

be warranted by then existing circumstances.

Chairman Kintner and Commissioner Kern not participating.

IN THE MATTER OF

HARRY GRAFF & SON, INC., ET AL.

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

Docket 7188. Complaint, July 17, 1958—Decision, July 31, 1959

Order requiring a furrier in New York City to cease violating the Fur Products Labeling Act by failing to comply with labeling and invoicing requirements, by setting out fictitious prices on invoices, by failing to maintain adequate records as a basis for said pricing claims, and by furnishing a false guaranty that certain of their products were not misbranded, falsely invoiced, and falsely advertised.

Mr. Charles W. O'Connell for the Commission.

Mr. Manfred H. Benedek, of New York, N.Y., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that respondents have engaged in practices which are in violation of the Fur Products Labeling Act (hereinafter referred to as the Fur Act) and the Rules and Regulations

promulgated thereunder (hereinafter referred to as the Rules), which practices constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Respondents, by answer, deny that they have violated either Act. Hearings have been held, at which evidence was presented in support of and in opposition to the allegations of the complaint, and counsel have filed proposed findings of fact and proposed conclusions. Upon the basis of the entire record, the following findings of fact are made, conclusions drawn and order issued.

1. Respondent Harry Graff & Son, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and place of business located at 251 West 30th Street, New York, New York. Respondents Harry Graff and Abraham Graff are president and secretary, respectively, of said corporation. They formulate, direct and control the acts, policies and practices of said corporate respondent, and their address is the same as that of the corporation.

2. Subsequent to the effective date of the Fur Products Labeling Act, August 9, 1952, respondents have been, and are now, engaged in the introduction into commerce and in the manufacture for 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 have manufactured for sale, 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 product" are defined in the Fur Products Labeling Act.

Misbranding:

3. The complaint charges that certain fur products were misbranded by respondents in violation of section 4(2) of the Fur Act and of Rule 29(a). In support of this charge, copies of two labels were introduced into evidence.

(a) The record discloses that by using the word "Beautified" instead of "dyed" on a label attached to a fur garment respondents had failed to make an adequate disclosure that such garment contained dyed fur. It appears, however, that this practice was voluntarily corrected prior to the issuance of the complaint herein. Evidence introduced for the purpose of showing that respondents had failed to set forth their name or identification number on a label does not support a finding that the label was deficient in this respect.

(b) The word "Ranch" appeared on both of the aforementioned labels with the information required by Section 4(2) of the Fur Act

and the Rules and Regulations promulgated under the Act. The fur products to which these labels were attached were therefore misbranded in violation of Rule 29(a) of the Rules and Regulations promulgated under the Fur Act.

False Invoicing Through Fictitious Pricing:

4. Respondents are charged with falsely and deceptively invoicing certain fur products by the use of fictitious prices in violation of §5(b)(2) of the Fur Act. The Act defines "invoice" as follows:

SEC. 2. As used in this Act—

* * * * *

(f) 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.

On consignment bills to Arnold Constable, respondents showed two sets of prices for each garment. In one instance (consignment bill, dated 4/12/56) one set of prices was in a column headed "Regular"; the other column of prices was headed "Present." In another instance (consignment bill dated 2/11/57) similar sets of prices were headed "Original" and "Present." In each instance the "Regular" and "Original" prices were substantially higher than the "Present" prices—for example, some "Regular" prices were \$475, \$3,750 and \$875 for garments, the "Present" prices of which were \$295, \$2,795 and \$640; other "Original" prices were \$2,450, \$2,250 and \$2,400 for garments, the "Present" prices of which \$1,975, \$1,695 and \$1,900. The "Present" prices were those at which the garments were offered for sale to Constable. The "Regular" or "Original" prices were those which, the respondents stated, the garments were made to sell for.

5. Respondents maintained no records relative to prices of specific fur garments, except as shown on invoices, including consignment memorandums. As to many of the garments which carried the dual prices, there was no evidence of previous offering or actual selling prices. As to other garments, the record shows the following facts:

A mink coat consigned to Constable February 11, 1957, at an "original" price of \$2,450, "present" price \$1,975, had been consigned to Tauber & Sons on January 20, 1956, at \$2,350; to Ben Denker on January 27, 1956, at \$2,350; and to Mandel Bros. on February 21, 1956, at \$2,200.

Another mink coat consigned February 11, 1957, to Constable at "original" \$2,400, "present" \$1,900, had been consigned February 3, 1956, to Fred Goldstein at \$2,700.

Of those consigned to Constable April 12, 1956, one, a mink stole, priced "Regular" \$475, "Present" \$295, had been consigned to M. J. Goldstone January 23, 1956 at \$350; another, a silver blue mink stole similarly priced to Constable had been consigned February 4, 1956 to Segal & Tucker at \$550; still another similarly-priced garment had been consigned to Mandel February 21, 1956, at \$365.

6. Respondents used the dual pricing system so far as the record shows only on consignments to Arnold Constable and Bon Marche, and it was done at the consignees' request. Respondents keep no records of "original," "regular" or "present" prices—in fact, have no records as to prices except as shown on copies of invoices or consignment bills. The pattern of pricing shows that respondents had no regular or usual price on their fur garments. The prices listed under the heading "Original" or "Regular" do not, so far as the record shows, indicate an established former asking price. They are not based on any records which respondents kept as to cost of materials and manufacturing, nor are there any other records of respondents pertaining to price which show at what price any garment was originally offered or what or when changes in such price were subsequently made. The conclusion is that such prices were fictitious, and that the respondents have violated the Fur Act by setting out fictitious prices on their invoices, as charged in the complaint.

False Advertising:

7. The third charge is that respondents have falsely and deceptively advertised certain fur products by setting out on invoices prices which were in fact fictitious, in violation of Section 5(a)(5) of the Fur Act, and reliance to establish this charge is upon the facts hereinabove set forth and discussed. That respondents used fictitious prices on their consignment memorandums issued in connection with their fur-products transactions with Arnold Constable is clearly established. The fictitious prices set forth in these documents were in excess of the offering prices of the fur products to which they related and constituted false representations that such products were being offered for sale at a reduction from such fictitious prices. The documents themselves were used by respondents to aid and assist in the sale or offering for sale of the fur products listed therein, and the false representations made therein with respect to the prices of such products were necessarily intended for the same purpose. The fur products so described in the aforementioned consignment memorandums were falsely advertised within the meaning of Section 5(a)(5) of the Fur Act.

Inadequate Records:

8. The fourth charge is that respondents have violated Rule 44(e) by not maintaining full and adequate records disclosing the facts upon which their pricing and savings claims and representations are based. As hereinabove found, respondents have falsely advertised certain fur products by representing that the prices thereof were reduced from what were, in fact, fictitious prices. Respondents have failed to maintain records disclosing the facts upon which such representations were based as required by subsection (e) of Rule 44 and, consequently, have violated that subsection.

False Guaranty:

9. The last charge is that respondents have furnished a false guaranty that certain of their furs or fur products were not misbranded, falsely invoiced and falsely advertised, when the respondents, in furnishing such guaranty, had reason to believe the furs or fur products so falsely guaranteed might be introduced, sold, transported or distributed in commerce, in violation of §10(b) of the Fur Products Labeling Act.

10. It has hereinabove been found that respondents have misbranded and have falsely invoiced and falsely advertised certain of their fur products which were consigned to a retailer who respondents had reason to believe would sell, introduce, transport or distribute them in commerce. It follows that the continuing guaranty filed by respondents with the Federal Trade Commission, a copy of which is in the record, was false in that it guaranteed that respondents' fur products would not be misbranded and that no fur or fur product would be falsely or deceptively invoiced or advertised within the meaning of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

CONCLUSIONS

1. Respondents are engaged in commerce and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Fur Products Labeling Act.

2. The Acts and practices of respondents hereinabove found are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

3. This proceeding is in the public interest, and an order to cease and desist the above-found acts and practices should issue against respondents.

4. The charge of alleged violation of Section 4(2) of the Fur Act is not sustained on the record, and provision for its dismissal accordingly is included in the order appearing hereafter.

Upon the basis of the foregoing findings and conclusions, and all the facts of record,

It is ordered, That respondents, Harry Graff & Son, Inc., a corporation, and Harry Graff and Abraham Graff, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the introduction, or the manufacture for introduction into commerce, or the sale, advertising, or offering for sale, transportation or distribution in commerce, of fur products, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation, or distribution of fur products which have 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 setting forth on labels attached thereto required information under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder, mingled with non-required information.

B. Falsely or deceptively invoicing fur products by representing, directly or by implication, on invoices that the former, regular or usual price of any fur product is any amount which is in excess of the price at which respondents have formerly, usually or customarily sold such product in the recent regular course of their business.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, 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 former, regular or usual price of any fur product is any amount which is in excess of the price at which respondents have formerly, usually or customarily sold such product in the recent regular course of their business.

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

E. Furnishing a false guaranty that any fur or fur product is not misbranded, falsely invoiced, or falsely advertised, when the respondents have reason to believe that such fur or fur product may be introduced, sold, transported or distributed in commerce.

It is further ordered, That the charge of the complaint relating to alleged violations of Section 4(2) of the Fur Products Labeling Act be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By SECRET, *Commissioner*:

The initial decision filed by the hearing examiner ruled that respondents had falsely invoiced certain fur products and had furnished a false guaranty in violation of the Fur Products Labeling Act. It dismissed the complaint as to charges that respondents had misbranded and falsely advertised fur products and that they had failed to keep records required by Rule 44(e) of the Rules and Regulations promulgated under the Act. Counsel supporting the complaint has appealed from this decision.

The issues raised by the charges relating to false advertising and the failure to maintain records were before us in the matter of *Leviant Brothers, Inc., et al.*, Docket No. 7194, and were decided in that case. Since we find no significant difference between the facts of the two cases insofar as these issues are concerned, our opinion in *Leviant* on these issues is equally applicable here. For the reasons stated in that opinion, we agree with counsel supporting the complaint that the hearing examiner erred in dismissing these two charges.

Counsel supporting the complaint also excepts to the hearing examiner's rulings dismissing the charges that respondents had misbranded certain fur products in violation of Section 4(2) of the Act and Rule 29(a) of the Rules and Regulations promulgated under the Act. With respect to the alleged violation of Section 4(2), counsel in support of the complaint contends, first of all, that one of respondents' labels was deficient in that it did not set forth the manufacturer's name or identification number. This label had been attached to a fur garment sold or consigned by respondents to a retailer and had been observed and copied by the investigator while the fur garment was in the retailer's possession. It appears, however, that a tab at the bottom of the label whereon the respondents' identification number would ordinarily have been placed had been removed before the label was copied by the investigator. There is no evidence that the tab had been removed when the label was issued by respondents. In view of this fact and in view of respondents' testimony that they never issue a label without the identification number, we are of the opinion that the record is insuffi-

cient to support a finding that the label when issued by respondents did not set forth their identification number.

Counsel in support of the complaint also contends that respondents violated Section 4(2) by failing to disclose on a label that the fur garment to which such label was attached contained dyed fur. The label in question contained the word "Beautified" but it did not otherwise indicate that the fur in the garment was dyed. The record discloses, however, that this label had been attached to the fur garment by respondents approximately two years prior to the issuance of the complaint. Respondents have also testified that they had voluntarily discontinued the use of the term "Beautified" when they discovered that it was not a proper word to show that a fur product contained fur that had been dyed. There is no other evidence in the record to indicate that respondents have failed to disclose information required by Section 4(2). Since the term "Beautified" is known in the industry to mean a process of dyeing, we have no reason to doubt that respondents' use of this term was a good faith attempt to comply with the requirement of subsection (c) of Section 4(2). This consideration together with respondents' statement that they had corrected their labels and the fact that the investigation failed to uncover any other instances of misbranding in violation of the aforementioned section lead us to believe that respondents had been in compliance with Section 4(2) for some time prior to the issuance of the complaint. We are in agreement with the hearing examiner, therefore, that an order requiring compliance with this section is not warranted under the circumstances.

We are of the opinion, however, that the hearing examiner erred in dismissing the charge that respondents had violated Rule 29(a) of the Rules and Regulations promulgated under the Act. The record clearly establishes that the word "Ranch" appeared with required information on labels affixed to fur garments by respondents. The use of this non-required information on the side of a label containing required information constitutes a violation of Rule 29(a). The hearing examiner's application of the *de minimis* doctrine to these instances of misbranding is unwarranted, and his ruling on this point is, therefore, reversed.

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

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the initial decision of the hearing examiner and the matter having been

heard on briefs, no oral argument having been requested; and the Commission having rendered its decision granting in part and denying in part the aforementioned appeal and directing modification of the initial decision:

It is ordered, That paragraph 3 of the initial decision be modified to read as follows:

3. The complaint charges that certain fur products were misbranded by respondents in violation of Section 4(2) of the Fur Act and of Rule 29(a). In support of this charge, copies of two labels were introduced into evidence.

(a) The record discloses that by using the word "Beautified" instead of "dyed" on a label attached to a fur garment respondents had failed to make an adequate disclosure that such garment contained dyed fur. It appears, however, that this practice was voluntarily corrected prior to the issuance of the complaint herein. Evidence introduced for the purpose of showing that respondents had failed to set forth their name or identification number on a label does not support a finding that the label was deficient in this respect.

(b) The word "Ranch" appeared on both of the aforementioned labels with the information required by Section 4(2) of the Fur Act and the Rules and Regulations promulgated under the Act. The fur products to which these labels were attached were therefore misbranded in violation of Rule 29(a) of the Rules and Regulations promulgated under the Fur Act.

It is further ordered, That paragraph 7 of the initial decision be modified to read as follows:

7. The third charge is that respondents have falsely and deceptively advertised certain fur products by setting out on invoices prices which were in fact fictitious, in violation of Section 5(a)(5) of the Fur Act, and reliance to establish this charge is upon the facts hereinabove set forth and discussed. That respondents used fictitious prices on their consignment memorandums issued in connection with their fur-products transactions with Arnold Constable is clearly established. The fictitious prices set forth in these documents were in excess of the offering prices of the fur products to which they related and constituted false representations that such products were being offered for sale at a reduction from such fictitious prices. The documents themselves were used by respondents to aid and assist in the sale or offering for sale of the fur products listed therein, and the false representations made therein with respect to the prices of such products were necessarily intended for the same purpose. The fur products so described in the aforemen-

tioned consignment memorandums were falsely advertised within the meaning of Section 5(a)(5) of the Fur Act.

It is further ordered, That paragraph 8 of the initial decision be modified to read as follows:

8. The fourth charge is that respondents have violated Rule 44(e) by not maintaining full and adequate records disclosing the facts upon which their pricing and savings claims and representations are based. As hereinabove found, respondents have falsely advertised certain fur products by representing that the prices thereof were reduced from what were, in fact, fictitious prices. Respondents have failed to maintain records disclosing the facts upon which such representations were based as required by subsection (e) of Rule 44 and, consequently, have violated that subsection.

It is further ordered, That paragraph 10 of the initial decision be modified to read as follows:

10. It has hereinabove been found that respondents have misbranded and have falsely invoiced and falsely advertised certain of their fur products which were consigned to a retailer who respondents had reason to believe would sell, introduce, transport or distribute them in commerce. It follows that the continuing guaranty filed by respondents with the Federal Trade Commission, a copy of which is in the record, was false in that it guaranteed that respondents' fur products would not be misbranded and that no fur or fur product would be falsely or deceptively invoiced or advertised within the meaning of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

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

1. Respondents are engaged in commerce and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Fur Products Labeling Act.

2. The acts and practices of respondents hereinabove found are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

3. This proceeding is in the public interest, and an order to cease and desist the above-found acts and practices should issue against respondents.

4. The charge of alleged violation of Section 4(2) of the Fur Act is not sustained on the record, and provision for its dismissal accordingly is included in the order appearing hereafter.

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 respondents, Harry Graff & Son, Inc., a corporation, and Harry Graff and Abraham Graff, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the introduction, or the manufacture for introduction into commerce, or the sale, advertising, or offering for sale, transportation or distribution in commerce, of fur products, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation, or distribution of fur products which have 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 setting forth on labels attached thereto required information under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder, mingled with non-required information.

B. Falsely or deceptively invoicing fur products by representing, directly or by implication, on invoices that the former, regular or usual price of any fur product is any amount which is in excess of the price at which respondents have formerly, usually or customarily sold such product in the recent regular course of their business.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, 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 former, regular or usual price of any fur product is any amount which is in excess of the price at which respondents have formerly, usually or customarily sold such product in the recent regular course of their business.

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

E. Furnishing a false guaranty that any fur or fur product is not misbranded, falsely invoiced, or falsely advertised, when the respondents have reason to believe that such fur or fur product may be introduced, sold, transported or distributed in commerce.

It is further ordered, That the charge of the complaint relating to alleged violations of Section 4(2) of the Fur Products Labeling Act be, and the same hereby is, dismissed.

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

It is further ordered, That respondents, Harry Graff & Son, Inc., Harry Graff and Abraham Graff, shall, within sixty (60) days after service upon them of this order, file with the Commission a report,