

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

Docket 7064. Complaint, Feb. 12, 1958—Decision, Feb. 9, 1960

Order requiring a corporation—which had purchased the stock of a bankrupt department store in Pasadena, Calif., brought in new merchandise, added a fur department operated on a concession basis, and participated with

the concessionaire in the sale and promotion of fur products—to cease violating the Fur Products Labeling Act by failing to comply with labeling, invoicing and advertising requirements, including failure to set forth the term “secondhand used fur” where required and naming an animal other than that which produced certain fur; by advertising in newspapers which falsely represented, among other things, fur products as on sale “some at cost” and “some below cost,” falsely represented a “three year guarantee” and that it was a manufacturer or wholesaler; and by failing to maintain adequate records as a basis for said pricing claims.

Mr. John J. McNally supporting the complaint.

Mr. Jerome Weber, Mr. Benjamin Held and Mr. David Hoffman of Los Angeles, Calif., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

Commission complaint issued February 12, 1958, and duly served charged respondents with violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and also with the violation of the Federal Trade Commission Act. Respondents' answer admitted the first and second paragraphs of the complaint, with the exception of denying that the individual respondent Manuel Feigenbaum controls the corporate respondent. The second paragraph so admitted charged respondents with the sale, advertising, transportation and distribution in commerce of fur products and contained other allegations, which admitted, give the Commission jurisdiction in this proceeding. All other allegations of the complaint were denied.

On April 18, 1958, the original date set for hearing in Los Angeles, California, the matter was continued over until April 21, 1958. Thereafter, beginning April 21, 1958, seven days of hearings were held for the taking of evidence in support of and in opposition to the allegations of the complaint. Both sides then rested their case insofar as the taking of evidence was concerned.

During the hearings the following facts were developed: There was another Federal Trade Commission proceeding pending entitled “In the Matter of Samuel A. Mannis, an individual trading as Samuel A. Mannis and Company.” The latter proceeding bears Docket No. 7062, and is in effect a companion case to this one. That is, all of the evidence in this proceeding is applicable to the proceeding in Docket No. 7062 and much of the evidence in Docket No. 7062 is applicable to this proceeding. Respondents in both proceedings were represented by the same counsel, and the same attorney was counsel supporting the complaint in both cases. After considerable discussion both on and off the record, it was agreed on the record between

Findings

56 F.T.C.

counsel on April 21, 1958, that these two proceedings be consolidated for the purpose of taking the evidence. Thereupon, on page 104 of the record, the hearing examiner, with consent of counsel directed such consolidation and further directed that all of the testimony previously taken and to be taken thereafter in both cases be made a part of the record in each case. Later, also with consent of counsel the reporter was directed to mark each exhibit received as an exhibit in both Docket Nos. 7062 and 7064.

Both sides were represented by counsel at all of the hearings and given full opportunity to introduce evidence pertinent to the issues, examine witnesses and argue points of law and evidence. Both sides were given the opportunity to and did file proposed findings, conclusions and orders together with the reasons therefor.

This proceeding is now before the hearing examiner for an initial decision upon the entire record including the pleadings, evidence and the proposed findings, conclusions and orders and the reasons therefor. All such proposed findings, conclusions and orders not hereafter adopted, found or concluded are hereby specifically rejected.

Upon the entire record and from the observation of the witnesses while testifying, the hearing examiner makes the following findings as to the facts, conclusions and order.

FINDINGS AS TO THE FACTS AND CONCLUSIONS

1. Respondent, Mannie Feigenbaum, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California with its office and principal place of business located at 8159 West Third Street, Los Angeles, California.

2. Individual respondent Manuel Feigenbaum, owns most of the stock, is president of the corporate respondent and formulates, controls and directs the acts, practices and policies of the corporate respondent. His address is the same as that of the corporate respondent.

3. The corporate respondent under the control of the individual respondent is engaged in the business of conducting auction sales and liquidating retail businesses both as an agent and also for its own account after purchase. The charges in the complaint grew out of the following operation:

A department store in Pasadena, California, operating under the name of T. W. Mather went into bankruptcy and its assets were sold to the highest bidder. Respondent Mannie Feigenbaum, Inc., acquired the bankrupt stock of goods. This store had a fur department. Mr. Feigenbaum said it was his intention at first to continue the business, presumably under the same name. They started off

with a sale on the premises that was highly advertised. In line with respondents' first idea of continuing the business (which was changed as the sale progressed) it was decided that other goods in addition to the bankrupt stock should be brought in.

4. Respondents herein contacted Samuel A. Mannis a Los Angeles furrier who is respondent in Docket No. 7062. As a result Samuel A. Mannis brought fur coats and other fur products into the T. W. Mather store and sold them there. The arrangement was that Mannis would pay Mannie Feigenbaum, Inc., 10% of his gross sales as rent, with a certain minimum rent agreed upon. The sale was advertised under the name T. W. Mather. Mannis' furs were advertised in the same advertisement with the goods being offered in the other departments of the store. Mannis also paid his proportionate part of the advertising for the sale, based on the amount of space used to advertise his fur products and a certain proportion for his part of the general advertising of the sale. The T. W. Mather sales slips were used, on which were placed a code number, assigned to Mannis, so that the copy of the sales slips revealed to Mannie Feigenbaum, Inc., that the particular sale was made by Mannis or his employees.

5. The advertising copy for the fur department used in the store advertisements was prepared by a Mannis employee, authorized by Mannis, and turned over to the Mannie Feigenbaum, Inc., employee who had charge of advertising for the store. Some of the other departments in the store were let out to concessionaires like Mannis and some were run directly by Mannie Feigenbaum, Inc. From the advertising in evidence in the Los Angeles papers and what was said about it being advertised solely in Pasadena in the beginning, the sale evidently lasted more than 30 days.

6. Under the above facts respondents contend that they were not in the fur business and not subject to the provisions of the Fur Products Labeling Act. Paragraph Two of the complaint reads as follows:

Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents in cooperation and conjunction with Samuel A. Mannis and Company have been engaged in the introduction in 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 sold, advertised, offered for sale, transported and distributed 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 product" are defined in the Fur Products Labeling Act.

7. This paragraph was evidently the interpretation by both parties at the time of the legal effect of the facts set forth above, because respondents in their answer admitted this paragraph of the com-

plaint. Aside from the answer, the profits of respondents herein increased in proportion to the fur business done by Mannis. Respondents' representative, Mr. Clejan, handled the advertising for all the concessionaires like Mannis, in fact for the whole store. Respondents paid the bills for all the advertising and were reimbursed by the concessionaires including Mannis for the respective amount due from each. This was not a "one shot" proposition as urged by respondents. The sale went on for a number of weeks. There are in evidence advertisements published in the Los Angeles papers during four different weeks. Respondents wanted only concessionaires who would offer goods at a bargain. Respondent Manuel Feigenbaum stated that such an operation as the Mather store sale had to offer goods below cost to get the people into the store. Respondents therefore would set the general tone of the advertising. It would be inequitable to let respondents profit from the fur sales brought in by such advertising without being subject to the Commission's jurisdiction in the administration of the Fur Products Labeling Act. Although respondent Manuel Feigenbaum had been relatively inactive in handling liquidating sales for a number of years prior to this sale he was reentering the field with the Mather store operation. It therefore is unimportant that he had never before had a fur concession in any of his sales.

Alleged Violations of Section 4 of the Fur Products Labeling Act and the Rules and Regulations Relative Thereto

8. These violations are charged in paragraphs 3 and 4 of the complaint. The evidence consist of certain labels or tags and the testimony in regard to them. Commission exhibits 41A through H were tags or labels taken from garments at the T. W. Mather store during the sale.

9. The Commission investigator, Edwin H. Anderson, testified that Commission exhibits 41A through H were the original tags taken from garments by Mannis' employee, Mr. Weiss, on June 8, 1956 and given to him at his request. These garments were among those in stock at that time at the T. W. Mather sale in Pasadena. He further said that Mr. Weiss replaced these tags with other tags in an attempt to show the required information in a proper manner. The hearing examiner has looked at each of these tags, Commission exhibits 41A through H and they are each deficient, that is, each of these tags do not contain all of the information required in the manner required by the Act and the Rules and Regulations promulgated by the Commission. For the respondents' benefit, Mr. Anderson in his testimony explained the deficiencies of each tag.

10. Anderson stated on direct examination, and it is brought out more clearly on cross, that there were also other tags on the garments from which these tags, Commission exhibits 41A through H were taken. Anderson stated that none of these other tags contained all of the required information in the proper manner, and for that reason he did not take the other tags. Mr. Weiss testified that he was familiar with the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and he was equally positive that the other tags which Anderson admits were on the garments did have on each of them all of the required information. This was a direct statement in addition to other general statements. Aside from being contradicted by Weiss on this point, to accept Anderson's testimony that these garments were misbranded, is to accept his conclusion, without any other evidence to support it, that the tags remaining on the garments did not comply with the Fur Products Labeling Act and the Rules and Regulations. In certain cases opinion evidence of experts may be accepted upon the ultimate issues before the Commission. This however is not that type of case. The proof therefore is lacking to support a finding that the garments from which Commission exhibits 41A through H were taken, were misbranded.

False Invoicing

11. The charges in the complaint in regard to false invoicing are contained in Paragraphs 5 and 6. The Mather Store sales slips in evidence consist of Commission exhibits 11 through 17 and Commission exhibit 38. Commission exhibit 11 is said to violate Sec. 5(b)(1)(c) and 5(b)(1)(F) because it does not show that the fur is dyed and imported. Commission exhibit 16 is said to offend Rule 4 in abbreviating the word "Jacket." This word is not a part of the required information. Com. Exhibit 13, 14, 16 and 17 are said to offend Rules 21 and 23 in regard to "second hand used fur." With the exception of Com. Ex. 11 and 38 all of the exhibits seem to be in substantial compliance. As a matter of discretion the hearing examiner does not think that a cease and desist order should be based upon these two exhibits aside from what is said in the Mandel case. If letter perfect compliance on every sales slip is insisted upon, the answer is found in the *Mandel Decision*.¹ This decision by the Seventh Circuit holds that sales slips such as these are not invoices within the meaning of the Act. Although this decision is before the Supreme Court and may be reversed, it is considered as governing this case unless and until it is reversed.

¹ *Mandel Bros., Inc. v. F.T.C.*, 254 F. 2d 18.

False Advertising

12. The charges of false advertising are set forth in Paragraphs 7 through 11 of the complaint. It was stipulated that the newspapers carrying respondents' advertising, copies of which were introduced in evidence including those particular issues of those newspapers were disseminated in commerce. A glance at the advertisements in evidence shows that they were intended to aid, promote and assist directly or indirectly in the sale and offering for sale of the fur products so advertised. That the advertisements did aid, promote and assist in the sale and offering for sale of said fur products is evident from the record. If these advertisements are false or do not otherwise comply with the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, a violation of the Act has been established.

"Some at Cost, Some Below Cost"

13. The advertisements of fur products in connection with this sale that are in evidence are Commission Exhibits 4, 5, 6, 7 and 8. They were advertisements in both the Los Angeles Times and the Los Angeles Examiner. The advertisements with the exception of the first one say "Save Up to 50% or More." Four of them say "Some at Cost, Some Below Cost," all referring to the price of fur garments.

14. In paragraph 8 of the complaint it is charged that the representation of "Some at Cost, Some Below Cost," all referring to the price of fur garments, with particular emphasis on mink, is a false representation in violation of Section 5(a) of the Act and Rule 44(a).

15. In support of this allegation there was introduced in evidence a tabulation by the witness Anderson showing that no fur products were sold at this sale at cost or below, and that the average percentage of profit during the sale was 46.8% on mink and 66.9% on other furs. This is Commission exhibit 102. That is all the creditable evidence on the point. The fact that none of the fur products were sold at cost or below does not establish a preponderance of the evidence that none of the furs advertised were offered at cost or below. There is also a stipulation in the record to the effect that all of the evidence in regard to the conduct of Samuel A. Mannis, respondent in Docket No. 7062, in his other fur sales shall be considered as background evidence in this proceeding. The complaint in Docket No. 7062 makes the same charge against Mannis as is here being considered against respondents in this Docket No. 7064. The Initial

Decision in the Mannis Case, Docket No. 7062 holds that considering all the testimony on the point in that case, the charge was established by a preponderance of the evidence. Even so, respondents herein cannot be found guilty by association with Mannis because Mannis violated this section of the Act in the conduct of other sales.

"Three Year Guarantee"

16. Each of these advertisements contained the words "3 Year Guarantee" with reference to the fur products offered. In Paragraph 9 of the complaint this is alleged to be deceptive in that respondents did not clearly and conspicuously set forth in the advertisements the manner and form in which they would perform such guarantee. Commission Exhibit 11 through 17 were evidently not the only evidence of title given to purchasers of fur products at the Bather Store sale. Miss Nancy Findley received another kind of sales slip. See Commission Exhibit 38 which is evidently a photostatic copy of the back side of Commission Exhibit 20. This exhibit says "3 Years Guarantee on rips and tears." However, if each one purchasing at the Mather store sale got this kind of guarantee at the time of sale it would be no defense to the charge. The Commission has held many times that the use of the word "guarantee" in advertising, without disclosing the nature and extent of the guarantee is deceptive. The fact that the nature and extent of the guarantee is disclosed at the time of sale is no defense.²

"Free Storage"

17. Paragraph Ten of the complaint charges false advertising of free storage when in fact purchasers of fur products were required to pay storage under the guise of insurance.

18. The record establishes that the concessionaire Mannis did furnish storage for fur products without charge to his customers. If they desired to insure the garments, they were charged for that. There is some testimony to the effect that other sellers of furs, not advertising free storage, charged the same amount for storage and insurance as respondent charged for insurance. Although the owners of most fur products may desire them insured when stored, there is no substantial evidence to the effect that respondents' offer of free storage led the purchasing public to believe that the garments would also be insured without charge, or had that capacity and tendency. This charge of false advertising is dismissed.

² *Carter Products Inc., et al v. F.T.C.*, 186 F. 2d 821 and cases therein cited.

“Save 50% or More”

19. Referring again to the advertisements for this sale, Com. exhibit 4 through 8, paragraph 11 of the Complaint, charges that by advertising “Save 50% or More” or presumably by advertising “Save up to 50%” or “Save up to 50% or More,” respondents have represented that the regular or usual retail prices charged by respondents for furs in the recent regular course of their business were reduced in direct proportion to the percentage of savings stated when such was not a fact in violation of Section 5(a)(5) of the Act. This advertising over the name of T. W. Mather is really a representation that the regular or usual retail prices charged by T. W. Mather for furs in the recent regular course of business were reduced in direct proportion to the percentage of savings stated. If these respondents had done business previously as T. W. Mather, the allegation as to the representation made would be correct. Since these respondents had never done business before under this name or been connected with a fur business under any name, this particular advertising cannot be held to make the representation alleged in Paragraph Eleven of the complaint.

Failing to Maintain Proper Records

20. Paragraph 12 of the complaint charges that in advertising fur products for sale at cost and below cost, and in advertising the percentage savings claims quoted therein, respondents failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based and that this was in violation of Rule 44(e). It is a fact that no such records were kept. Mr. Feigenbaum testified to that effect and Mr. Weiss who was in charge for the concessionaire Mannis also testified to the same effect. Failure to keep such records where this type of advertising is used is a violation of Rule 44(e) without regard to whether the advertising is false.³

21. The aforesaid acts and practices of respondents found to be in violation of the Fur Products Labeling Act and the Rules and Regulation promulgated thereunder constitute unfair and deceptive acts and practices under the Federal Trade Commission Act. This proceeding is in the public interest and an order to cease and desist from such unlawful practices should be issued.

22. The allegations in regard to violations of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder

³ In the *Matter of Frank Gross* doing business as Frank Gross Furs, Docket No. 6921.

contained in paragraphs 3, 4, 5, 6, the second sub-paragraph under paragraph 8, paragraphs 10 and 11 should be dismissed.

ORDER

It is ordered. That respondents, Mannie Feigenbaum, Inc., a corporation and Manuel Feigenbaum, individually and as an officer of said corporation and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the introduction into commerce, or the sale, advertising, offering for sale, 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 is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from 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:

1. Represents directly or by implication that any such fur products are guaranteed, unless the nature and extent of such guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously set forth;

2. Sets forth comparative prices, savings claims or representations as to selling or offering to sell at or below cost, unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based as required by Rule 44(e) of the Rules and Regulations promulgated under the Fur Products Labeling Act.

It is further ordered. That allegations of violation of the provisions of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder contained in paragraphs 3, 4, 5, 6, the second sub-paragraph of paragraph 8, paragraphs 10 and 11 of the complaint be, and the same hereby are, dismissed.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

The complaint in this matter charges respondents with misbranding, false invoicing and false advertising of fur products and the failure to maintain records, in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder. The hearing examiner held in his initial decision that, with the exception

of one of the charges pertaining to false advertising and the charge that respondents had failed to maintain records required by Rule 44(e), none of the allegations of the complaint had been sustained by the evidence. Both sides have appealed from this decision.

Respondents are engaged in conducting auction sales and liquidating retail businesses. In 1956 they purchased the merchandise of T. W. Mather, Inc., a Pasadena department store which had gone into bankruptcy. It is not entirely clear from the record whether respondents originally intended to continue the business or merely to conduct a sale of the store's bankrupt stock. In any event, they brought in new merchandise and added new departments, including a fur department, operated on a concession basis. A highly advertised sale of these products was started in June of 1956 and continued for several weeks. The concessionaire handling fur products during this sale was Samuel A. Mannis, respondent in Docket No. 7062. The charges of the complaint in this matter cover violations of the Fur Act and the Rules and Regulations promulgated thereunder alleged to have occurred in connection with the offering for sale and sale of fur products by respondents in cooperation with Mannis during the aforementioned sale.

RESPONDENTS' APPEAL

Respondents' sole contention on appeal is that they are not in the fur business and are not subject to the provisions of the Fur Act. They argue in this connection that they were merely landlords renting a concession in their store to Mannis, that they were without power of authority to supervise his business practices and, consequently, should not be held responsible for any of Mannis' practices found to be in violation of the statute.

We are of the opinion that the evidence does not support respondents' argument. While it is true that respondents are not regularly engaged in the fur business, the record establishes that during the sale at the Mather store, respondents were not merely renting space to Mannis but were, in fact, participating with that individual in the sale and promotion of fur products.

Respondents received 10% of Mannis' gross sales of fur products. These products were advertised in the same advertisements with goods being offered in other departments of the store. Mannis' advertising copy was turned over to one of respondents' employees who had charge of the advertising for the store and there is evidence to the effect that copy prepared by Mannis was revised by this employee. The "sale" was advertised under the name of T. W. Mather. The invoices used by Mannis in connection with the sale

of fur products bore the name of the department store. The public was not informed by either the advertising or the invoices or in any other manner that Mannis was a concessionaire or that the fur department was not part of the department store.

We agree with the hearing examiner that in these circumstances respondents should be held responsible for violations occurring in connection with the offering for sale and sale of fur products brought into the store by Mannis. Respondents' appeal is therefore denied.

APPEAL OF COUNSEL SUPPORTING THE COMPLAINT

The first issue raised on this appeal concerns the hearing examiner's dismissal of the charges that respondents misbranded fur garments in violation of Section 4(2) of the Act and Rule 29(b) of the Rules and Regulations. This same issue, involving the same factual situation, was raised in the matter of *Samuel A. Mannis*, Docket No. 7062, and we held in that case that there was sufficient evidence to support these charges of misbranding. In view of that holding, the appeal of counsel supporting the complaint on this point is granted.

Counsel supporting the complaint also takes exception to the dismissal of the allegations pertaining to false invoicing. Although the hearing examiner found two of the respondents' invoices to be defective, he ruled that "as a matter of discretion" a cease and desist order was not warranted. He also ruled, in reliance upon the decision of the United States Court of Appeals in *Mandel Bros., Inc. v. Federal Trade Commission*, 254 F. 2d 18 (7th Cir., 1958), that respondents' sales slips are not invoices within the meaning of the Act. We agree with counsel supporting the complaint that dismissal of the allegations on these grounds was improper. *Federal Trade Commission v. Mandel Bros., Inc.*, 359 U.S. 385 (1959).

We are also of the opinion that the hearing examiner erred in finding that, with two exceptions, respondents' invoices were "in substantial compliance" with the statute. The record clearly establishes that respondents violated Rule 23 by failing to set forth the terms "second-hand" on invoices issued in connection with the sale of used fur products. The evidence also shows that respondents violated Section 5(b)(1) by failing to disclose on an invoice the information required by subsections (C) and (F) of that section. We concur in the hearing examiner's ruling, however, that the abbreviation of the word "jacket" does not violate Rule 4 since this word is not part of the required information.

Another question raised on this appeal is whether the evidence supports the allegation that respondents had falsely advertised that fur products were being offered for sale at cost and below cost. The

advertisements in evidence show that respondents and their fur concessionaire, Mannis, made the following representations with respect to certain fur garments offered for sale: "Save up to 50% and more! Some at cost! Some below cost!" A tabulation of all the sales made of the garments so advertised shows that none of them was sold at cost or below cost and that the average percentage of profit was 46.8% on mink garments and 66.9% on garments composed of other furs. The hearing examiner ruled that evidence showing that no garments were sold at cost or below did not negate the possibility that other garments were offered for sale at cost or below. He held therefore that the allegation had not been sustained. We think this ruling was incorrect. Respondents represented that certain fur products were being offered for sale: "Some At Cost! Some Below Cost." In our opinion, prospective purchasers may well understand this claim to mean that all of the products so advertised would be sold at cost or below. The claim is particularly susceptible of such interpretation when viewed in context with the following claims in the advertising in which it appeared: "Mather's Went Broke," "The Death of a Great Pasadena Department Store," "Entire Stock Doomed For Immediate Selling!", "No Exceptions! Every Item Must Be Sold Regardless of Cost!" Since at least some of the advertised garments were sold above cost, we believe the record supports the allegation that respondents falsely represented that the garments featured in the aforementioned advertisements would be sold at cost or below cost.

Counsel supporting the complaint also argues that the hearing examiner erred in dismissing the allegation concerning percentage savings claims. The complaint charges that respondents falsely represented through use of such claims as "Save 50% or more" that the regular or usual retail prices charged by respondents for fur products in the recent regular course of their business were reduced in direct proportion to the percentage of savings stated. The hearing examiner held that since the advertising referred to in the charge appeared over the name of T. W. Mather, it was a representation concerning a reduction in the regular or usual prices charged by that store for fur products and was not a representation concerning prices formerly charged by respondents. We agree with the hearing examiner that such statements in advertising as "Save 50% or more" are representations of the advertiser's usual and regular prices. We do not agree with his conclusion, however, that the advertising claims in question refer to T. W. Mather's usual or regular prices for fur products. T. W. Mather did not have a fur department prior to the respondents' purchase of the assets of that store. In one of the

first advertisements of the sale at the Mather store, respondents disclosed that the store was under new ownership and that new stock had been brought in for the sale. The following notice appeared at the top of this advertisement:

DUE TO FINANCIAL DIFFICULTIES WHICH CAUSED THE PREVIOUS MANAGEMENT TO BE ORDERED INTO BANKRUPTCY BY THE U.S. COURT * * * THIS 54 YEAR OLD DEPARTMENT STORE WAS ORDERED SOLD. * * * Established California Management was the successful purchaser. We knew in advance the high caliber store * * * the fine merchandise they carried. Realizing the importance of continuing MATHER'S fine reputation, we knew it would take a lot more stock to satisfy the thousands of old MATHER'S customers. We immediately notified our staff of buyers to ship in nothing but the finest type of merchandise to be sold at unheard of prices.

We think it is clear from this statement that respondents, trading as T. W. Mather, are the advertisers. The savings claims used in connection with the prices of new merchandise, including fur products, brought in for the sale refer to respondents' usual and regular prices. Since the record shows that respondents had not previously sold fur products, the aforementioned claims challenged in the complaint were misrepresentations in violation of Section 5(a) (5) of the Act.

The final exception to the initial decision on this appeal concerns the dismissal of the allegations that respondents falsely advertised free storage. This same argument was considered and rejected in the matter of *Samuel A. Mannis*, Docket 7062. Since there is no significant difference between the facts of the two cases on this point, the appeal is denied for the reasons stated in our opinion in the *Mannis* proceeding.

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

Respondents and counsel in support of the complaint having filed cross-appeals from the initial decision of the hearing examiner, and the matter having been heard on briefs; and the Commission having rendered its decision denying the appeal of respondents and granting in part the appeal of counsel in support of the complaint and directing modification of the initial decision:

It is ordered. That the fourth paragraph on page 3 of the initial decision be modified by striking therefrom the sentence "This store had a fur department."

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

10. Certain of the products to which these labels had been affixed were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act. Three of the labels did not disclose the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur. One of the labels did not disclose that the fur product contained dyed fur. One of the labels did not disclose the name or registration number required by subsection (E) of Section 4(2). Certain of the products were misbranded in that they were not labeled in accordance with the Rules and Regulations promulgated under the Fur Products Labeling Act, in that information required under Section 4(2) was set out in handwriting in violation of Rule 29(b).

It is further ordered, That paragraph 11 of the initial decision be modified to read as follows:

11. One of the fur products sold by respondents was falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that the invoice issued in connection with the sale thereof did not contain the information required by subsection (C) and (F) of Section 5(b)(1). Certain other fur products sold by respondents were falsely and deceptively invoiced in that such garments had been used by ultimate consumers and the invoices issued in connection with the sale thereof did not designate such products "Second-hand" as required by Rule 23 of the Rules and Regulations promulgated under the Act.

It is further ordered, That paragraph 15 of the initial decision be modified to read as follows:

15. The advertising in which this claim appeared contained the following representations: "Mather's Went Broke," "The Death of a Great Pasadena Department Store!", "Entire Stock Doomed For Immediate Selling!", "No Exceptions! Every Item Must Be Sold Regardless of Cost!" In this context, the statement "Some At Cost, Some Below Cost," referring to certain advertised fur products, constitutes a representation that all of the advertised fur products would be sold either at cost or below cost. A tabulation prepared by the witness Anderson shows that the average percentage of profit during this sale was 46.8% on mink garments and 66.9% on garments composed of other furs. Since some of the advertised garments were sold at a profit, the representation "Some At Cost, Some Below Cost" was false and deceptive as alleged in the complaint.

It is further ordered, That paragraph 19 of the initial decision be modified to read as follows:

19. Paragraph 11 of the complaint charges that by advertising "Save 50% Or More" respondents have falsely represented that the regular or usual retail prices charged by respondents for fur products in the recent regular course of their business were reduced in direct proportion to the percentage of savings stated. Respondents' advertisement in the June 7, 1956, edition of the Los Angeles Times contained a statement to the effect that the T. W. Mather Department Store was under new management and that new merchandise had been brought in for the "liquidation" sale. In view of this announcement and in view of the fact that T. W. Mather did not have a fur department prior to this sale, the claims "Save 50% or More," made with respect to the prices of fur products, referred to savings from respondents' usual and regular prices. Respondents had not previously sold fur products and, consequently, had no usual or regular prices for such products. Since the advertised products were not sold at a 50% reduction from respondents' usual and regular prices, such products were falsely and deceptively advertised in violation of Section 5(a)(5) of the Fur Products Labeling Act.

It is further ordered. That paragraph 22 of the initial decision be modified to read as follows:

22. The allegations in regard to violations of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder contained in subparagraph (a) of paragraph 6 and paragraph 10 of the complaint should be dismissed.

It is further ordered. That the following order be substituted for the order contained in the initial decision:

It is ordered. That respondents, Mannie Feigenbaum, Inc., a corporation, and Manuel Feigenbaum, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the introduction 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 is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Misbranding fur products by:

A. Failing to affix labels to fur products showing in words and figures plainly legible all information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

B. Setting forth on labels affixed to fur products required information in handwriting.

2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish to purchasers of fur products invoices showing all information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

B. Failing to set forth the term "Second-hand" on invoices issued in connection with the sale of fur products that have been used or worn by an ultimate consumer.

3. 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:

A. Represents, directly or by implication, that any fur product is being offered for sale at or below respondents' cost, when such is not the fact.

B. Represents, directly or by implication, that any fur product is guaranteed, unless the nature and extent of such guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously set forth.

C. 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 and representations of the types referred to in paragraphs A and C above, unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

It is further ordered, That allegations of violation of the provisions of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder contained in subparagraph (a) of Paragraph Six and Paragraph Ten of the complaint be, and the same hereby are, 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, Mannie Feigenbaum, Inc., and Manuel Feigenbaum, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

Decision

IN THE MATTER OF
LAURIE RECORDS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 7695. Complaint, Dec. 18, 1959—Decision, Feb. 9, 1960*

Consent order requiring New York City manufacturers of phonograph records which they sold to independent distributors for resale to retail outlets and juke box operators, to cease giving concealed "payola"—payment of money or other valuable consideration—to disk jockeys to increase sales of their records by "exposure"—broadcasting day after day and several times daily—on radio and television programs.

Mr. John T. Walker and Mr. James H. Kelley for the Commission.

Rosen, Seton & Sarbin, by *Mr. Charles B. Seton*, of New York, N.Y., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with violation of the Federal Trade Commission Act in the distribution and sale of phonograph records by disbursing "payola," i.e., the payment of money or other valuable considerations to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which respondents have a direct financial interest, on the express or implied understanding that the disk jockey will conceal, withhold or camouflage the fact of such payment from the listening public.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and an Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement states that respondents Laurie Records, Inc. and Abel Productions, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their offices and principal place of business located at 1755 Broadway, New York, N.Y., and that individual respondents Allan Sussel, Gene Schwartz, Eliot Greenberg, and Robert Schwartz are president, vice president, secretary, and treasurer, respectively,