there is no proof in the record in support of these allegations. Accordingly, no finding will be made. With respect to the alleged invoicing violations of Rules 4 and 40 which provide respectively that required information not be abbreviated and that the invoice disclose the item number of the fur product, counsel supporting the complaint proposed no findings of fact, there is no proof in the record to sustain such allegations, and no such findings are made.

C. False Advertising of Fur Products

The complaint alleged that respondent falsely and deceptively advertised its fur products in violation of the Fur Act, of Rules 44(a), (b) and (c), and of the Act, by newspaper advertisements which represented that the prices of its fur products had been reduced from their regular and usual prices when in truth and in fact such so-called regular or usual prices were fictitious, and by newspaper advertisements which represented that the sale prices of its products enabled purchasers to effectuate savings greater than the difference between such prices and current market value. Rule 44(a) prohibits such fictitious pricing and Rules 44(b) and (c) prohibit such comparative pricing and value claims unless based upon current market values or the time of such compared prices is given and such claims are true in fact. It is of course well established that such false representations in commerce concerning prices and value are violations of Section 5 of the Act.³

The record establishes that respondent by its newspaper advertising misrepresented its regular and usual prices, and misrepresented the market price or value of its fur products. Four newspaper advertisements of respondent were received in evidence, two from the

³ *The Orloff Company, Inc.*, Docket No. 6184 (1956), and cases cited therein.

Chicago Sun-Times and Chicago American on October 3, 1954, one from the Chicago Tribune on October 2, 1954, and the other from the Chicago Tribune on October 5, 1952.

1. The Comparative Pricing

The alleged misrepresentation concerning the market price or value of respondent's products is considered first. Respondent operated two fur departments in its Chicago store, one called the Subway Fur Department in the basement and the other on the fifth floor called the Fur Salon. Respondent annually each October conducts a sale in its Subway Department during which hundreds of fur coats, jackets and other garments are sold at a single price of \$125.00 each. Respondent has been conducting this particular promotion for many years. The two advertisements dated October 3, 1954, and the advertisement dated October 5, 1952, dealt with this particular annual sale of fur products. The 1954 advertisements contain a long list of fur garments of different types of furs with a corresponding list of market prices ranging from \$195.00 to \$499.00 each, all for sale at the single price of \$125.00. The 1952 advertisement was substantially the same except that the market prices listed ranged from \$165.00 to \$599.00. In addition, the 1952 advertisement also stated that many of the fur products on sale were reduced from respondent's own stock.

The record establishes that the market price or value of the fur products advertised by respondent in 1952 and 1954 did not equal or approach \$599.00 and \$499.00, respectively. Commission Exhibits 25 through 46 are respondent's invoices showing sales made during the 1954 Subway Fur sale, together with the receiving aprons and manufacturers' invoices tied to each such sale invoice showing the original cost of each garment and also listing respondent's retail prices thereon as \$125.00. These exhibits reveal that the cost of the fur products sold by respondent during the 1954 Subway sale ranged from \$83.00 to approximately \$100.00 a unit. Commission Exhibits 55 through 60 are manufacturers' invoices of fur products purchased by respondent for its 1952 Subway sale and show costs ranging from \$87.50 to \$100.00 a garment. Counsel supporting the complaint called Messrs. Himmel and Friedman, two experienced furriers engaged in the business in Chicago for many years, who both testified that the average mark-up in the fur industry was 60 percent of the cost or 37½ percent of the retail price. Mr. Friedman testified that the maximum range of mark-up was from 50 to 70 percent of the cost. Respondent offered no evidence to contradict this testimony and accordingly it is undisputed in the record. Computing the maximum mark-up used in the industry, 70 percent, upon the maximum cost

of any of the garments listed in the foregoing exhibits would result in \$170.00 as the highest market value of any of the fur products.

Messrs. Hill and Bernstein were the buyers for and in charge of the Fur Salon and the Subway Department, respectively. They testified that they made frequent buying trips to New York City and, by careful shopping and buying in lots rather than individual pieces, were able to acquire fur products at prices substantially less than they could be purchased by competitors in single units.

Messrs. Hill and Bernstein also testified that the market prices listed in the three advertisements above mentioned were true and correct. For a number of reasons, this testimony cannot be credited. Based upon this and proof that respondent's mark-ups averaged from 5 to 10 percent less than the usual mark-up of 37½ percent of retail price, respondent argued that the market prices contained in its advertisements were in fact correct. While this would result in lower prices to the public, as contended, it by no means establishes the truth of the market value representations. As heads of the respective departments, Messrs. Hill and Bernstein either prepared or supervised the preparation of respondent's newspaper advertisements. Self-interest would dictate that they testify that such advertisements were true and correct in all respects. More conclusively, the facts established by the documentary evidence in the record reveal that the market values listed in the advertisements could not possibly have been true. As previously noted, a maximum mark-up applied to the fur products costing the most would have resulted in a market price of only \$170.00. Based upon the highest cost of the fur products, a mark-up of 400 to 500 percent would have been necessary to reach the market prices of \$499.00 and \$599.00 listed in respondent's advertisements. In view of the testimony of Messrs. Himmel and Friedman, both of whom had many years of experience in the fur business and were president and secretary, respectively, of the Associated Fur Industries of Chicago, such a mark-up would be incredible.

The argument that because respondent purchased its fur products in lots or large quantities it was able to secure them at cost prices 400 to 500 percent below market value is equally incredible. With regard to this, it will be noted that both Messrs. Hill and Bernstein testified that they were able to purchase such products at a cost considerably lower than buying each garment individually. Respondent's argument assumes that competitors could buy fur products only as individual items, an assumption which obviously is not sound. Mr. Himmel testified that his firm operated the largest exclusive fur building in Chicago and was also engaged in manufacturing. The market price or value of a product must be the average price

at which such products are sold in the industry at retail. Here this necessarily means the price at which competitors of respondent were selling such products on the retail market in Chicago. To assume that such competitors could and did purchase their fur products wholesale only individually or in small units instead of lots could hardly be accurate, yet this is the tenor of respondent's argument.

Actually, respondent's invoices demonstrate the invalidity of this argument. An examination of them reveals that, contrary to its contention concerning buying in quantity, the lowest cost prices appear on the invoices involving the smallest number of fur products. For example, Commission Exhibit 29 involving the purchase of eight garments to be sold for \$125.00 shows the cost thereof to be \$84.00 a piece. Similarly, Exhibits 40, 42, and 44, involving the purchase of only 14, 17 and 21 garments, respectively, show the cost to be \$83.00 per garment. Conversely, many of the invoices covering a purchase of substantially larger numbers of fur garments show a higher cost per item. It can hardly be contended seriously that respondent's competitors, including the largest exclusive furrier in Chicago, could not purchase lots of fur garments wholesale in quantities ranging from 8 to 21. In view of these established facts, respondent's advertised market prices representing a mark-up of 400 to 500 percent above cost cannot be true.

Another point worth noting in this connection is that if respondent's market prices or values of \$499.00 to \$599.00 were correct, the cost of such products to respondent's competitors must have ranged from approximately \$300.00 to \$350.00 per unit, and they could have effectuated great savings and substantial profits merely by purchasing such garments from respondent for \$125.00 during its sale. Respondent also argued that there was no proof in the record that the garments identified by invoice were those advertised. Actually the converse is true. Mr. Bernstein testified that respondent never used the \$125.00 price except during its Annual sale, and hence the identified garments must have been those advertised. For all of the foregoing reasons, it is concluded and found that respondent's representations concerning the market price or value of its fur products listed in the foregoing advertisements were false.

2. The Fictitious Pricing

The complaint also alleged that respondent falsely represented its usual and regular prices of such products. The proof in support of this allegation was the representations made in the advertisement in The Chicago Tribune dated October 2, 1954, Commission Exhibit 47. This advertisement dealt with a sale of fur products by

respondent in its Fur Salon. It stated that the fur products on sale at \$244.00 were "Usually \$299.00 to \$399.00. This interpretation is corroborated by the testimony of Mr. Camenisch, who contacted Mr. Hill with respect to this advertisement and asked him if he could point out the particular garments advertised. According to Mr. Camenisch, Mr. Hill replied that he had no definite record of the particular garments but suggested that Mr. Camenisch check the sales records to find any garments sold at that price pursuant to the advertisement to ascertain the validity of the claims made therein. If it be contended that the advertisement was a representation of market value rather than respondent's usual and regular prices, Mr. Hill, who prepared the advertisement and was contacted by Mr. Camenisch, could have at that time made that fact clear. Instead, however, Mr. Hill suggested that Mr. Camenisch check respondent's sales records to locate any particular garments sold by it pursuant to that advertisement. This testimony was undenied although Mr. Hill testified on two occasions. It seems clear, therefore, in addition to the wording of the advertisement itself, that respondent was representing and intended to represent that the usual and regular prices of these products were from \$299.00 to \$399.00.

Mr. Camenisch proceeded to check the sales records and found three sales invoices of garments sold pursuant to that advertisement. Such sales invoices and the corresponding manufacturers' invoices of the particular garments were received in evidence. The manufacturer's invoices show that at the time respondent purchased these garments it priced them for sale at retail at \$244.00, \$244.00 and \$288.00, respectively. Respondent's officials testified, and it was undisputed, that in connection with all of the manufacturers' invoices and receiving aprons received in evidence, respondent entered thereon its retail price to be charged for the particular garments and such price was not thereafter changed. This demonstrates that the garments sold were not usually and regularly priced by respondent for sale at from \$299.00 to \$399.00. Accordingly, it is concluded and found that respondent, by the above advertisement concerning the sale in the Fur Salon, falsely represented its usual and regular prices of such products.

3. The Failure to Maintain Records Concerning

Pricing Claims and Representations

The complaint also alleged that respondent failed to maintain full and adequate records disclosing the facts upon which the pricing claims and representations discussed above were based, in violation of Rule 44(e). Rule 44(e) provides that persons making pricing

claims or representations of the types described in subsections (a), (b) and (c) thereof, namely, fictitious and comparative pricing, must maintain full and adequate records disclosing the facts upon which such claims or representations are based. Mr. Camenisch testified that he asked both Messrs. Hill and Bernstein for such records but that none were produced or available, and that respondent's inventory records indicated that the garments advertised never had such value or price, as previously found herein. This testimony was undisputed and accordingly it is found that respondent failed to maintain the records supporting its pricing claims required by Rule 44(e).

D. Respondent's Contentions and Defense

Respondent's contention concerning the triviality and technicality of its labeling violations, and its contention with respect to interstate commerce within the meaning of the Act and the Fur Act, have previously been considered herein. In addition, respondent contended that the requirements of the Fur Act with respect to invoicing do not apply to a person engaged in the retail sale of fur products because of the definition of "invoice" in Section 2(f). This section provides that: "The term 'invoice' means a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person *who is engaged in dealing commercially in fur products or furs.*" (Emphasis supplied by respondent.)

Because of the underscored portion of the foregoing definition, respondent contends that the term "invoice" applies only to wholesalers, manufacturers and jobbers, but not to retailers. The gist of respondent's argument is that because of the foregoing language an invoice as defined can apply only to a purchaser who is engaged in dealing commercially in fur products or furs. Such a construction of Section 2(f) appears far too limited in view of the undisputed purpose of the Fur Act to protect the ultimate consumer from deception by false invoicing. It is clear that the Commission has not so construed the meaning of invoice under Section 2(f). The various rules and regulations adopted by the Commission dealing with invoicing clearly indicate that the Commission considers the invoicing requirements of the Act applicable to retailers of fur products who sell to the purchasing public. In addition, decisions of the Commission, including the *Pelta Furs* case,⁴ establish that the

⁴ See Footnote 2, *supra*.

Commission has applied the invoicing requirements of the Act to retailers selling fur products to the public.

Respondent also argued that Rule 44 is *ultra vires* as an unwarranted extension of the power delegated to the Commission by the Fur Act. This identical issue was considered by the Commission in the *Pelta Furs* case,⁵ in which the Commission held that Rule 44 was an appropriate exercise of the Commission's power under Sections 8(b) and 5(a) (5) of the Fur Act. Respondent also contended that Rule 44 cannot operate to shift the burden of proof to respondent. Apparently this contention is based upon respondent's belief that there is no proof in the record to sustain the allegations of fictitious and comparative pricing, and that therefore the position of counsel supporting the complaint must be that respondent is required to show that its alleged fictitious and comparative prices were in fact not fictitious and were in fact true market values, respectively. Of course respondent's contention that Rule 44 cannot operate to shift the burden of proof to it is correct. However, no such position was taken by counsel supporting the complaint, and the record does not support respondent's belief. As previously found, counsel supporting the complaint established by reliable, probative and substantial evidence that respondent's pricing representations were in fact false and fictitious. The burden of proof to establish any alleged violation of the Act or the Fur Act is always upon counsel supporting the complaint, and in this proceeding counsel has clearly met that burden.

The fact that Rule 44(e) requires persons making price representations to maintain records supporting such representations does not operate to shift the burden of proof to such persons. Obviously, proof that a respondent did not maintain such records, while it would establish a violation of Rule 44(e), would not be sufficient to establish a violation of Rule 44(a), (b), or (c), and the burden of proving that a respondent's price representations were in fact fictitious or false would still be upon counsel supporting the complaint. The record establishes the pricing allegations of the complaint and accordingly respondent's argument in this respect is without merit.

E. Concluding Findings

As previously found, there is no evidence in the record that respondent misbranded its fur products by failing to affix labels showing that the fur was used, that the fur was composed of paws, tails, etc., or the name of the person selling, advertising, transporting, or

⁵ See Footnote 2, *supra*.

Findings

54 F.T.C.

distributing such products in commerce, as alleged in the complaint, nor was there any evidence in the record that respondent falsely invoiced its fur products by failing to show thereon that the fur was used, that the fur was composed of paws, tails, etc., or the country or origin of any imported furs, or by abbreviating required information or failing to disclose the required item number, as alleged in the complaint. Accordingly, it is found that there is no substantial evidence in the record to support the foregoing allegations of the complaint.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent misbranded certain of its fur products by failing to affix labels thereto showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide, and as prescribed under the Rules and Regulations;

(b) The name of the country of origin of any imported furs used in the fur product; and

(c) That the fur product contained or was composed of bleached, dyed or otherwise artificially colored fur, when such was the fact.

It is further concluded and found that respondent falsely and deceptively invoiced fur products by failing to furnish invoices to purchasers showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide, and as prescribed under the Rules and Regulations;

(b) That the fur product contained or was composed of bleached, dyed, or otherwise artificially colored fur when such was the fact; and

(c) The address of the person issuing such invoices.

It is further concluded and found that respondent falsely and deceptively advertised fur products by the use of advertisements and representations which were intended to and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of such products, and which represented, directly or by implication, that (1) its sale prices were reduced from the regular or usual prices of its fur products, when in truth and in fact such represented regular and usual prices were in excess of the prices at which respondent had usually and customarily sold such products in the recent regular course of its business; and (2) its sale prices enabled purchasers of its fur products to effectuate savings greater than the difference be-

tween the stated price and the current market price of such products, in violation of both the Fur Act and the Act.⁶

It is further concluded and found that respondent, in making the pricing claims and representations hereinabove found, failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of the Rules and Regulations.

F. The Effect of the Unlawful Practices

The use by respondent of the false, misleading and deceptive statements and representations found above in Section III C1, 2 and E has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public and thereby induce the purchase of substantial quantities of respondent's fur products. As a result, substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has been and is being done to competition in commerce.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce, and engaged in the above found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act and in the Fur Act.

2. The acts and practices of respondent hereinabove found are in violation of the Fur Act and the Rules and Regulations promulgated thereunder, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Act.

3. The acts and practices of respondent found in Section III C1, 2 and E are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition and unfair and deceptive acts and practices within the intent and meaning of the Act.

4. This proceeding is in the public interest, and an order to cease and desist the above-found unlawful practices should issue against respondent.

5. There is no evidence that the labels affixed to respondent's fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose respondent's name or that the invoices issued by respondent in connection with

⁶ While the Commission disagreed concerning the validity of Rule 44 under the Fur Act in the *Pelta Furs* case, *supra*, it unanimously held such practices to be in violation of Section 5 of the Act.

Order

54 F.T.C.

the sale of fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose the country of origin of imported furs, or the required item number, or that said invoices were improper in that they abbreviated required information.

ORDER

It is ordered. That respondent, Mandel Brothers, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce; and

(f) The name of the country of origin of any imported furs used in the fur product.

2. Setting forth on labels attached to fur products:

(a) Required information in abbreviated form or in handwriting;

(b) Non-required information mingled with required information.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name and address of the person issuing such invoices;

(f) The name of the country of origin of any imported furs contained in the fur product.

2. Setting forth required information in abbreviated form.

3. Failing to show the item number or mark of fur products on the invoices pertaining to such products.

C. Falsely or deceptively advertising fur products through the use of any advertisement, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which represents directly or by implication that the regular or usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of its business;

D. Making pricing claims or representations of the type referred to in Paragraph C above, unless there is maintained by respondent full and adequate records disclosing the facts upon which such claims or representations are based.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

Respondent has appealed from the hearing examiner's initial decision which found that it had violated the Fur Products Labeling Act and the rules and regulations promulgated thereunder in that, in certain respects, it had misbranded, falsely invoiced, and falsely advertised fur products sold by it. Respondent's appeal essentially is to the effect (a) that the Commission lacks jurisdiction and (b) that Rule 44 of the Fur Regulations is *ultra vires* the Commission's powers under the Fur Act. Respondent also questions whether the evidence supports the findings as to misbranding, false invoicing and false advertising.

Counsel in support of the complaint have also appealed, questioning the limited scope of the order to cease and desist in the initial

decision insofar as the prohibitions against misbranding and false invoicing are concerned. They deem the order to be satisfactory insofar as the advertising violations are concerned.

Respondent's first contention, in effect, is that the evidence does not support the finding that respondent, Mandel Brothers, Inc., is subject to the Commission's jurisdiction under the Fur Act and the Federal Trade Commission Act. Under Section 3(a) of the Fur Act, the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced within the meaning of the Fur Act or the rules and regulations promulgated thereunder is unlawful and is an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act. Section 4 of the same Act provides that for the purposes of the Act a fur product shall be considered to be misbranded if there is not affixed thereto a label showing the proper name of the animal producing the constituent fur; that it contains used fur, when such is the fact; that it contains bleached, dyed, or otherwise artificially colored fur, when such is the fact; that it contains paws, tails, bellies or waste fur, when such is the fact; the name or other identification of the person who manufactured it for introduction into commerce, who introduced it into commerce, or who sells, advertises or offers it for sale, or transports or distributes it in commerce; and the name of the country of origin of the constituent fur; and Sections 5(a) and (b), respectively, provide that for the purposes of the Act a fur product shall be considered to be falsely or deceptively advertised or invoiced if the advertising or invoices do not show substantially the same information. Section 8 of the Fur Act, among other things, authorizes and directs the Federal Trade Commission to prevent violations of Section 3 by the same means, and with the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act were made a part of the Fur Act.

As will hereinafter appear, the record discloses that respondent misbranded, falsely invoiced, and falsely advertised fur products sold by it. The record further discloses that respondent advertised and offered for sale in commerce fur products through the recognizedly interstate media of The Chicago Tribune, The Chicago American and The Chicago Sun-Times, newspapers with substantial circulation outside the State of Illinois. Furthermore, the record shows a number of instances where respondent shipped and delivered, or introduced into commerce, fur products sold to customers

outside the State of Illinois. In this latter connection, the hearing examiner found, in effect, that respondent's officials admitted such interstate sales because customer invoices showed that no Illinois sales tax was charged. Thus, the factual evidentiary situation in this regard is substantially the same as that which obtained in *Jacques De Gorter and Suze C. De Gorter, trading as Pelta Furs v. F.T.C.* (C.A. 9, decided April 17, 1957), and we conclude that the principles enunciated there are controlling here and that respondent's contentions as to the jurisdiction of the Commission are without merit.

Considering now respondent's second principal contention, namely, that Rule 44 of the Fur Regulations prohibiting price misrepresentations with respect to fur products is an unwarranted extension of power delegated to the Commission pursuant to the Fur Act, it is the opinion of the Commission that this point should be, and it hereby is, decided adversely to respondent—also for the reasons stated in the *Pelta Furs* case, *supra*, where the Court, upholding, in effect, the Commission's opinion that Rule 44 is a valid, substantive regulation with the full force and effect of the statute itself, held:

By applying the principles in the cases just cited, and taking into account the legislative history of the Act, it is quite evident that the intention was to reach *all misrepresentations in advertising*, including those relating to prices and value. If any doubt exists about the matter the clause under consideration indicates the intention to include them. The Commission was right in so interpreting the statute and acted within its powers in promulgating the rule under discussion. [Emphasis by the Court.]

Finally, as indicated above, respondent attacks the sufficiency of the evidence to support findings in the initial decision as to misbranding, false invoicing and deceptive advertising.

Respondent does not dispute that it has violated the *labeling* requirements of the Fur Act and the rules and regulations promulgated thereunder.¹ It contends, however, that the instances of violation were merely technical and too trivial in nature to warrant a cease and desist order in the public interest. On this subject, the hearing examiner found as follows:

Respondent's argument is without merit. Admittedly, the misbranding found was not as serious or substantial a violation of the Fur Act as, for instance, calling muskrat mink or rabbit ermine, but the very purpose of Congress in adopting the provisions of the Fur Act and directing the Commission to pro-

¹ In fact, respondent lists in its brief on appeal some seven pages of more than one hundred instances of admitted misbranding. These encompassed failure to use proper names of constituent furs, failure to properly show country of origin and that fur was dyed or artificially colored, improper use of abbreviations, the mingling of non-required with required information and labeling containing information in handwriting. Some of these are in direct contravention of the statute; others are in violation of rules and regulations promulgated under the Act, which are by statute also misbranding. (See *Pelta Furs v. F.T.C.*, *supra*.)

Opinion

54 F.T.C.

mulgate rules and regulations thereunder was to prevent deception of the public by such practices. It cannot seriously be urged that violations of specific sections of an act adopted by Congress are too technical or trivial to warrant the issuance of a cease and desist order.

In addition, the Commission, as an expert body, was authorized and directed to adopt rules and regulations to carry out the purpose of the Act, namely, to prevent the deception of the public by misbranding or falsely advertising or invoicing fur products. Obviously, the use of abbreviations, handwriting, and the mingling of non-required information with required information are devices which can readily be used to deceive and mislead the public. Even though it be conceded that they may have been done innocently, in ignorance of the law, and without intention to deceive, they cannot be permitted. To dismiss respondent's misbranding as too trivial or technical to warrant the issuance of a cease and desist order would be to open the door to deception and evasion of the Act.

The statute does not establish or specify any criteria to permit differentiation between the trivial or serious nature of instances where a retailer fails to affix a label to fur products disclosing, in the manner and form contemplated, all of the information required by the Fur Act and rules and regulations promulgated thereunder. When alleged practices of a retailer are found to constitute violations of the statute, the Commission is under an obligation to correct them. In the circumstances of record in this proceeding, the Commission has concluded that the hearing examiner's findings in the respect indicated is entirely proper and correct. The reasons urged by respondent against sustaining such finding are without merit.

On the question of *false invoicing*, the hearing examiner found four instances of failure to state the correct name of the animal producing the fur contained in respondent's fur products and six instances of failure to set forth on invoices to customers that a fur product was bleached, dyed or otherwise artificially colored. He also found that respondent's invoices, while setting forth its trade name, do not include its address, as required by Section 5(b)(1) of the Act.

Respondent contends that these findings as to false invoicing should not be sustained. It does not seriously question that its sales slips are deficient in that they fail to show the name of the animal producing the fur, or that such slips do not carry respondent's address. It does question the sufficiency of the evidence to establish the fact that the fur products to which the sales slips related were actually dyed, bleached or artificially colored.

Considering this latter point first, sales slips in evidence show sales of fur products made of muskrat and black Persian lamb unaccompanied by a statement that they are dyed. There is uncontroverted testimony that furs made of the skins of muskrat and

black Persian lamb are always dyed. Respondent's argument that this finding as to false invoicing, with respect to bleached, dyed, or artificially colored fur, should be stricken is without merit.

On the question of failure to show respondent's address on sale slips, it is the position of respondent that the omission is of such trivial character as not to require corrective action by the Commission. Counsel supporting the complaint point to the express provision of Section 5(b) (1) (E) of the Fur Act which requires invoices to show:

(E) the name and *address* of the person issuing such invoice * * *.
[Emphasis supplied.]

In the face of this statutory directive, the hearing examiner could not find otherwise than he did in this connection.

In Section 2(f) of the Act, the term "invoice" is defined to mean:

* * * a written account, memorandum, list or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs.

Respondent's main contention in justification of its false and deceptive invoicing practices is that the requirements of the Fur Products Labeling Act respecting invoicing are inapplicable to transactions involving the retail sale of fur products. Holding in effect that the construction advocated by the respondent misconstrues the impact of the word "other" in the context above, the hearing examiner rejected respondent's argument, and correctly so. The Commission has consistently construed the statute's proscriptions against false and deceptive invoicing to extend to invoices or sales slips furnished by retailers to the purchasing consumer. That a prime purpose of the Act was to eliminate deceptive invoicing at the consumer level is evident from its title, namely, "To protect consumers and others * * * against * * * false invoicing of fur products and furs." To accept the construction advanced by the respondent clearly would defeat the congressional declaration of purpose and render the Act ineffective in a major respect.

In the latter connection, it should be noted that the retailer's memorandum of sale or invoice constitutes documentary evidence of rightful possession by the consumer of her fur garment, a factor obviously conducive to preservation of the invoice. This consideration is not applicable, however, with respect to the garment label. Inasmuch as the invoice may serve as a documentary link connecting the sale of specific fur products back through the retailer's rec-

ords with advertisements therefor, the application of the invoicing provisions of the Act to transactions between retailers and consumers represents a key implement for effective administration of the Act.

Not only is the interpretation advocated by the respondent in conflict with the Act's avowed purpose and the legislative design underlying the invoicing provision, but such a construction ignores the language arrangement of Section 2(f) itself. The words "or agent" prefacing the phrase "or any other person who is engaged in dealing commercially in fur products" are set off from the preceding and succeeding parts of the sentence by commas. Hence, the words "or agent" comprise a separate and integral phrase in their own right. It accordingly seems reasonable to conclude that the final phrase extending the definition of invoice to memoranda issued to commercial dealers generally was intended to augment and expand the kindred class of persons dealt with in the preceding phrase, namely, agents.

Another consideration detracting from the force of the respondent's argument is the fact that subsection (b) of Section 3 of the Act not only proscribes misbranding and false advertising but false invoicing as well. Subsection (a) similarly forbids misbranding and false and deceptive advertising and invoicing, but its proscriptions relate only to interstate aspects of the marketing and distribution of fur products and furs. Subsection (b) confers jurisdiction over fur products made in whole or in part of fur which has been shipped and received in commerce, and clearly reaches deception engaged in at the local or intrastate level, the prime point of retail sales' consummation. The inclusion in this subsection of the provision against false invoicing is similarly suggestive of a legislative purpose that the Act's invoicing requirements be applicable to retail transactions.

Respondent further submits that "it would be an unworkable burden on the retailer at a time of an extensive sale with many inexperienced sales persons on the floor to require each of them to have the detailed and intimate knowledge of the Fur Act * * *" necessary to enter the information required by Section 5(b) of the Act on the invoice, or sales slip, delivered to each customer. The answer to this contention is that such sales person is not required to have any specialized knowledge properly to complete the sales slip. The information can be copied by the sales person directly from the required label attached to the fur product. It is no more, and in fact is less, burdensome on a retailer than on a wholesaler, whose clerical personnel may have no physical contact with the

merchandise or labels on merchandise being shipped to meet invoicing requirements of the Act. Respondent's contention that invoicing requirements of the Fur Act and rules and regulations promulgated thereunder do not apply to retail transactions is rejected.

Finally, respondent contends that the evidence does not support the hearing examiner's finding that its advertising of fur products contained false and fictitious statements. The complaint in this respect charges that respondent (1) misrepresented prices of fur products as having been reduced from regular or usual prices in that the regular or usual prices set forth in advertisements in fact were not the prices at which the merchandise was usually sold by respondent in the recent regular course of business, and (2) misrepresented by means of comparative prices and other statements as to "value" the amount of savings to be effectuated by purchasers.

As to (1)—the fictitious pricing charge—the record shows, and the hearing examiner found, that respondent placed an advertisement in The Chicago Tribune of October 2, 1954, which stated that fur products offered at a price of \$244.00 were "Usually \$299.00 to \$399.00." The record also discloses that it was respondent's customary and usual practice (never deviated from) to enter on manufacturers' invoices, at the time of receipt of merchandise, the intended regular and usual retail prices which, according to the testimony of respondent's buyers, always were observed. Manufacturers' invoices introduced into evidence herein, and concerning which the same buyers also testified, showed as usual and regular retail prices, amounts of \$244.00 or \$288.00, not the prices stated in the advertisement as "Usually \$299.00 to \$399.00." Mr. Camenisch, a witness called in support of the complaint, identified, and testified as to respondent's invoices furnished to customers on or about the date of The Herald Tribune advertisement. His testimony was that, through identifying stock item numbers appearing on these customer invoices, he traced the particular merchandise involved through respondent's records back to the manufacturers' invoices previously mentioned. He thus established that certain garments sold during the sale for \$244.00 were the same garments advertised. This testimony and evidence clearly establishes the relationship of the sales and advertising in question. The net effect of respondent's use of "fictitious" prices such as the above-quoted "Usually \$299.00 to \$399.00," in the opinion of the Commission, was to mislead and deceive purchasers as to the amount of savings to be realized if advantage were taken of the sale price of \$244.00. The evidence fully substantiates the hearing examiner's finding that respondent

did engage in fictitious pricing. Respondent's contention on this point, therefore, is rejected.

As to (2)—the comparative pricing charge—the respondent is alleged to have misrepresented the amount of savings possible to a prospective purchaser by stating in advertisements that fur products featured therein had a stated “market value” or “market price” when such stated value, or price, was not true in fact.

The hearing examiner found that the market value or price stated by the respondent in its advertisements exceeded considerably the actual market value or price of the fur products offered. This finding is based on his analysis of respondent's invoices of sales made, together with manufacturers' invoices, showing costs to respondent, to which are attached “receiving aprons” on which had been made notations of the retail price of the advertised garments to be \$125.00.

Of the above-mentioned manufacturers' invoices, Commission Exhibits 25 through 46, covering the 1954 Subway store sale, show costs of garments to respondent ranging from \$83.00 to \$100.00; Commission's Exhibits 55 through 60, covering the 1952 Subway store sale, show costs to respondent ranging from \$87.50 to \$100.00 per garment. There is expert testimony that maximum mark-up usually would range from 50 to 70% of cost. Using that range of mark-up on respondent's unit costs of record, the hearing examiner reasoned, would result in \$170.00 as the highest market value of any of the fur products—not the market value or price placed upon them by respondent in its advertisements as ranging from \$195.00 to \$499.00 in 1954 and from \$165.00 to \$599.00 in 1952. Also, the hearing examiner found that, “Based upon the highest cost of the fur products, a mark-up of 400 to 500 percent would have been necessary to reach the market prices of \$499.00 and \$599.00 listed in respondent's advertisements.” The hearing examiner further found that such a mark-up would be incredible. He found equally incredible respondent's argument that because it purchased in lots and quantities, it was able to secure cost prices 400 to 500 percent below market value.

This reasoning of the hearing examiner, while cogent, does not establish to the satisfaction of the Commission that the respondent misrepresented, by means of comparative prices and other statements as to “value,” the amount of savings to be effectuated by purchasers. In order to make such a finding, it is obviously necessary to first find what the actual market value, or price, of the fur product involved in this proceeding in fact was. There is no evidentiary basis on the record here to make such a determination. All that this record does show is what respondent's costs were, the

usual and customary trade mark-up in the Chicago area and the retail prices at which respondent sold fur products. In view of the lack of evidence establishing actual market value, the Commission cannot accept the reasoning of the initial decision as establishing the conclusion that respondent did, in fact, misrepresent savings to be effectuated by prospective purchasers of fur products advertised and sold by it. It follows that the charge in the complaint to the effect that respondent misrepresented, by means of comparative prices and other statements as to "value" not based on current market values, the amount of savings to be effectuated by purchasers of respondent's fur products has not been substantiated. The initial decision will be modified accordingly.

Turning now to a consideration of the appeal of counsel supporting the complaint, their appeal is limited to challenging the scope of the initial decision's order to cease and desist. Counsel contend, in such connection, that the hearing examiner erred in failing to require the respondent to comply with all labeling and invoicing requirements, respectively, prescribed in Sections 4(2) and 5(b)(1) of the Act. The allegations of the complaint in Paragraphs 3 and 5 are that certain of the respondent's fur products were misbranded and falsely invoiced in that they were not labeled or invoiced as required by these sections.

Under Section 4(2) of the Fur Products Labeling Act, a fur product is misbranded if it does not have affixed to it a label showing in words and figures which are plainly legible:

(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7(c) of this Act;

(B) that the fur product contains or is composed of used fur, when such is the fact;

(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(E) the name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product for introduction into commerce, introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce;

(F) the name of the country of origin of any imported furs used in the fur product.

With slight variation, the information prescribed by Section 5 (b)(1) for inclusion on invoices to avoid falsity is the same.

With respect to the charge of misbranding in violation of Section 4(2), the record discloses numerous instances of the respondent's

failure to label its fur products with the correct name of the animal producing the constituent fur. Also, there were about 15 occasions when the respondent neglected to disclose on labels attached to its garments the fact that they were composed of dyed, bleached or otherwise artificially colored furs. In addition, we note numerous cases of failure adequately to disclose on labels the required information as to the country of origin of the component furs of the respondent's garments. The evidence shows, however, that the respondent's labels did carry in large type print the words "Mandel Brothers, Chicago," and this we regard to be in substantial compliance with the subsection's requirement for identification of the seller.

The initial decision's findings generally reflect the foregoing, and similarly recognize that no instances were shown in which the respondent's labels were legally deficient through failure to reveal matters concerning the presence of used fur or paws and tails or relating to the seller's identity. A generally similar situation prevails as to some of the items of information on invoices. The order contained in the initial decision is limited to requiring cessation of the labeling and invoicing deficiencies found, and omits any provision making it mandatory for the respondent to likewise observe the other affirmative requirements of either Section 4(2) or 5(b)(1).

The Fur Products Labeling Act expresses a national policy against misbranding and false invoicing of fur products. Under the Act, a fur product is misbranded and the introduction, or manufacture of it for introduction, into commerce, or the transportation or distribution of it in commerce, or the sale, advertising or offering of it for sale in commerce is unlawful, unless it has attached to it a label setting forth clearly and conspicuously all the data indicated as necessary to be included thereon by Section 4(2), and is falsely invoiced unless there is issued, in connection with its sale, an invoice which incorporates each of the statements of the nature contemplated by Section 5(b)(1). The violations with which the subsections are concerned consist of the failure to attach to a fur garment an adequate label as there prescribed or to deliver to the customer in connection with the sale an invoice that imparts all required information. The subsections do not deal with separate violations in and of themselves, nor do they recognize or excuse misbranding or false invoicing in varying degrees. Under the plain language of the statute, the offense of misbranding or false invoicing occurs either by reason of failure to attach to a fur product a

label or to issue in connection with its sale an invoice, or failure to include on a label which is attached or to show on an invoice which is issued each of the items of information which the statute requires.

Further supporting this interpretation is the circumstance that the particular definitive provisions relating to misbranding and false invoicing appearing in the subsections mentioned comprise only part of the definitions contained in Section 4 and Section 5(b). Two additional definitions of misbranding appear in other subsections of Section 4, one (subsection 1) relating to deceptive representations on labels, and the other (subsection 3) specifically prohibiting use on labels of animal names other than those provided in the Fur Products Name Guide. Substantially similar supplemental definitions relating to false invoicing appear in subsection (2) of Section 5(b). Subsection (2) of Section 4 and subsection (1) of Section 5(b) evidence a clear legislative design that garments subject to the Act be at all times identified by labels and invoices revealing facts generally relevant to the utility and value of the component fur and continuously identified with a person likewise subject to the Act. Congress' inclusion of these subsections looked not only to combatting deception by insuring disclosure of material facts, but the subsections were also intended to serve as keystones for effective enforcement of companion sections of the Act likewise directed against misbranding and false invoicing and others proscribing false advertising. The requirements specified for an adequate label in subsection (2) of Section 4 are closely interrelated, and the same holds true for those contained in subsection (b)(1) of Section 5 respecting invoices.

For the foregoing reasons, the Commission is of the opinion that in any case in which it is found that the labeling or invoicing requirements of Sections 4(2) or 5(b)(1) of the statute have not been fully complied with, the appropriate conclusion is that the fur products in connection with which the deficiencies have occurred have been misbranded or falsely invoiced, and that the appropriate order to be issued in correction of the offense is one requiring cessation of the practice, namely, the misbranding or false invoicing by failure to attach proper labels or to issue proper invoices.

While the foregoing considerations are fully controlling on the scope of the order, it should be noted, too, that the Commission is not limited to prohibiting an illegal practice in the precise form in which it is found to have existed in the past. *Hershey Chocolate Corporation v. F.T.C.*, 121 F. 2d 968 (C.A. 3, 1941). In addition to proscribing specific deceptive acts, unfair methods reflecting ex-

pansion or variation in original basic theme also may be prohibited. *Consumers Sales Corporation v. F.T.C.*, 198 F. 2d 404 (C.A. 2, 1952).

Considerations of sound administrative policy similarly require that orders be not unduly narrow in their scope when issued in proceedings wherein proof of misbranding or false invoicing has been limited to failure to comply with some, rather than all, of the requirements of subsections 4(2) or 5(b)(1). If compliance with all criteria of the relevant subsection were not required, institution of new proceedings manifestly would be necessitated in challenging subsequent omissions not theretofore resorted to but similarly violative of the public policy expressed in the subsection. The multiplicity of actions so resulting patently would not be in the public interest.

The Commission's long established policy with respect to orders covering violations of Section 4(2) of the Wool Products Labeling Act obviates such multiplicity in the enforcement of that statute. Orders thereunder have included prohibitions against failure to disclose on labels all elements of information required by that subsection, even though failure to disclose some elements of information were not involved in various of the cases; and our orders heretofore issued under the Fur Products Labeling Act generally have contained requirements for a disclosure on labels and invoices of all information prescribed by Sections 4(2) and 5(b)(1) of that Act. An example of such an order was that approved by the Court in the *Pelta Furs* case, *supra*.

By issuing an order of the scope indicated, the Commission is not finding directly, or by implication, that respondent has engaged in any questionable practices other than those of misrepresenting that its advertised prices were reduced from regular and usual prices; and by failing to label and invoice its fur products so as to show its name and address, the name of the animal producing the constituent fur, the fact that certain of its fur products contained bleached, dyed, or otherwise artificially colored fur, and, in some instances, the country of origin of imported component furs.

These conclusions notwithstanding, it would be erroneous to conclude that the record affords adequate basis for informed determinations that the respondent's labeling has never in any instance reflected departures from the requirements of subparagraphs (b), (d) or (e) of Section 4(2); and neither does the record suffice for similarly informed determinations respecting certain of the invoicing requirements prescribed under the subparagraphs of Section 5(b)(1). Insofar as the fifth numbered conclusion of law in the

50

Order

initial decision may imply the contrary, modification of the initial decision in that respect, in addition to modification of the order contained therein, is warranted.

To the extent previously indicated herein, the appeal of counsel supporting the complaint is deemed well taken, and our order providing for appropriate modification of the initial decision is issuing herewith.

Commission Tait concurs in the result.

FINAL ORDER

Respondent and counsel supporting the complaint having filed cross-appeals from the hearing examiner's initial decision filed October 9, 1956, and the matter having come on to be heard by the Commission upon the whole record, including briefs and oral argument, and the Commission having rendered its decision granting in part and denying in part the appeal of respondent and granting the appeal of counsel supporting the complaint and directing modification of the initial decision:

It is ordered, That Paragraph 5 of the conclusions of law contained in the initial decision be modified to read as follows:

"5. There is no evidence that the labels affixed to respondent's fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose respondent's name or that the invoices issued by respondent in connection with the sale of fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose the country of origin of imported furs, or the required item number, or that said invoices were improper in that they abbreviated required information."

It is further ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

"It is ordered, That respondent, Mandel Brothers, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce, as 'commerce,' 'fur' and 'fur

Order

54 F.T.C.

products' are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

"A. Misbranding fur products by:

"1. Failing to affix labels to fur products showing:

"(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

"(b) That the fur product contains or is composed of used fur, when such is the fact;

"(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

"(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

"(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce; and

"(f) The name of the country of origin of any imported furs used in the fur product.

"2. Setting forth on labels attached to fur products:

"(a) Required information in abbreviated form or in handwriting;

"(b) Non-required information mingled with required information.

"B. Falsely or deceptively invoicing fur products by:

"1. Failing to furnish invoices to purchasers of fur products showing:

"(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

"(b) That the fur product contains or is composed of used fur, when such is the fact;

"(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

"(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

"(e) The name and address of the person issuing such invoices;

"(f) The name of the country of origin of any imported furs contained in the fur product.

"2. Setting forth required information in abbreviated form.

"3. Failing to show the item number or mark of fur products on the invoices pertaining to such products.

"C. Falsely or deceptively advertising fur products through the use of any advertisement, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which represents directly or by implication that the regular or usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of its business;

"D. Making pricing claims or representations of the type referred to in Paragraph C above, unless there is maintained by respondent full and adequate records disclosing the facts upon which such claims or representations are based."

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

It is further ordered, That the respondent, Mandel Brothers, 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 the order to cease and desist.

Commissioner Tait concurring in the result.

IN THE MATTER OF
THE HOUSE OF KUDRA FURS ET AL.

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

Docket 6730. Complaint, Feb. 21, 1957—Decision, July 6, 1957

Consent order requiring a furrier in Trenton, N.J., to cease violating the Fur Products Labeling Act by invoicing which named an animal other than that producing a particular fur; by advertising in newspapers which falsely represented the prices of fur products as reduced when the so-called regular prices were fictitious, and misrepresented comparative prices and percentage savings and values; and by failing in other respects to conform to the requirements of the Act.

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

Gill & Phelan by *Mr. Edmund J. Phelan* of Trenton, N.J., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above named respondents on February 21, 1957 charging them with violation of the Federal Trade Commission Act and the Fur Products Labeling Act and the Rules and Regulations promulgated under the last mentioned act as set forth in said complaint. After service of the complaint respondents on May 8, 1957 entered into an agreement with counsel supporting the complaint for a consent order to cease and desist from the practices complained of, which agreement purports to dispose of all the issues in this proceeding without hearing. This agreement has been duly approved by the Assistant Director and the Director of the Bureau of Litigation and has been submitted to the undersigned, heretofore designated to act as hearing examiner herein, for his consideration in accordance with Rule 3.25 of the Commission's Rules of Practice.

Respondents in the aforesaid agreement have admitted all the jurisdictional facts alleged in the complaint and have agreed that the record may be taken as if findings of the jurisdictional facts had been duly made in accordance with such allegations. Said agreement provides further that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. It has also been agreed that the record herein shall consist solely of the com-