

Inc., a corporation, and Isadore Klayman, individually, and as an officer of said corporation, 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.

IN THE MATTER OF
MORTON'S, INC., ET AL.

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

Docket 6976. Complaint, Dec. 11, 1957—Decision, Feb. 25, 1960

Order requiring retail furriers in Boston, Mass., to cease violating the Fur Products Labeling Act by failing to comply with labeling requirements; by advertising in newspapers which failed to disclose the names of animals producing certain furs and represented prices falsely as reduced from so-called regular prices which were, in fact, fictitious; and by failing to keep adequate records as a basis for such pricing claims.

Before Mr. William L. Pack, hearing examiner.

Mr. Harry E. Middleton, Jr. and Mr. Thomas A. Ziebarth for the Commission.

Guterman, Horvitz & Rubin, of Boston, Mass., for respondents.

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 December 11, 1958, issued and subsequently served its complaint in this proceeding upon the respondents, charging them with violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and with engaging in unfair and deceptive acts and practices in violation of the Federal Trade Commission Act. 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 were received into the record. In the initial decision filed March 17, 1959, the hearing examiner held that certain of the complaint's allegations 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 and the entire record in this proceeding, and

having ruled on said appeals and having determined 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, conclusions 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, Morton's Inc., is a corporation organized and doing business under the laws of the State of Massachusetts, with its office and principal place of business at 89 Causeway Street, Boston, Massachusetts. Respondent Hyman Gondelman is Chairman of the Board and Treasurer of the corporation, and respondent Morton N. Gondelman is President of the corporation. These two individuals are in complete charge of the corporation's affairs and control its policies, acts and practices. The business operated by respondents is that of a retail fur goods store.

PAR. 2. Subsequent to August 9, 1952, the effective date of the Fur Products Labeling Act, respondents have advertised their fur products in commerce, as "commerce" and "fur products" are defined in the Fur Products Labeling Act. Certain of such 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. 3. 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 mingled with non-required information in violation of Rule 29(a) 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 not completely set forth on one side of the 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.

PAR. 4. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that

respondents caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements concerning such fur products which were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder. Such advertisements were intended to and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products. The aforesaid advertisements appeared in the Boston Traveler and Boston Sunday Globe, which were newspapers published in the City of Boston, Commonwealth of Massachusetts, and having a substantial circulation in said Commonwealth and other States of the United States.

PAR. 5. By means of said advertisements, respondents falsely and deceptively:

(a) Failed to disclose the name of the animal or animals producing 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, which so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was offered or usually sold by respondents in the recent regular course of their 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. 6. Respondents, in making the pricing claims and representations referred to in Paragraph 5(b) hereof, failed to maintain full and adequate records disclosing the facts on which such claims and representations were based, in violation of Rule 44(e) of the aforesaid Rules and Regulations.

CONCLUSIONS

The aforesaid acts and practices of the respondents 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 also was submitted at the hearings relevant to the charges of Paragraph 5 of the complaint which alleged false and deceptive invoicing, to the charges of Paragraph 4(a) which alleged violations of Rule 27, and to the charges of Paragraphs 7(b) and (d) which alleged violations of Rules 44(a) and 44(b). These

Order

56 F.T.C.

charges are not sustained by the record and provision for their dismissal accordingly is included in the order appearing hereafter.

ORDER

It is ordered, That the respondents, Morton's Inc., a corporation, and its officers, and Hyman Gondelman and Morton N. Gondelman, individually and as officers of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with 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, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

(1) Failing to affix labels to fur products showing 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.

(2) Setting forth on labels affixed to fur products:

- (a) Non-required information mingled with required information;
- (b) Required information in handwriting.

(3) Failing to set forth all the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on one side of the labels.

B. 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 fails to disclose 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.

C. Falsely or deceptively advertising fur products through 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 regular or usual price of any fur product is any amount which is in excess of the price

at which respondents have usually sold such products 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 is maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based.

It is further ordered, That the charges of Paragraphs 4(a), 5, 7(b) and 7(d) of the complaint be, and they hereby are, dismissed.

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

Commissioner Kern dissenting in part.

OPINION OF THE COMMISSION

By KINTNER, *Chairman*:

Respondents operate a store in Boston for the retailing of fur garments, some of which are manufactured on the premises. In the initial decision, the hearing examiner dismissed for lack of jurisdiction the complaint's charges that respondents had advertised or offered for sale fur products which were misbranded and falsely invoiced in violation of Sections 3(a) and 3(b) of the Fur Products Labeling Act. He further ruled that one of the charges of false and deceptive advertising in commerce was supported by the evidence, but held a failure of proof as to other related charges.

In their cross-appeals, respondents except to the holding sustaining the above charge and counsel supporting the complaint challenges certain of the dismissal rulings. Because it primarily concerns jurisdictional questions, the appeal of counsel supporting the complaint will be discussed first. Section 3(a) of the Act¹ makes unlawful "the * * * advertising * * * in commerce of any fur product which is misbranded or deceptively advertised or invoiced." Although there is no evidence that the respondents ship or sell their fur products to purchasers in states other than Massachusetts, the record shows that respondents placed advertisements for certain of their merchandise which appeared January 4, January 6 and Feb-

¹ The subsection reads:

"The introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8(b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act."

ruary 3, 1957. The circulations of the two Boston newspapers used included subscribers outside the State of Massachusetts. Hence, respondents' advertisements were disseminated in interstate channels.

The advertisements stated, among other things, that Morton's had bought the fur and mink stocks of Russeks, a New York manufacturer; that the collection included "superb mink, fabulous chin-chilla, gleaming broadtail" and that the particular garments there listed represented only a partial listing of that stock. Each garment listed was designated in the advertisements with a former price and a reduced sale price. The representative of the Commission who investigated the respondents' merchandising practices on February 20, 1957, was called as a witness in the hearings. The labels which he testified were improper labels were labels affixed by Morton's rather than by its suppliers and none were articles bought in the collection. Stating that the advertisements disseminated were unrelated to any of the deficiently labeled fur products, the hearing examiner held that such products had not been advertised in commerce within the meaning of the Act.

Determinations of whether the mission of the advertisements was thus narrowly confined to advertising the special purchase garments should be made, however, in the light of all record matters relating to respondents' promotional activities. The twenty-two fur garments contended by staff counsel as shown to be misbranded included six derived from mink and two broadtail lamb garments. Though acquired from other sources, these articles clearly were in the same merchandise categories as those listed in the advertisements. The tags for three of the mink items and for the broadtail lamb jackets also featured prices purporting to be marked down from stated higher prices. Out of the group of twenty-two garments, seventeen were thus marked as reduced in price. Hence, the sale was nowise limited to merchandise bought from the manufacturer whose name was being featured, but essentially represented a store-wide fur promotion.

The term "advertising in commerce" is not specifically defined in Section 3(a) of the Act. However, Section 5(a) prescribes that a fur product shall be considered to be falsely or deceptively advertised if any advertisement or notice intended to aid, promote, or assist directly or indirectly, in the product's sale or offering for sale does not show the information specified in the Act. Respondents' advertisements directed the public's attention to their store, its location and its status as New England's largest furrier and invited everyone "considering owning a fur at all" to come to their

salon. As previously noted, the garments referred to in the advertisements included mink, chinchilla and "broadtail." A list of the special purchase merchandise was received in evidence and shows that mink garments predominated, only two broadtail lamb garments being included.

That the advertisements emphasized the prestige source of the garments, therefore, is not controlling. It is controlling that the advertisements were keyed to directly assisting the sale of all of respondents' lamb and mink garments and to attracting potential buyers for other types of furs similarly available at reduced prices. In these circumstances, the hearing examiner clearly erred in concluding that the advertisements bore no relation to the deficiently labeled fur products included in respondents' special promotion. We think that the fur products which counsel supporting the complaint contends were misbranded, were advertised in commerce within the meaning of Section 3(a) of the Act. They, accordingly, were products subject to the Act.

Furthermore, the record fully supports counsel's contentions of misbranding. Among the labels affixed by the respondents which omitted the information required by Section 4(2)(F) of the Act were those for three Persian lamb garments which made no disclosure as to the foreign origin of the skins. They contained skins produced in Southwest Africa and such garments were so invoiced to respondents by the respective suppliers. Contrary to the provisions of Section 4(2)(A) of the Act, two dyed broadtail lamb garments were identified on respondents' labels as dyed broadtail.

In addition to misbranding through failure to furnish statutorily prescribed information, the record shows that the respondents failed to supply such required information in the manner prescribed by the rules and regulations promulgated by the Commission. Thus, required information was mingled with non-required information in many instances and in another the items of required information were not set forth on one side of the label, both practices being violative of Rule 29(a) of the regulations. Also, such information was handwritten in instances instead of printed as prescribed by Rule 29(b).

Counsel supporting the complaint excepts to the hearing examiner's characterization of these rule departures as technical or minor violations and matters to be regarded as *de minimis*. Respondents' violations were nowise limited to activities proscribed by the rules; instead, the statute's mandate that material facts be supplied respecting the products also was ignored. Nor does the Act differentiate between minor and serious violations. On the contrary, the

statute contemplates that the products' labels set forth all the information specified in such Act and in the manner prescribed by the rules. When violations are proved, assurances against their continuance or resumption ordinarily are best afforded by issuance of an order to cease and desist. Under the circumstances of this case, we deem counsel's exceptions to the *de minimis* concepts applied in the initial decision to be well taken.

Because also related to the rules and regulations, we comment at this point on respondents' contentions during the hearings that the rules are arbitrary and legally invalid. Such argument focused on the fact that no record showing was made that respondents' failures to observe the requirements of the rules had resulted in consumer deception. The authority conferred under Section 8(2)(b) of the Act is, among other things, to prescribe rules governing the manner and form for disclosing information required by the Act. Hence, it is not necessary that requirements imposed by the regulations be solely directed against forms of disclosure which would engender deception in every marketing situation or instance of use. Respondents' contentions as to the rules and regulations being improper or invalid are rejected.

We also have considered the evidence relevant to the complaint's charges of misbranding through use of labels allegedly smaller than those prescribed by Rule 27. The labels exceeded the minimum dimensions stipulated in the rule, though each contained two perforated lines whereby duplicate segments could be detached. Only if both segments were removed attendant to a second sale of a garment after return by its original purchaser, would the label fall below the rule's prescribed size minima. Respondents enlarged their labels shortly after being contacted in the investigation. Our findings and order, accordingly, provide for dismissal of this charge.

Counsel supporting the complaint contends in his appeal that the evidence shows false and deceptive invoicing by the respondents of fur products subject to Section 3(a) of the Act. The record, however, only suggests possible invoicing failures to show the origin of the furs in respondents' products. In the invoices where the fur named included the name of a country in adjective form, Persian lamb for example, no evidence was presented to show that those particular skins did not in fact originate in such country. The evidence bearing on invoicing practices is plainly inconclusive and this aspect of the appeal is denied.

Section 3(b) of the Act makes unlawful, among other things, the local or intrastate sale of misbranded products made in whole or in part of fur which has been shipped and received in commerce.

Counsel claims error by the hearing examiner in failing to find respondents' deficiently labeled garments additionally subject to that section of the Act inasmuch as they were shipped to respondents in commerce by out-of-state suppliers which necessarily entailed shipment and receipt of the component skins. The answer to this is that the Act undertakes to rest jurisdiction over a marketer due to movement of fur products to him in commerce only as expressly provided by Section 3(e) of the Act. Assuming, but not however deciding, that respondents' acts are within the purview of Section 3(e), the complaint includes no charges of unfair and deceptive acts in violation of that section. In our decision here, we have determined that the respondents' misbranded fur products were advertised in commerce within the meaning of Section 3(a) of the Act and, therefore, were garments subject to the Act. In view of this disposition, we deem it unnecessary to rule on counsel's further contentions that Morton's garments were subject to the Act as fur products made in whole or in part of skins previously shipped to and received by respondents' manufacturing suppliers in commerce.

As previously noted, the charges relating to false and deceptive advertising in commerce in violation of the Act were sustained in part and dismissed in part by the hearing examiner. The circulation of the Boston newspaper in which two of respondents' advertisements were published and disseminated was approximately 476,000, of which 740 copies went outside the State of Massachusetts. The remaining advertisement received into the record was published in another Boston newspaper having a daily circulation of 212,000, of which approximately 6500 copies went outside Massachusetts. Thus, a substantial number of respondents' advertisements were disseminated in interstate commerce.

Each advertisement contained two columns of prices, the first column of higher prices being captioned "were" or "usually," and the second or lower as "now" prices. The only prices at which the garments were ever offered by respondents were the advertised "now" prices and the higher prices were, therefore, fictitious. Respondents urge that any capacity to deceive inhering in such pricing misrepresentations was removed by another advertising statement to the effect that the garments had just been purchased. While some members of the public might note that statement and perhaps infer no prior offering by Morton's of that or like merchandise, others would not. Moreover, two of the advertisements did not contain such a statement. In our view, the hearing examiner's findings that the respondents had disseminated pricing misrepre-

sentations in commerce had sound record basis and he correctly held that issuance of an order was warranted in the public interest. The respondents' appeal is, therefore, denied.

The exceptions of counsel supporting the complaint to the hearing examiner's dismissal of other deceptive advertising charges contained in paragraph 7(b) of the complaint also are denied. These allegations challenged use in the advertisements of the expression "Below original wholesale" to designate the prices for the promotion. At the time of purchase, a listing or memorandum of prices was furnished by respondents' supplier. The supplier represented that such merchandise had been previously offered or like garments sold by it at wholesale at the higher levels listed. The prices named as current prices in the respondents' advertising were below those represented by the manufacturer as prior prices.

Although the hearing examiner properly ruled that the foregoing charges of paragraph 7(b) of the complaint should be dismissed, his like disposition of the allegations of paragraph 7(a) was erroneous. The latter charged failure in advertising to disclose the names of the animals producing the furs or the fur products as set forth in the Fur Products Name Guide and as required by Section 5(a)(1) of the Act. The advertisement dated February 3, 1957, stressed that chinchilla and "broadtail" were included in the liquidation. Twenty-six mink articles were listed, ten of which, though made of mink, were not so expressly identified. The law, however, requires that all fur products, including mink and lamb products, be accurately identified as to their zoological origin. Under the Act and rules, the purported broadtail stocks were "lamb" or "broadtail lamb." Two other advertisements of the respondents when listing specific garments properly designated them as broadtail lamb, but elsewhere referred to their merchandise category as broadtail. We think that the record amply establishes that the respondents failed to comply with the Act's mandate that names of animals producing the furs be disclosed in the advertising for fur products.

The complaint also charged that respondents in violation of Rule 44(e) had failed to maintain full and adequate records disclosing the facts upon which their pricing claims were based. The rule contemplates that the records of marketers subject to the Act disclose all facts relied upon as basis for pricing representations and that they be kept in sufficient detail and in such form as affirmatively to disclose the accuracy of the representations. The evidence establishes that the respondents have engaged in fictitious pricing. Respondents obviously did not maintain the full and adequate records required by Rule 44(e) and the hearing examiner therefore erred in dismissing this charge.

The Commission's accompanying findings as to the facts, conclusions and order provide for disposition of the charges of the complaint in conformity with the views expressed above. The appeal of respondents is denied, the appeal of counsel supporting the complaint is granted in part and denied in part, and the initial decision is vacated and set aside.

Commissioner Kern dissented in part to the decision herein.

OPINION OF COMMISSIONER KERN DISSENTING IN PART

I find myself unable to agree with some of the views of my colleagues as expressed in Chairman Kintner's opinion. The area of my disagreement is confined to the action of the majority in overruling the hearing examiner's determination that the charge of misbranding of a fur product advertised in commerce in violation of Section 3(a) of the Fur Products Labeling Act had not been sustained. In my judgment the hearing examiner correctly concluded that the advertisements disseminated were unrelated to the deficiently labeled products and that such products had not been advertised in commerce within the meaning of the Act.

The problem is a simple one. It concerns three advertisements respondents placed in two Boston newspapers in January and February of 1957.¹ The statutory language now in issue requires the misbranded fur product to be advertised in commerce. The three advertisements in question, which are the only evidence adduced on this issue, are completely concerned with the sale of furs purchased from Russeks, a New York manufacturer, and stated that the particular garments listed represented only a partial listing of that stock. No mention was made of the fact that this was a store-wide sale or that other garments than the Russeks furs might be included. It is conceded that the articles misbranded were not specifically mentioned in the foregoing advertisements. Moreover, there is no question that the misbranded garments were not part of the Russeks fur stock with which these advertisements were concerned. Not only the main, but the entire thrust of these advertisements was related to the sale of the Russeks stock purchased. As much as I deplore my own iconoclasm, I find it necessary to conclude that the image created by the majority opinion as to the substance of the advertisements is completely misleading.

The rationale of the majority opinion is contained in the following language:

"The term 'advertising in commerce' is not specifically defined in Section 3(a) of the Act. However, Section 5(a) prescribes that a

¹ Commission Exhibits 5A, 5B and 5C.

fur product shall be considered to be falsely or deceptively advertised if any advertisement or notice intended to aid, promote, or assist directly or indirectly, in the product's sale or offering for sale does not show the information specified in the Act. Respondents' advertisements directed the public's attention to their store, its location and its status as New England's largest furrier and invited everyone 'considering owning a fur at all' to come to their salon."

The short and simple answer to the problem involved is that a statute as clear and unambiguous as this one means exactly what it says. To me it requires the misbranded fur product to be advertised in commerce. Moreover, I am willing to accept, at least by way of argument, the conclusion of the majority that the particular misbranded garment need not be advertised, but that the requirement of the statute is met by a store-wide or general advertisement based on a store-wide or general fur promotion. The majority's conclusion, however, does not follow from that premise. Deluded by the discovery that this was a store-wide sale and that the articles misbranded were included in such sale along with the Russeks garments that were the subject of the advertisements, the majority concludes: "Hence, the sale was nowise limited to merchandise bought from the manufacturer whose name was being featured, but essentially represented a store-wide fur promotion." The vice of this reasoning is that the statute is concerned with the advertising and not with the character of the promotion.

The majority further seeks support from the fact that "Respondents' advertisements directed the public's attention to their store, its location and its status as New England's largest furrier." Should this satisfy the requirements of the statute, then a classified listing in a telephone directory—and directories cross state lines in many metropolitan areas—would suffice. Even if a store-wide or general advertisement meets the requirements of the statute, the advertisements in question, when dispassionately evaluated, simply do not measure up.

The majority's attempted interpretation of Section 3(a) by resort to Section 5(a) of the Act does not impress me. Section 5(a) deals with false or deceptive advertising, whereas Section 3(a) deals with advertising, whether true or false, of misbranded fur products. The question under Section 5(a) is whether the advertisement "is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale" of a deceptively advertised fur product. Under Section 3(a), insofar as here relevant, the question is whether the misbranded fur product is the subject matter of the advertisement. On the face of the statute, the latter is a narrower provision than

the former. In any event, the two sections deal with different problems and there is no warrant for reading one into the other. Indeed there is no need to resort to construction at all. I had considered it fundamental that "when the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." *Caminetti v. U.S.*, 242 U.S. 485 (1917). See also *U.S. v. Missouri Pacific R. Co.*, 278 U.S. 269, 277 (1929); *Marmon v. Railroad Retirement Board*, 218 F. 2d 716, 718 (3d Cir., 1955).

In my view the majority has indulged in statutory interpretation where none was warranted and then has incorrectly concluded that the advertisements in question embraced the misbranded garments, even though the misbranded garments were not in any way the subject of the advertisements. I see no justification in legislative history or otherwise for the construction accorded this section of the Act by the majority. Likewise, I find in the record no factual basis for the majority's conclusion. For these reasons I dissent.
