

Findings

IN THE MATTER OF
THE FAIR

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

Docket 6822. Complaint, June 17, 1957—Decision, Mar. 4, 1959

Order requiring a Chicago department store to cease violating the Fur Products Labeling Act by failing to comply with the labeling and invoicing requirements; by advertising in newspapers which failed to disclose the names of animals producing certain furs, represented prices as reduced from purported regular prices which were in fact fictitious, and used comparative prices and percentage savings claims not based on current market values or a designated time; and by failing to keep adequate records as a basis for such pricing claims.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on June 17, 1957, issued and subsequently served its complaint in this proceeding upon the respondent charging it with violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and, as specified under the provisions of the aforesaid Act, with engaging in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. After the filing of answer by respondent, hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of, and in opposition to, the allegations of the complaint was received into the record. In an initial decision dated April 29, 1958, the hearing examiner held that certain of the complaint's charges were sustained and that others should be dismissed. The initial decision contained a provisional order to cease and desist.

The Commission having considered the cross appeals filed from the initial decision of the hearing examiner and the entire record in this proceeding and having determined that the appeal of counsel supporting the complaint should be granted and the appeal of respondent denied in part and granted in part and that the initial decision should be vacated and set aside, the Commission further finds that this proceeding is in the interest of the public and now makes this its findings as to the facts, conclu-

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sions drawn therefrom and order, the same to be in lieu of those contained in said initial decision.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, The Fair, is a corporation duly organized and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business and office located at 140 South State Street, Chicago, Ill. Respondent is engaged in the general retail merchandising of consumer goods including the retail sale of fur products in its fur department.

PAR. 2. Subsequent to August 9, 1952, the effective date of the Fur Products Labeling Act, respondent has advertised and offered for sale its fur products in commerce and has sold, advertised and offered for sale fur products which were 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 Products Labeling Act.

PAR. 3. Certain of the aforementioned fur products have been misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 4. Certain of said fur products were misbranded, in violation of the Fur Products Labeling Act, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder was abbreviated on labels in violation of Rule 4 of the aforesaid Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder was mingled with nonrequired information on labels in violation of Rule 29(a) of the aforesaid Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder was set forth in handwriting on labels in violation of Rule 29(b) of the aforesaid Rules and Regulations.

(d) Labels affixed to fur products composed of two or more sections containing different animal furs failed to set forth separately the furs composing such sections in violation of Rule 36 of the aforesaid Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required under the provisions of Section 5(b) (1) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced, in violation of the Fur Products Labeling Act, as they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in that the information required under Section 5(b) (1) of the Act was set forth in abbreviated form in violation of Rule 4 of the aforesaid Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act, in that respondent caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements concerning said fur products, which advertisements were not in accordance with the provisions of Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 8. Among and included in the advertisements, as aforesaid, were advertisements of respondent which appeared in issues of the Chicago Tribune, which newspaper is published in Chicago, Ill., and has wide circulation in the State of Illinois and other States of the United States.

By means of the aforesaid advertisements respondent falsely and deceptively:

(a) Failed to disclose the name or names of the animal or animals that produced the fur contained in the fur products, as set forth in the Fur Products Name Guide, in violation of Section 5(a) (1) of the Fur Products Labeling Act.

(b) Represented prices of fur products as having been reduced from regular or usual prices, where the so-called regular or usual prices were in fact fictitious, in that they were not the prices at which said merchandise was usually sold by respondent in the recent and regular course of its business, in violation of Section 5(a) (5) of the Fur Products Labeling Act and Rule 44(a) of the aforesaid Rules and Regulations.

PAR. 9. Respondent, in making the pricing claims and representations referred to in paragraph 8(b) hereof, failed to main-

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tain full and adequate records disclosing the facts upon which such claims and representations were purportedly based, in violation of Rule 44(e) of the aforesaid Rules and Regulations.

PAR. 10. Respondent in advertising its fur products misrepresented the grade, quality or value of certain of said fur products by the use of illustrations depicting higher priced or more valuable products than those actually available for sale at the advertised selling price, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(f) of the aforesaid Rules and Regulations.

PAR. 11. The respondent in the regular course of its business has been in substantial competition with other corporations, individuals, and firms likewise engaged in the retail sale and distribution of fur products.

CONCLUSIONS

The aforesaid acts and practices of the respondent, as herein found, have been in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and, as specified under the provisions of the aforesaid Act, constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

Evidence was also submitted at the hearings relevant to the charges of alleged violations of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(b) of the aforesaid Rules and Regulations through the use of comparative prices and percentage claims which were not based on current market values and without giving the designated time of a bona fide compared price. Those charges are not sustained on the record, and provision for their dismissal accordingly is included in the order appearing hereafter.

ORDER

It is ordered, That respondent, The Fair, 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,"

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"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) Nonrequired 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;

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(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.

C. Falsely or deceptively advertising fur products through the use of any advertisement, public announcement, notice or in any other manner 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:

(1) 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;

(2) That such product is of a higher grade, quality or value than is the fact, by means of illustrations or depictions of higher priced or more valuable products than those actually available for sale at the advertised selling price, or by any other means.

D. Making pricing claims or representations of the type referred to in paragraph C(1) 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 charges of the complaint relating to alleged violations of Rule 44(b) of the Rules and Regulations promulgated under the Fur Products Labeling Act be, and the same hereby are, dismissed.

It is further ordered, That the respondent, The Fair, 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.

OPINION OF THE COMMISSION

By KERN, Commissioner:

This matter is before the Commission for final decision on the merits on cross appeals by respondent and by counsel supporting the complaint from the hearing examiner's initial decision. Briefs have been submitted and oral argument had.

The complaint charges that respondent has violated the Fur Products Labeling Act¹ and the Rules and Regulations promulgated thereunder² by (a) *misbranding* fur products, (b) falsely

¹ 15 U.S.C. 69 *et seq.*

² 16 C.F.R. 301.

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and deceptively *invoicing* fur products, (c) falsely and deceptively *advertising* fur products, and (d) failure to keep *adequate records*.

The hearing examiner found that respondent had violated Section 5 of the Federal Trade Commission Act through use of false and deceptive pricing representations and he issued a cease-and-desist order prohibiting such practices in the advertising and sale of "fur products, or any other products or commodities." He dismissed all other charges of the complaint, including allegations of violation of the Fur Products Labeling Act. As will hereinafter appear, the Commission has concluded that the initial decision is erroneous in these respects.

Respondent challenges the findings as to its pricing claims and contends that the hearing examiner erred in not dismissing the complaint by reason of respondent's discontinuance of the questioned pricing practices and in failing to find that certain rules promulgated under the Fur Products Labeling Act were invalid. Respondent also attacks the scope of the proposed order to cease and desist as apparently applying to all merchandise sold in The Fair's department stores instead of being limited to fur products.

In their appeal, counsel supporting the complaint assert that the hearing examiner erred in holding (1) that guaranties furnished respondent by manufacturers, or other suppliers, protected respondent where misbranding was apparent on the face of labels, (2) that the aforesaid guaranties protected respondent from its own actions in falsely advertising fur products, (3) that alleged violations of the Rules and Regulations promulgated under the Fur Act were not established, and (4) that retail sales slips are not "invoices" within the meaning of the Fur Products Labeling Act. They disagree with respondent's contention regarding the scope of the order to cease and desist, as a matter of law, but take no position on the question of discretionary propriety of such an order.

Jurisdiction

In its answer, respondent admitted the jurisdiction of the Commission; and the hearing examiner made the requisite jurisdictional finding.

However, during the hearings before the examiner, and on appeal, respondent in effect suggested that, because there is no

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direct evidence of sales by it in commerce of improperly labeled or misbranded fur garments, the Commission is without jurisdiction to enter an order with respect to mislabeling. The evidence in the record of sales for fur products by respondent indicates that the customers involved resided in the State of Illinois.³

Section 3(a) of the Fur Act defines as unlawful "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."

Moreover, Section 3(b) bans "the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded or falsely and deceptively advertised or invoiced."

For the purposes of the Fur Act, misbranding is described and defined in Section 4, while false or deceptive advertising and false or deceptive invoicing are described in Section 5. Section 8 of the Act confers upon the Commission jurisdiction over violations of the Act and the Rules and Regulations promulgated thereunder.

The record before us discloses that respondent did, in fact, misbrand and falsely and deceptively advertise and invoice fur products sold by it. It further establishes that respondent advertised and offered fur products for sale in commerce within the meaning of Section 3(a), through the Chicago Tribune, which has substantial circulation outside the State of Illinois.⁴ The manufacturers' or suppliers' invoices of record⁵ also disclose that the fur products involved in this proceeding were "made in whole or in part of fur which has been shipped and received in commerce" within the meaning of Section 3(b) in that they show the origin of the fur pelts contained in such fur products to be Turkey, Iran, Russia, Sweden, Afghanistan, Canada and the United States of America.

We conclude that respondent's dealings in fur products are well within the scope of the Act.⁶

³ Respondent's sales slips, Commission Exhibits 8-13, 15, 19-21.

⁴ Commission Exhibits 1-4, incl.

⁵ Commission Exhibits 5, 14, 16-18, incl.

⁶ *Pelta Furs*, Docket 6297; *Mandel Brothers, Inc.*, Docket 6434; *Benton Furs*, Docket 6501.

Respondent's Appeal

The first specific issue raised by respondent in its appeal relates to the sufficiency of the evidence to support the hearing examiner's finding that certain of respondent's pricing representations were false and deceptive.

The complaint attacks respondent's pricing claims in two respects. It alleges first that respondent engaged in "fictitious pricing" by advertising that the prices at which fur products were offered were "reduced from regular or usual prices * * * at which said merchandise was usually sold by respondent in the recent and regular course of its business," in violation of section 5(a)(5) of the Act and Rule 44(a) of the Rules and Regulations. Secondly, the complaint alleges that respondent "used comparative prices and percentage savings claims which were not based on current market values," in violation of section 5(a)(5) of the Act and Rule 44(b) of the Rules and Regulations.

As to the first charge, the record shows, and the hearing examiner found, that respondent advertised and offered its fur products for sale in the Chicago Tribune a recognized interstate medium. One of the advertisements introduced in evidence, for example, featured several major price groups—some fur products being offered for \$299, "Usually \$399 to \$499"; still others for \$399, "Usually \$499 to \$599"; and another group for \$499, "Usually \$649 to \$699." Similar claims were made in other advertisements received of record. The record also discloses that respondent customarily attached to manufacturers' and suppliers' invoices "aprons" upon which respondent entered the intended regular and usual price which, according to respondent's buyer were "never varied from." For example, the "aprons" attached by respondent to its suppliers' invoices disclosed entries of retail prices for certain garments as \$299 which were advertised as "Usually \$399 to \$499." They had never been priced as advertised. Among garments advertised for \$299 as "Usually \$399 to \$499" were some, the regular retail price of which was shown on invoice aprons as \$299; and also some offered for \$399 as "Usually \$499 to \$599," the regular retail price of which was \$399. One of respondent's advertisements offered "\$399 capes and stoles" for \$288. The apron attached to the invoice for one such item showed the regular retail price to be \$288. It had never been priced at \$399. A Commission investigator testified in support of the complaint that through identifying stock item

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numbers he traced particular garments through respondent's records from the advertisements introduced in evidence back to the invoices and aprons previously mentioned, thus establishing that certain garments sold as a result of the questioned advertising actually were the garments advertised. The relationship of the sales and advertising in question thus was clearly established. The record fully supports the conclusion that respondent actually engaged in "fictitious" pricing in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated thereunder.

In this connection, the hearing examiner in his initial decision was wrong in two respects: he found that respondent's "fictitious pricing" constituted, in and of itself, a violation of Section 5 of the Federal Trade Commission Act, and he failed to find that such a practice violated the Fur Act. The complaint does not charge a separate violation of Section 5 of the Federal Trade Commission Act, but that respondent through its pricing practices violated the Fur Act and that, by virtue of such violation of the Fur Act, the Federal Trade Commission Act was violated. The findings of fact, conclusion, and order to cease and desist entered by the Commission correct this compound error.

Furthermore, in regard to respondent's pricing practices, the initial decision can be construed to suggest that respondent may have available to it the defense of good faith acceptance of its suppliers' guaranties provided for in Section 10(a) of the Fur Act. We discuss below in some detail the extent to which such a defense may be available under the terms of the Fur Act and note here in passing that, to the extent the initial decision may be so construed as indicated, it errs.

With respect to respondent's use of misleading "comparative prices," the examiner appears to have assumed that the burden is upon respondent to prove that fur garment prices advertised by it as "usual" were, in fact, current market values or prices at which similar garments were being offered for sale by respondent's competitors. Actually, it is incumbent upon counsel supporting the complaint to establish what the current market values, or prices, actually are; and to show that they were, in fact, misrepresented by the seller. A respondent can be called upon to rebut a charge of false advertising through the use of misleading "comparative prices" only if it be first established *prima facie* that the practice has been engaged in.

Concerning this charge the record shows the respondent's costs,

its usual and customary markup, and its retail sales prices. Also, there is a modicum of inconclusive evidence as to the prevailing markup among competitive fur dealers in the Chicago area. But there is no persuasive evidence establishing the actual market values, or prices, of the fur products involved in this proceeding. The allegation that respondent has violated Section 5(a)(5) of the Fur Act and Rule 44(b) of the Rules and Regulations promulgated thereunder through the use of comparative prices and percentage savings claims which were not based on current market values has not been established.

Respondent next contends that the examiner erred in not dismissing the complaint by reason of respondent's discontinuance of the pricing practices complained of and because it had actually gone out of the fur business before issuance of the complaint on June 17, 1957.

Respondent asserts that in February 1957 it entered into a lease agreement with I. Himmel & Sons, Inc., by the terms of which Himmel took over the operation of the fur departments in respondent's stores as an independent entity. Under the lease all fur business done by Himmel is to be done in the name of The Fair; The Fair must approve all of the lessee's employees before they are employed in the leased department and, according to the record, The Fair actually hires the lessee's employees through its own personnel department; The Fair shares in the lessee's profits through payment to it of a percentage of the lessee's gross sales; customer lists become the property of The Fair; and The Fair makes independent adjustments of customer complaints and accounts. Furthermore, all fur advertising must be done in The Fair's name and is subject to prior approval of The Fair, which also retains the right to approve any and all advertising media used.

Customers of The Fair's fur department have no way of knowing that they are dealing with an alleged "independent contractor." Indeed when respondent's Assistant Comptroller was asked whether The Fair was still in the fur business, he testified, "Well, as far as the customers are concerned, I suppose it is in the fur business."

These circumstances by no means support respondent's argument that no order should be entered against it because of discontinuance of the pricing practices complained of and because respondent had gone out of the fur business prior to issuance of the complaint.

We consider next respondent's argument that Rules 4, 29(a), 29(b) and 36, promulgated pursuant to the Fur Products Labeling Act, are invalid because they are difficult or impossible to comply with⁷ and that Rule 44, prohibiting price and value misrepresentations with respect to fur products, as promulgated by the Commission, is not authorized by the Fur Products Labeling Act. The latter point should be, and it hereby is, decided adversely to respondent on the authority of the *Pelta*⁸ and *Mandel*⁹ cases, and does not merit further discussion.

To buttress the contention that Rules 4, 29 and 36 are invalid because compliance with their requirements is difficult or impossible respondent cites the testimony of several independent witnesses, fur dealers thoroughly familiar with the trade. It urges that, since this evidence went unchallenged and uncontradicted, the challenged rules, therefore, are invalid. Congress directed the Commission, in Section 8 of the Fur Products Labeling Act, to prescribe rules and regulations governing the manner and form of disclosing information required by the Act and such as might be necessary and proper for purposes of its administration and enforcement. Accordingly rules and regulations, including those here questioned by respondent, were issued pursuant to that authority and statutory direction after due notice and full opportunity for all interested persons to be heard. Since the effective date of those rules and regulations the Commission has observed through its inspection programs that hundreds of fur retailers subject to the Act have complied with those rules without great inconvenience or hardship. Taking into consideration all of the factors involved, including the testimony relied upon by respondent, the Commission concludes that it must reject respondent's contention that the questioned rules are invalid because of difficulty or impossibility of compliance with their requirements.

Appeal of Counsel Supporting the Complaint

The appeal of counsel supporting the complaint poses first the question of the extent to which Section 10(a) of the Fur Products

⁷ Rule 4 prohibits use of abbreviations and ditto marks on labels and invoices and in advertising. Rules 29(a) and (b) prohibit the use of handwriting on labels and set forth certain other requirements as to disclosure on labels. Rule 36 concerns requirements as to disclosure where fur products are composed of two or more sections.

⁸ *DeGorter v. FTC*, 244 F.2d 270 (9th Cir., 1957).

⁹ *Mandel Brothers v. FTC*, 254 F.2d 18 (7th Cir., 1958), cert. granted, 79 S. Ct. 54.

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Labeling Act is available as a defense to charges of misbranding and certain false advertising. That subsection reads as follows:

No person shall be guilty under Section 3 if he establishes a guaranty received in good faith signed by and containing the name and address of the person residing in the United States by whom the fur product or fur guaranteed was manufactured or from whom it was received, that said fur product is not misbranded or that said fur product or fur is not falsely advertised or invoiced under the provisions of this Act. Such guaranty shall be either (1) a separate guaranty specifically designating the fur product or fur guaranteed, in which case it may be on the invoice or other paper relating to such fur product or fur; or (2) a continuing guaranty filed with the Commission applicable to any fur product or fur handled by a guarantor, in such form as the Commission by rules and regulations may prescribe.

We note that there may be an unresolved question as to whether the protection afforded by Section 10(a) of the Fur Act [through reliance in good faith upon guaranties furnished sellers by their suppliers] was intended by the Congress to apply to charges of misbranding brought by the Commission in an administrative proceeding under Section 8 of the Act, or whether it was intended to be limited as a defense to criminal charges brought under Section 11 of the Act. It is our opinion, however, that it is unnecessary to determine that question now, in view of the disposition made of these appeals.

The record here shows, and the examiner found, that the fur products in question were the subject of guaranties furnished by manufacturers or suppliers from whom respondent purchased. The examiner further found, as to labeling, that "Most of the faulty labeling was not glaringly obvious and could have been easily overlooked * * *. To have discovered some of the defects would have required the careful scrutiny of the garments by one skilled in furs and well versed in the language of the Fur Act and of the Rules and Regulations." He concluded, therefore, that "* * * respondent is entitled to the benefit of §10(a), and cannot be found guilty of misbranding under §3 of the Act."

Our review of the record convinces us that the foregoing holding of the hearing examiner is erroneous.

Respondent's fur buyer testified that she had twenty-one years'

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experience in the fur business, fourteen of which were with The Fair, and that she was the fur buyer for respondent during the period when the misbranding occurred. We also learn from the record that she was in complete charge of respondent's fur department; that she was thoroughly acquainted with the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder; that she was a skilled buyer and was familiar with the fur industry and its various manufacturing and dyeing methods, countries of origin, etc.; and that she examined all fur products that came into her department and checked the labels for accuracy and compliance with the Act.

The deficiencies on labels attached to fur garments sold by respondent were substantial in number—113 violations. These defects were readily apparent on the face of the labels. Further, respondent was legally obligated to examine the labeling of fur products purchased and advertised and sold by it and to correct any erroneous labels. Rule 34(a) of the Fur Rules and Regulations provides:

If a person subject to Section 3 of the Act with respect to a fur product finds or has reasonable cause to believe the label affixed thereto is incorrect or does not contain all the information required by the Act and the Rules and Regulations, he shall correct such label or replace same with a substitute containing the required information.

Respondent asserts that the questioned labels were those of its suppliers, and that appears to be true. However, the defects in the labels clearly could have been discovered with the exercise of ordinary diligence. Respondent obviously should have been aware of those defects; its contention that it relied "in good faith" on the suppliers' guaranties is not convincing.

With respect to certain of respondent's advertising claims, the hearing examiner also interpreted Section 10(a) of the Act "as requiring that the respondent be found not guilty of having violated §3 of the Act by failure to disclose in its advertising the name or names of the fur-producing animal or animals." Counsel supporting the complaint appeal from that holding.

The typical advertising defects noted by the hearing examiner were the failure to include the use of the word "lamb" in describing "Persian Paw jackets" and "Black Dyed Broadtailed jackets." Counsel supporting the complaint point out that the Fur Products Name Guide, which is an integral part of the Rules

and Regulations promulgated under the Fur Act, clearly indicates that these are not acceptable names, and argue that a knowledgeable merchant could not, in good faith, compound the misbranding on labels and invoices received from its suppliers and include such terminology in its advertising when, on the very face, of the labels and invoices, and even in the format of the advertisements of record, such terminology clearly is erroneous. They further argue that, unlike the misbranding charges which were errors of omission, the advertising charges in the complaint are bottomed upon positive, affirmative acts of respondent in preparing its own advertising copy.

Respondent cannot rely on guaranties furnished to it by suppliers to excuse representations made by it in its own advertising on the theory that those representations were made in good faith through acceptance of information set forth on suppliers' labels. With the exercise of reasonable diligence, respondent could have corrected the erroneous information contained on labels and carried over by it into advertising copy originating in its own fur department. Section 10(a) of the Act ought not to be available as a defense to false and misleading advertising resulting from respondent's own affirmative acts.

Respondent's concluding argument in this connection is that the number of proven mistakes in advertising was limited, only three or four being established, and these were trivial. Respondent's argument as to the minimal effect of its advertising representations is rejected, and the appeal of counsel supporting the complaint on this phase of the case is being granted. *Mandel Brothers*, Docket 6434.

We turn now to the appeal of counsel supporting the complaint from the hearing examiner's holding that violations by respondent of Rules 44(e) and (f) were not established.

Rule 44(e) requires the maintenance of full and adequate records disclosing facts upon which certain types of pricing claims and representations are made. And not only should those records disclose all facts relied upon as a basis for such pricing representations, but they should be kept in sufficient detail, and in such form, as affirmatively to disclose the accuracy of the representations. Otherwise the Commission has no alternative but to hold the records to have been inadequately maintained.

In our consideration above of respondent's appeal, we have found that respondent engaged in "fictitious pricing." In view of

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this it is obvious that respondent did not maintain the full and adequate records required by Rule 44(e). It follows that the hearing examiner was in error in concluding that respondent "violated * * * [no] law insofar as the maintenance of records is concerned."

Rule 44(f) prohibits the use in the advertising of a fur product of "* * * an illustration which shows such * * * fur product to be a higher priced product than the one so advertised." The record shows, and the hearing examiner found, that respondent prepared and placed an advertisement in which appeared a depiction of a "let-out mink jacket" although the garments advertised in fact were "split mink jackets." Split mink jackets, the examiner noted, are cheaper than let-out mink jackets. He concluded, however, that "It is doubtful if any member of the purchasing public was or could have been deceived by the advertisement," and further that "As to the technical violation of the Fur Act, the *de minimis* rule is applicable." For the reasons hereinabove set forth with reference to respondent's use of unacceptable constituent fur names in its advertising, this conclusion of the examiner must be rejected.

The appeal of counsel supporting the complaint from the hearing examiner's findings that violations of Rule 44(e) and (f) were not established is granted.

Counsel supporting the complaint also appeal from the hearing examiner's finding that retail sales slips furnished to respondent's customers are not "invoices" under the Fur Products Labeling Act. The Commission considered that identical question in the *Mandel* case, *supra*, and there held that a retail sales slip is an "invoice" within the meaning of that term as defined in Section 2(f) of the Act, and that the invoicing requirements of the Act and of pertinent rules and regulations promulgated thereunder are applicable to retail sales. In its disposition of a petition for review filed by the respondent in that case, the Seventh Circuit Court of Appeals reversed the Commission on this issue, but the case is now pending in the Supreme Court on a writ of certiorari. The hearing examiner's conclusion that "retail sales slips cannot be considered as invoices" is consistent with the Seventh Circuit Court's decision, but is not in accord with our views on that question.¹⁰ Until this issue has been ultimately resolved in the courts, the Commission adheres to its original

¹⁰ Docket No. 6434, decided July 5, 1957.

position. Accordingly, the appeal of counsel supporting the complaint on this aspect of the case is granted.

Finally, we consider the form of the order to cease and desist contained in the initial decision. As noted previously, respondent attacks the scope of that order, asserting that it appears to apply to all merchandise sold by it instead of being limited to fur products. We believe respondent's position in this regard to be well taken. The order will accordingly be modified.

Counsel supporting the complaint, inferentially at least, question the scope of the initial decision as inhibiting only violations of the Federal Trade Commission Act. Having determined above that certain of respondent's practices were violative of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, we are issuing our own findings as to the facts, conclusions, and order to cease and desist in lieu of the initial decision of the hearing examiner, which is vacated and set aside.

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IN THE MATTER OF
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

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

Docket 6450. Complaint, Nov. 18, 1955—Order, Mar. 4, 1959

Order dismissing on jurisdictional grounds on the authority of the *per curiam* opinion of the United States Supreme Court in the combined cases of *Federal Trade Commission v. National Casualty Company* and *Federal Trade Commission v. The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958), complaint charging a New York City insurance company with false advertising concerning its policies providing indemnification for losses resulting from accidental injury and sickness.

Before Mr. Loren H. Laughlin, hearing examiner.

Mr. Donald K. King, Mr. J. W. Brookfield, Jr. and Mr. Eugene Kaplan for the Commission.

Mr. Haughton Bell and Mr. Arthur C. Kaiser, of New York City, for respondent.

FINAL ORDER

This matter having come on to be heard by the Commission upon the record herein and upon briefs in support of and in opposition to the appeal of counsel supporting the complaint from the initial decision of the hearing examiner finding in part that respondent's methods of advertising have been voluntarily abandoned and that such matters are *de minimis* and dismissing the complaint for lack of jurisdiction; and

The Commission having considered the initial decision and the appeal briefs, together with the stipulated facts of record, and having concluded that it disagrees with the initial decision to the extent that said decision is based upon the *de minimis* rule and the finding that respondent voluntarily abandoned its questioned advertising practices; but that it agrees the proceeding should be dismissed on jurisdictional grounds on the authority of the *per curiam* opinion of the United States Supreme Court in the combined cases of *Federal Trade Commission v. National Casualty Company* and *Federal Trade Commission v. The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958) :