

ing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

It is further ordered, That the respondents herein 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 this order.

IN THE MATTER OF

GIMBEL BROTHERS

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

Docket 7888. Complaint, May 13, 1960—Decision, Feb. 23, 1962

Order requiring a corporation operating retail stores in New York City, Milwaukee, Pittsburgh, and Philadelphia, to cease violating the Fur Products Labeling Act by advertising in a Philadelphia newspaper which failed to disclose the names of animals producing the fur in fur products, the country of origin of imported furs, and that certain furs were artificially colored; represented prices of fur products as reduced from usual prices when they had never sold at such prices and as "1/2 off" when such was not the fact; and failed to maintain adequate records as a basis for price and value claims.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gimbel Brothers, a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Gimbel Brothers 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 principal place of business located at 34th Street and Broadway, New York, N.Y. Corporate respondent oper-

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ates a number of branch stores. The acts and practices as hereinafter alleged relate to the Philadelphia, Pa., branch store located at 8th and Market Streets.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce and in the sale, advertising and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondent caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements, concerning said products, which were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 4. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondent which appeared in issues of the Evening Bulletin, a newspaper published in the city of Philadelphia, State of Pennsylvania, and having a wide circulation in said State and various other States of the United States.

By means of said advertisements and others of similar import and meaning, not specifically referred to herein, respondent falsely and deceptively advertised fur products in that said advertisements:

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

(b) Failed to disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was the fact, in violation of Section 5(a)(3) of the Fur Products Labeling Act.

(c) Failed to disclose the name of the country of origin of the imported furs contained in the fur products, in violation of Section 5(a)(6) of the Fur Products Labeling Act.

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

(e) Represented through the use of percentage savings claims through such statements as "1/3 Off" that the regular or usual prices charged by respondent for fur products in the recent regular course of business were reduced in direct proportion to the percentage of savings stated when such was not the fact in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 5. Respondent in advertising fur products for sale as aforesaid made claims and representations respecting prices and reductions therefrom of fur products. Respondent in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based in violation of Rule 44(e) of said Rules and Regulations.

PAR. 6. The aforesaid acts and practices of respondent, as herein alleged, 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.

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

Schnader, Harrison, Segal & Lewis, by *Mr. Bernard J. Smolens* and *Mr. Edward W. Mullinix*, of Philadelphia, Pa., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Gimbel Brothers, a corporation, is charged with having violated the Fur Products Labeling Act and the Federal Trade Commission Act. The facts are as follows:

1. Gimbel Brothers 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 principal place of business at 34th Street and Broadway, New York, New York. This proceeding relates solely to the respondent's Philadelphia retail store.

2. Subsequent to the effective date of the Fur Products Labeling Act, respondent, in connection with its Philadelphia operations, has been and is now engaged in the introduction into commerce and in the sale, advertising and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce",

"fur" and "fur product" are defined in the Fur Products Labeling Act.

3. Respondent's Philadelphia store has caused advertisements of its fur products to be published in newspapers which have substantial circulation in states other than the State of Pennsylvania. These advertisements are and have been intended to aid, promote and assist in respondent's sale and offering for sale of its fur products. Only one such advertisement, engrossing approximately a page and a half of newspaper space, was introduced into the record, and only one part of that advertisement is relied upon as the basis for this action. A photostatic copy of the portion relied upon appears on p. 362a.

4. The foregoing advertisement is charged to be false and deceptive and in violation of the Fur Products Labeling Act and the Rules and Regulations thereunder in five respects:—first, in that it

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

In support of this charge, it is pointed out that in the "mink, beaver, fox" designation the particular type of fox, as specified in the Name Guide, was not disclosed. In the Guide there are listed nine types of fox furs—Black, Blue, Cross, Grey, Kit, Platinum, Red, Silver and White. There is no unqualified Fox classification. § 5(a)(1) of the Act is as follows:

Sec. 5. (a) For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if 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 such fur product or fur—

(1) does not show the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7(c) of this Act;

5. The advertisement does not purport to describe specifically any individual garment or group of garments. It is general in nature, calling attention only to some of the types of fur that are included in the merchandise offered. In such an advertisement the listing of all the names of all the furs advertised and the colorings or other physical characteristics of the various garments would be meaningless because the details of name or other characteristic could not be referenced to any particular garment. The argument that specific names should be set forth in an advertisement such as is at issue here can be reduced to an absurdity if it be applied to a general advertisement in which all of a stock of furs or fur garments are offered at specified prices. Certainly it would not be expected, under such circumstances, that all the names and characteristics of all the fur products involved in the advertised sale would have to be set forth in the general advertisement. That same reasoning applies

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Initial Decision

The Evening Bulletin Tuesday, September 29, 1959

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sample sale!

PHILADELPHIA STORE ONLY

Fashion flair and workmanship in the custom bracket, but at take from-the-rack prices! Gimbel's is famous for sales of fine samples, caviar of the fashion world! These were made as this season's showpieces, will be outstanding wherever they are worn. The wools, many imported are superb. Mink, fox, beaver climax each design. Each coat is individually made, fine hand artistry of a master tailor. Models of perfection for sizes 10, 12, 14.



mink
beaver
fox

1/3 off

luxury furs on 100% wool
coats...even 100% cashmere

28 sample coats were \$118, now \$78
31 sample coats were \$148, now \$98

30 sample coats were \$195, now \$128
44 sample coats were \$225, now \$148

NOTE: no mail or phone orders. Gimbel's Retail Store, 1211 Third Floor, Chestnut—Philadelphia Store only

to the situation which is presented in this proceeding. There is no claim that each individual garment was not properly marked as to name and other required characteristics. The advertisement cannot be looked upon as in any way misleading or deceptive.

6. Looking again at the statute, it is clear that the reference "a fur product or fur" and that the advertisement is faulty only if it is intended to aid, promote, or assist in the sale of "*such* fur product or fur (*italics* added), applies only to individual garments. Had the Congress any other intent, the wording of the statute could have readily expressed that intent by a very slight variance of the language used. The intent and meaning of the statute is clear, and does not require a merchant to list in a general advertisement the names of all the animals that produced the many furs that might be contained in the numerous garments offered for sale. The converse is true when the merchant advertises specific garments, for in such cases the names of animals, and other required characteristics, must be stated. The respondent is found not to have violated the provisions of § 5(a) (1) of the Fur Act.

7. The second violation charged is that respondent's advertisement

(b) Failed to disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was the fact, in violation of § 5(a) (3) of the Fur Products Labeling Act.

In support of this charge it is pointed out by counsel supporting the complaint that following respondent's advertising of "mink, beaver, fox", the advertised coats were inspected at respondent's store by a Commission investigator, who observed that the beaver-trimmed coats were labeled as dyed beaver, and that respondent's invoices listed one coat, which was among those advertised, as being trimmed with dyed beaver, and other coats as trimmed with dyed mink and dyed beaver. The advertisement did not disclose that the mink and beaver trimmings were dyed. There is no dispute as to these facts. § 5(a) of the Act is as copied above; subsection (3) thereunder is as follows:

(3) does not show that the fur product or fur is bleached, dyed, or otherwise artificially colored fur when such is the fact ;.

The singular designation is again used. Following the reasoning set forth in the paragraph above, the same advertisement being here under consideration, the same conclusion is reached—that the requirement of the Act is applicable only when specific garments are advertised and described. The respondent is found not to have violated the provisions of § 5(a) (3) of the Fur Act.

8. The third violation charged is that respondent violated § 5(a) (6) of the Fur Act in that its advertisement does not

disclose the name of the country of origin of the imported furs contained in the fur products * * *.

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Some of the "mink, beaver, fox" fur in the advertised garments originated in Canada and Norway. At the bottom of the first page (not reproduced herein) of respondent's advertisement is a statement in small but readable print, "—fur products labeled to show country of origin of imported furs * * *". This is compliance under Rule 38(b), which is as follows:

Rule 38—*Advertising of Furs and Fur Products.*

* * * * *

(b) In general advertising of a group of fur products composed in whole or in part of imported furs having various countries of origin, the disclosure of such countries of origin may, by reference, be made through the use of the following statement in the advertisement in a clear and conspicuous manner: "Fur products labeled to show country of origin of imported furs."

This charge of the complaint will be dismissed.

9. The next two charges of the complaint are that respondent has made fictitious-pricing representations and savings claims, in violation of § 5(a)(5) of the Act and Rule 44(a) of the Regulations. The specific charges are, as set forth in paragraph 4 of the complaint, subsections (d) and (e), that in its advertising respondent falsely and deceptively advertised products, in that it

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

(e) Represented through the use of percentage savings claims through such statements as "1/2 Off" that the regular or usual prices charged by respondent for fur products in the recent regular course of business were reduced in direct proportion to the percentage of savings stated, when such was not the fact, in violation of § 5(a)(5) of the Fur Products Labeling Act.

The advertisement hereinabove reproduced, listing

29 sample coats were \$118, now \$78

31 sample coats were \$148, now \$98

30 sample coats were \$195, now \$128

44 sample coats were \$225, now \$148,

is a representation that the coats listed in the advertisement had previously been priced and offered for sale by respondent at the higher prices, that is, unless there is a clear implication to the contrary by the statements in the advertisement that this was a "sample sale" and that these were "sample" coats. Much evidence was offered and many arguments were advanced relating to this phase of the proceeding.

10. The "sample" coats offered by respondent through this advertisement had been procured by respondent's buyer for the Philadelphia store at special discount prices from various manufacturers. They

were coats which were pilot models which the manufacturers had used to show to wholesale buyers as representative of the lines of coats being offered for presentation to the retail trade. As pilot models they were original creations, had been carefully and individually hand-made and trimmed perhaps with better fur than the mass-production coats patterned after the samples. They had been procured at one-third off the price for which the coats made from these samples were regularly sold by the manufacturer. By applying its regular mark-up, respondent was able to offer these coats at retail to the public at one-third off the price at which the coats would have sold if they had been regular stock, and, as the record indicates, at one-third less than was the regular selling price of the coats for which these were the pilot samples. These facts were not contradicted. Nor was the fact contradicted that these particular coats had never before been offered for sale by the respondent, so the higher price mentioned in the advertisement could not have been the present or former regular price of these sample coats. There was no direct proof in the record that respondent had not previously offered for sale at the higher prices mentioned in the advertisement coats similar to those referred to therein, or coats manufactured through the use of the advertised samples as pilot models. That issue was not met. If the prospective purchasers of these coats had known what a sample coat was, they would not have been misled by the advertisement. The respondent's records disclose fully the facts upon which the advertised prices were based.

11. In its defense respondent presented a highly-qualified expert in women's fashions and women's wear—the fashion editor of the Philadelphia Inquirer. Based on a broad advertising and retailing experience and familiarity with merchandising techniques followed by retailers of women's clothes, she testified that the average woman customer in the Philadelphia area would understand the term "sample" as used in the trade, and would have interpreted the higher-price figure in respondent's advertisement as being the price at which coats patterned after the advertised sample coats were currently being sold by the retailers who had purchased them, and that the saving mentioned was from that price, and would be one-third.

12. To controvert this testimony, there were produced in Washington, D.C., from the Washington area, seven witnesses, whose reliability respondent questions, whose testimony indicated that they did not understand a sample coat to be as above described and therefore thought the advertisement signified that respondent had previously offered these coats, or coats like these coats, at the higher price, and that, therefore, the purchasers of these coats would be saving one-third of the amount they would have paid for the coats had they been bought from respondent at this higher original price. Respond-

ent's contention that the testimony of these public witnesses was unreliable is based on the argument that women in the Philadelphia area understand what a sample coat is, whereas those in the Washington area do not.

13. To support this contention, another highly-qualified expert was presented, who testified that she was, and had been for three years, familiar with the advertising of women's wear in the Washington area and that she had never seen a sample sale advertisement in any of the area papers, thus supporting the conclusion that sample sales are rare in Washington and that the women in Washington would therefore not be expected to understand the terms "sample" and "sample sale" as would the women in Philadelphia, where sample sales were shown to be more frequent. Fortunately it is unnecessary to base a conclusion as to the meaning of respondent's advertising on the bound-to-be-unpopular determination of the comparative knowledge of Washington and Philadelphia women.

14. Respondent's expert testified as to the manner in which the average woman in Philadelphia would interpret the advertisement, but the Commission has said repeatedly that its obligation runs not just to the intelligent or well-informed person, nor to the person of average intelligence, but also to those who are even less informed. Undoubtedly there were and are many women—prospective purchasers of women's fur-trimmed coats—even in the Philadelphia area, who would understand and believe that the higher prices mentioned in the advertisement were prices at which the respondent had previously sold or offered for sale the same coats as those advertised, or similar coats. The conclusion is that respondent's advertisement is misleading and deceptive as to its price and savings representations.

15. There is one other defense presented by respondent which requires a determination of the meaning of the statutes under which this proceeding was brought. This defense is based upon facts peculiar to this proceeding, and must be determined entirely upon those facts. Hence the conclusion reached herein would be applicable only in proceedings involving precisely the same facts and circumstances.

16. During 1958 respondent's Philadelphia newspaper advertising totaled over 4,000,000 lines, of which 64,810 related to fur products; during 1959 the total was in excess of 4,500,000 lines, of which over 75,000 lines related to fur products. The single advertisement upon which the case in support of the complaint herein is based was an isolated incident which respondent asserts was contrary to the company's policy and occurred despite the fact that respondent had taken all practicable precautions to prevent such occurrences. It was respondent's policy, at the time, that the advertisement after being prepared in the advertising department and made up into proof be submitted to the fur department buyer for approval. This adver-

tisement was not so submitted. Shortly before the advertisement was published, respondent's experienced copywriter, responsible for preparing such advertising, left respondent's employ, and was replaced by a person of less experience who is no longer employed by respondent.

17. Following the publication of this advertisement, and prior to the issuance of the complaint in this case, respondent tightened its policy rules by requiring all fur advertisements to be cleared through the office of the Assistant to the Comptroller of the Philadelphia store, this office being charged with responsibility for the store's compliance with all matters involving governmental regulations. The record shows that respondent has on many occasions conferred with Federal Trade Commission personnel for interpretations and suggestions, and has always complied with the suggestions and recommendations received. The respondent has adopted and maintains a firm policy to comply with the laws and regulations administered by the Federal Trade Commission, and has periodically so instructed its employees. This, the respondent asserts, is motivated to accord with the company's interest in maintaining good customer relationships. It was also stated in the record that it was and is against company policy to use the word "were" in comparative pricing advertisements, and that "were" had never been so used prior to September 29, 1959, and has not been so used since that time.

18. The foregoing facts are established by the record and are urged by respondent as requiring a finding that the publication of the one advertisement involved in this proceeding does not constitute "acts or practices" within the meaning of § 5 of the Federal Trade Commission Act. The Act speaks in the plural, which would indicate an intent of the Congress not to subject a respondent to prosecution for a single isolated act of violation. Public policy and the public interest would seem not to favor, much less require, the issuance of a cease-and-desist order against an institution having an established policy of cooperation and compliance with the law and the regulations thereunder; but public policy and public interest are ultimately for decision by the Commission itself, and no conclusions reached herein will be based on the Hearing Examiner's interpretation of either of these terms.

19. It is the Hearing Examiner's conclusion that under all the facts and circumstances of this proceeding, the respondent cannot be found to have engaged in acts or practices (the complaint charges "acts and practices") in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, or of the Federal Trade Commission Act. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By MACINTYRE, *Commissioner*:

This matter is before us for consideration of an appeal by complaint counsel from the hearing examiner's initial decision dismissing the complaint.

We are here principally concerned with a single advertisement of fur products which respondent caused to appear in a newspaper of interstate circulation. A reproduction of the advertisement appears on page 362a.

The complaint herein, issued May 13, 1960, charges respondent with six separate violations of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder. The hearing examiner dismissed all of the charges and with one exception committed error in doing so. Each of these separate matters are now considered *seriatim*.

The Improper Animal Name Charge

Paragraph 4(a) of the complaint charges that respondent's advertisement was false and deceptive in that it:

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

The advertisement in question uses merely the word "fox" to describe certain of the fur products offered for sale. This designation was at the time of complaint, and is now, an improper designation for some of the fur products advertised in that "fox" is not the correct name of the animals which produced the fur used to trim some of the coats offered in the advertisement.¹ The record reveals that some of the coats were trimmed with Norwegian blue fox and dyed white fox.

The hearing examiner dismissed this charge of the complaint because in his opinion "The advertisement does not purport to describe specifically any individual garment or group of garments." He concluded "The intent and meaning of the statute is clear and does not require a merchant to list in a general advertisement the names of all the animals that might be contained in the numerous garments offered for sale." In so holding, the examiner disregarded the prior holding of this Commission in *Hoving Corporation*, Docket No. 7195 (September 23, 1960). In that matter, an advertisement somewhat similar

¹ On November 3, 1961, the Fur Products Name Guide was amended to permit the use of the single word "fox" to describe the genus and species of the red fox and its color phases, which are known as black fox, cross fox, platinum fox, silver fox, and red fox.

to the one here involved represented that a group of fur products were "mink, chinchilla, fox". The hearing examiner there found that "fox" was an improper designation. On appeal, we affirmed his finding, pointing out that even if the advertisement be considered as "institutional", that is, not intended to aid or promote the sale of any specific fur products, nevertheless the correct name of the animal which produced the furs must be disclosed. Here it is not even claimed that the advertisement is "institutional", leaving the examiner's decision without even the color of correctness. We hold that respondent's use of the word "fox" to describe the lot of furs, which included Norwegian blue and dyed white fox, violated Section 5(a)(1) of the Fur Products Labeling Act.

The Failure To Disclose Dyed Furs

In paragraph 4(b) of the complaint, it is alleged that the advertisement was false in that it:

Failed to disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was the fact, in violation of Section 5(a)(3) of the Fur Products Labeling Act.

Some of the mink, fox and beaver fur products advertised were dyed, and the advertisement does not disclose this fact. The hearing examiner dismissed this charge following the same reasoning he used in dismissing the previous charge. The examiner's overtechnical conclusion that because the Act refers in the singular to "a fur product or fur", it cannot be held to apply to a "general advertisement" in which "numerous garments [are] offered for sale" is clearly erroneous. A multiple violation is even less excusable than a single one. Respondent's counsel concedes that if all the furs in the lot advertised were dyed, it "might" be held that the Act requires disclosure. Thus, he is presumably not wedded to the examiner's theory but makes his plea for avoidance on the ground that the unqualified animal designations in the advertisement cannot be identified with the specific fur products which were dyed. While this is true, it does not in any manner rebut or dilute the fact that dyed furs were advertised for sale without disclosure of the fact of dyeing. That the dyed furs were commingled with natural furs in the lot advertised only makes the unqualified designation partly true. An advertisement which is partly true is, of course, partly false and subject to prohibition under the statute.

The Failure to Disclose Foreign Origin

The third principal charge of the complaint is contained in subparagraph (c) of paragraph 4, which alleges that the advertisement:

Failed to disclose the name of the country of origin of the imported furs contained in the fur products, in violation of Section 5(a)(6) of the Fur Products Labeling Act.

The record reveals that some of the coats advertised were trimmed with fur which was imported from foreign countries. The advertisement does not disclose this fact, but the hearing examiner dismissed the charge because a disclosure of foreign origin was made in another advertisement appearing on an adjacent page in the newspaper. The foreign origin declaration found in the second advertisement obviously only refers to the different furs there offered for sale. The two advertisements are separated by an unrelated women's sweater advertisement of four-column width. In addition, each advertisement is outlined with a heavy black border clearly setting it off as a separate advertisement. Quite obviously the foreign origin declaration in the one advertisement was insufficient to inform the public that some of the furs depicted in the advertisement in question were imported and the dismissal of this charge was erroneous.

The Fictitious Pricing Charges

In subparagraphs (d) and (e) of paragraph 4, the complaint charges that the advertisement made fictitious and false pricing representations as follows:

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

Represented through the use of percentage savings claims through such statements as "1/4 Off" that the regular or usual prices charged by respondent for fur products in the recent regular course of business were reduced in direct proportion to the percentage of savings stated when such was not the fact in violation of Section 5(a)(5) of the Fur Products Labeling Act.

It is respondent's contention that the record shows only that respondent had never sold the advertised *sample* coats before; that the price saving representations in the advertisement were based upon the regular ("were") prices of *production* model coats patterned after the samples; and that there is no record evidence to show that respondent did not sell such *production* model coats at the higher "were" prices contained in the advertisement.

The hearing examiner's findings and conclusions on this subject are confusing and to a certain extent contradictory. His finding that

the price saving representations were misleading and deceptive is apparently based upon the respondent's admission that it had never before sold or offered any part of the particular lot of sample coats presented in the subject advertisement. He specifically found that the record contained "no direct proof" that the respondent had not made prior sales or offerings of regular production models of these coats and concluded, "That issue was not met." In view of his finding the advertisement to be deceptive, it must be concluded that he considered the lack of "direct proof" that respondent had not made prior sales of production model coats as immaterial.

We are not so persuaded. Sample coats are by definition identical in all material respects to production model coats patterned after them. Thus, if Gimbel's had in the recent regular course of business sold production models of the advertised coats at the higher ("were") prices, its advertisement would be neither misleading nor deceptive. We turn now to a consideration of such evidence as was adduced on this decisive point.

If the hearing examiner's conclusion that this issue was not met is correct, it would appear that he was instrumental in creating the hiatus for he stopped complaint counsel's cross-examination of respondent's comptroller on this point, saying: ". . . there isn't question in my mind that the witness has said the word 'were' was wrongly used there and the implication could well be taken by a customer that they had been offered at this higher price by Gimbel's. I don't think there is any dispute about that." It is noteworthy that respondent's counsel offered no objection to this conclusion.

In addition to characterizing the word as used in the advertisement as "inaccurate", the Gimbel comptroller testified with respect to the meaning of the representation "were \$118" which appeared in the advertisement: "I don't think it means was Gimbel's price." The witness was then asked flatly whether the "were" price of \$118 was Gimbel's price. His answer was not responsive but revealed that the higher price ". . . reflected the valuation that we were saying represented the one-third off." The hearing examiner then interrupted the examination with the remark we quoted above.

In our view, this testimony is conclusive on the question of prior sales at the "were" prices. The witness involved was a high-ranking official of the respondent. In response to repeated direct questions as to the "were" prices, he replied that they were not Gimbel's prices but reflected a valuation Gimbel's was "saying" represented one-third off.

We are convinced that this issue was met and, on the basis of all the evidence, we conclude that respondent had not in the recent regular course of business sold either sample or production model coats of the type advertised at the "were" prices listed in its advertisement.

Respondent introduced evidence which purported to show that an unspecified number of unnamed retailers located in unnamed areas purchased production model coats patterned after the sample coats sold to Gimbel's at prices 50% higher than the prices paid by Gimbel's for the sample coats and that said retailers resold said coats at prices approximately 50% higher than the "now" prices listed in Gimbel's advertisement. Even if this evidence is given full weight, it avails respondent nothing since it does not reveal that Gimbel's ever sold similar coats at the higher "were" prices. This evidence has no relevance to the issues here involved and complaint counsel's objection to it should have been sustained.

Respondent attempted to show that the prospective customers to whom the advertisement was directed, that is, women in the Philadelphia area, understand that a "sample sale" is an offering of one-of-a-kind samples and that production models, patterned after the samples, had been sold (not necessarily by the advertiser) at the higher "were" prices. The record contains much evidence and argument on this point, none of it convincing.

Respondent relies in the main upon the testimony of an expert witness, the fashion editor for a leading Philadelphia newspaper. While undoubtedly an expert in her chosen field, we are not persuaded that the point which respondent seeks to establish is susceptible of proof by expert testimony or at least by the expert produced. The understanding or impression communicated to a consumer by respondent's entire advertisement is most likely to be accurately learned from a sampling of the consumers themselves. But the evidence adduced by complaint counsel in rebuttal on this point has even less value than respondent's since it consists of the "impression" testimony of consumers residing in the Washington, D.C., area where respondent has shown "sample sales" are extremely rare or nonexistent. The testimony of such witnesses could not, of course, rebut respondent's attempted showing as to what Philadelphia consumers, apparently constantly exposed to "sample sale" advertisements, understand such advertisements to mean.

It is noteworthy that the hearing examiner, having heard and observed the witnesses for both sides, was of the opinion that even in the Philadelphia area many women would understand from the advertisement that respondent itself had previously sold the same or

similar coats at the higher "were" prices. We are also convinced of this and so find.

But as we view it a finding favorable to respondent on this point would not save this particular advertisement. By the use of the word "were" prior sales by respondent itself are definitely indicated, and even though Philadelphia consumers may understand what is meant by a "sample sale", they can and will be misled by this advertisement into the erroneous assumption that the sale coats were samples of coats previously sold by Gimbel's. In other words, the representation "were" is not cleansed of deception by reason of being used in a "sample sale" advertisement regardless of the degree of sophistication found to exist in the consumers to whom the advertisement was directed.

On the basis of all of the evidence we are convinced that the price saving representations made in the advertisement are false and deceptive and find the charges made in subparagraphs (d) and (e) of paragraph 4 of the complaint to be sustained and proved.

The hearing examiner's dismissal of the fictitious pricing charges is a surprising result in view of his finding that the "... respondent's advertisement is misleading and deceptive as to its price and savings representations." While, at first reading, the decision appears to be founded upon the patently erroneous ground that a single advertisement cannot constitute "acts or practices" within the meaning of Section 5 of the Federal Trade Commission Act, a closer scrutiny reveals that the dismissal is based upon "all the facts and circumstances of this proceeding". It is apparent that the "facts and circumstances" which the hearing examiner had in mind were those adduced by respondent which purported to show that the advertisement in question was a single instance, inadvertent departure from an established policy of compliance with the law. As we view it, respondent's record of compliance is not so stainless as to force the conclusion that public protection does not require a cease and desist order. We have, in the past, issued two cease and desist orders against Gimbel Brothers, and on six different occasions this respondent has entered stipulations with the Commission in which it agreed, without confessing illegality, to cease certain actions the Commission deemed unlawful.

It is highly significant that the official responsible for approving respondent's advertisements testified that the "1/3 off" representation in the advertisement was proper. By so testifying, he indicated that future similar representations not based upon respondent's usual and regular prices would be approved. The purpose of an order to cease and desist is not to punish but to safeguard the public from future violations. Under the circumstances of this case, such an order is necessary and will issue.

The Failure to Maintain Records Charge

The final charge in the complaint is contained in paragraph 5, which reads:

Respondent in advertising fur products for sale as aforesaid made claims and representations respecting prices and reductions therefrom of fur products. Respondent in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based in violation of Rule 44(e) of said Rules and Regulations.

The hearing examiner found that the respondent's records disclose fully the facts upon which the advertised prices were based and dismissed the charge. With this conclusion, we agree.

At the time this complaint issued, the Commission interpreted Rule 44(e) as requiring that sellers making pricing representations must maintain records ". . . in sufficient detail and in such form as affirmatively to disclose the accuracy of the representations." (*Morton's Inc.*, Docket No. 6976, February 25, 1960). However, this Commission holding was appealed to a circuit court which held that the interpretation extended the rule beyond the scope of our rule-making power. (*Morton's Inc., et al. v. Federal Trade Commission*, 286 F. 2d 158 [1st Cir. 1961].) Thus the law as it now stands requires only that respondent keep such records as are needed to disclose the truth or falsity of the pricing representations made. In this matter, respondent kept and produced all records possible under the circumstances. Records of prior sales at the "were" prices were not produced for the simple reason that such sales had not been made.

We have noted that we are here principally concerned with a single advertisement which respondent caused to appear in a newspaper of interstate circulation. However, it violated the law in several respects. Moreover, prior to the institution of this proceeding this respondent was before the Commission charged with other violations of the Fur Products Labeling Act. There the Commission chose to not "issue a complaint"; instead it resorted to the utilization of the "ingenious" aspect of administrative process of affording respondent the opportunity of disposing of the charges through an informal stipulation providing for voluntary compliance with the law. On that occasion respondent in 1959 agreed to forthwith cease and desist certain false and misleading advertising claims in connection with the offering for sale, transportation, or distribution of any fur product made wholly or partly of fur. In that connection respondent agreed that its advertising of such products through labels on garments would clearly show the name or names of animals producing the furs as required by law and regulations, the name of the country of origin of imported

furs contained in a fur product, and accurately show the facts when any fur products offered for sale by respondent contain or are composed of bleached, dyed, or artificial fur, when such is the fact.

That was not the only instance where respondent was before the Commission on charges that it had violated the law through false and misleading advertising. On several earlier occasions in connection with the advertising, offering for sale and sale and distribution of other products, respondent entered into informal stipulations with the Federal Trade Commission to cease and desist the use of particular statements which the Commission deemed to be false and misleading. These repeated instances of the Commission's willingness and effort to guide respondent down the road to voluntary compliance with the requirements of the law apparently have not deterred it from the violation of law we have found here. Nevertheless, the Commission's willingness and efforts to bring about voluntary observance of the law are clear in its repeated contacts with the respondent in this case.

When one reviews the background and history of the Commission's repeated contacts with the respondent and its use of the informal administrative process, there is little or no cause to wonder why an informal administrative process was avoided in the Commission's disposition of respondent's clear violations of law which have been established in this instance.

It should be kept in mind that we are not here dealing with a violation of the Federal Trade Commission Act; instead we are here concerned with clear violations of the Fur Products Labeling Act. Congress made the provisions of that law specific for the protection of the consumer. In doing so, Congress did not provide the Commission with the flexibility and the latitude it has in the enforcement of Section 5 of the Federal Trade Commission Act.

The initial decision of the hearing examiner is vacated and set aside and in lieu thereof we are issuing our own findings of fact, conclusions and order to cease and desist.

Commissioner Elman dissented to the decision in this matter.

DISSENTING OPINION

By ELMAN, *Commissioner*:

I think the complaint should be dismissed.

I

At the risk of seeming to restate the obvious, I should like to preface what I have to say about this case by making some general observations on the Commission's so-called adjudicative function. By doing

so, my reasons for writing a dissent in a case which itself is of little importance may emerge more clearly.

The Federal Trade Commission is an administrative agency, not a court. Congress has given the Commission a broad range of powers to carry out its statutory responsibilities. One of these—and not necessarily the most effective or important—is the power to file complaints in formal proceedings looking to the issuance of cease-and-desist orders against particular respondents.

In one basic respect, court and agency are alike. Both are governed by the fundamental principle that in adjudicative proceedings the tribunal must decide the issues fairly, impartially, and solely on the basis of facts of record or within official notice.

In another basic respect, however, an agency is not at all like a court, even as to adjudicative proceedings. The difference between them in this regard reflects a distinctive characteristic of the administrative process.

A court is a passive, disinterested arbiter of controversies that happen to be presented to it by the parties. Its business is determined fortuitously, comprising matters brought to it by litigants, not those which it chooses to hear. If a case on its docket—no matter how it got there—presents a justiciable controversy, a court ordinarily has no choice but to decide it. A court may feel that its time and energy are being wasted on cases that for one reason or another ought not be before it, but—generally speaking—it cannot on that ground refuse to hear and decide them. Almost inevitably, therefore, judge-made law tends to evolve episodically and without symmetrical or even coherent design.

This characteristic of the judicial process was an important reason for the creation of administrative agencies. The job of an agency, unlike a court, is to regulate through *administration*, a unique process of governmental activity that requires positive, planned, and systematic effort to achieve the statutory objectives. The Federal Trade Commission is a clear example of this. In his address before both Houses of Congress on January 20, 1914, when President Wilson asked for the establishment of an interstate trade commission, he said it was needed “as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate * * *.”¹ As Mr. Justice Brandeis aptly characterized it in his notable opinion in the *Gratz* case,² the

¹ Congressional Record, 63d Cong., 2d Sess., p. 1963.

² *Federal Trade Commission v. Gratz*, 253 U.S. 421, 435 (dissent).

Commission represented a "new experiment on old lines" in dealing with unfair and restrictive trade practices.

Congress did not contemplate that the Commission would function, like a court, as a passive arbiter of controversies. It was not created merely to apply specific legal standards to isolated commercial acts. If Congress had had a design so narrow, it would hardly have thought it necessary to establish a new kind of governmental mechanism endowed with a comprehensive range of powers for "doing justice" where the processes of the courts are inadequate. Congress gave the Commission a most challenging assignment, expecting that it would be met by creative, resourceful, and, above all, planned affirmative action.

Congress deliberately chose, therefore, not to leave the Commission circumscribed with respect to selection of cases. It recognized that the Commission, if it were to fulfill its responsibilities as an agency and not a court, should have full control over the selection of cases on its docket. Congress knew that the extent of the benefits which the public would derive from the Commission would bear a direct relation to the public importance of the practices assailed.

Accordingly, it provided, in Section 5(b) of the Federal Trade Commission Act, that two determinations must be made by the Commission before it can issue a complaint: (1) that there is "reason to believe" a violation of law exists; and (2) that a proceeding by the Commission with respect to such violation "would be to the interest of the public." Thus, Congress directed the Commission not to proceed on a hit-or-miss basis, depending upon the complaints that arrive in its mail. It perceived that the way in which cases are selected may be as important as the way they are decided; and it told the Commission, in effect, that cases for complaint should be selected in order of priority of public importance.

Reviewing the Act's legislative history in his classic study, "The Federal Trade Commission" (1924), Gerard C. Henderson observed that one of the reasons why Congress adopted the "anomalous procedure" which makes the Commission "both complainant and judge" was that "the legislators feared that the Commission would be overwhelmed with a host of petty squabbles, and therefore provided that the formal machinery of the Commission could be set in motion only by the Commission itself, where the case seemed to be of sufficient importance." (pp. 328-29)

Throughout its history, from its earliest days to the present, the Commission has been charged with failing to fulfill this responsibility

imposed on it by Congress. Surveying its docket almost forty years ago, Henderson found:

... that the Commission is handling too many cases, and that it should exercise a greater discretion in selecting those cases which involve questions of public importance. It does not seem necessary that public funds should be employed to prosecute cases ... involving trivial or merely technical offenses, in which the public interest is not always easy to discern. There is constant complaint of the crowded condition of the Commission's docket. It takes months to bring a case to a hearing, and additional months to reach a decision. (p. 337)

When the Task Force of the Hoover Commission made its study in 1949, it found that time had only aggravated the conditions described by Henderson in 1924:

As the years have progressed, the Commission has become immersed in a multitude of petty problems. ... The Commission has largely become a passive judicial agency, waiting for cases to come up on the docket, under routinized procedures, without active responsibility for achieving statutory objectives.

In the selection of cases for its formal dockets, the Commission has long been guilty of prosecuting trivial and technical offenses and of failing to confine these dockets to cases of public importance. (pp. 125, 128)

It is common knowledge that the Commission is still beset by this problem. Its resources of manpower, money, and time are necessarily limited. The basis of selection of cases in which complaints are to be issued is thus of prime importance in determining how well the Commission does its job. Here, too, there operates a kind of Gresham's law. The trivial and inconsequential cases leave little room for, and tend to drive out, the substantial and significant.³

The public interest requires that the Commission not squander its resources by undertaking extensive and expensive formal proceedings where, as I believe is true here, the alleged violation arises out of a single, isolated, and extraordinary episode, having no significance beyond the particular circumstances, and where the violation is, at most, technical and legalistic in the invidious sense of those terms. It is error for the Commission to find initially that it is "to the interest of the public" to place such a case on its formal docket. It only compounds the error for it to fail to dismiss the complaint when

³ A perceptive scholar has pointed out that a basic weakness of the agencies "is that they are so overburdened with interlocutory and final decisions in cases that they do not have time, energy, or perhaps inclination to face large policy issues. It must be easy in the framework within which commissions operate to succumb to the pressure of detail. Someone has suggested that the administrator should be forewarned that the most important business is often not that in the in-basket. There is also the warning to the administrator that a heavy volume of work in his in-basket may be an index of poor work assignment." Emmette S. Redford, *National Regulatory Commissions: Need for a New Look*, 1959, p. 15.

the case is subsequently brought before the Commission for review. Issuance of an order cannot be justified on the theory that it is now too late to undo what has been done, or that, after long and costly proceedings, the Commission would "lose face" if it rescinded its original action issuing the complaint. Failure to dismiss a complaint in such circumstances serves to encourage rather than discourage the bringing of insignificant cases that drain the Commission's capacity to proceed in the significant cases raising substantial issues of law or policy which, in the public interest and for the guidance of businessmen and the bar, the Commission should undertake to resolve. Just as courts abhor hard cases because they make bad law, administrative agencies should abhor petty cases because they make no law.

The courts, which have found it necessary to keep reminding the Commission of the statutory requirement that only those proceedings should be brought that are "to the interest of the public" (e.g., *Federal Trade Commission v. Klesner*, 280 U.S. 19, 30), have understandably been reluctant to sit in judgment on the Commission's assessment of the public interest. Compare *Exposition Press, Inc., v. Federal Trade Commission*, decided by the Court of Appeals for the Second Circuit, November 6, 1961, with *Moretrench Corp. v. Federal Trade Commission*, 127 F. 2d 792, 795 (C.A. 2). In the *Exposition Press* case, Judge Friendly thought the lack of public interest so clear that he dissented from affirmance of the Commission's order, stating that "the government funds that have been spent on this proceeding, not to speak of the diversion of energies from more worthwhile tasks, outran any possible public benefit by a tremendous margin." (Slip op., at p. 81.)

Whatever the scope of judicial review in this respect, it is the responsibility of the Commission, primarily and principally if not exclusively, to determine whether issuance of a complaint is in the public interest. This responsibility, confronting us as it does every day of the Commission's workweek, cannot be shirked in any spirit of good-natured accommodation or deference to institutional habits. If, as I believe, major change must be made in the criteria governing selection of cases on the Commission's docket, it is the Commission which must make it. Individual members of the Commission cannot publicly announce the fact of, and reasons for, dissent when particular complaints are issued. Hence I have thought it appropriate to express here my reasons for believing that this is not the kind of case in which the public interest is served by issuance of a complaint.

II

I turn now to this particular case, which arises under the Fur Products Labeling Act, 65 Stat. 175, 15 U.S.C. 69. The benefits which the public may derive from that statute, like other regulatory acts, depend largely on how it is interpreted and applied by the responsible agency. Through practical flexibility and reasonableness in administration, the statute can be a useful instrument for protecting the consuming public against deceptive selling practices. On the other hand, if administered with artificial rigidity and literalness, the statute can impose needless burdens on business with no compensating protection of the public.

The Commission has recognized this in administering the Fur Products Labeling Act. For example, Section 5(a) provides, in absolute and unqualified terms, that "a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement * * * which is intended to aid, promote, or assist directly or indirectly" in its sale fails to reveal (1) the correct animal name, or (2) that the fur is used, (3) bleached or dyed, or (4) includes in substantial part paws, tails, bellies, or waste furs, or (5) contains an erroneous animal name, or (6) fails to reveal the country of origin of any imported furs.

Disregarding the literal language, the Commission has—as a matter of fair and sensible administration—relaxed the requirements of the statute to avoid unnecessary severity. For example, under Rule 38(b) promulgated by the Commission the country of origin need not be shown in advertising a group of furs, so long as the advertisement states the following: "Fur products labeled to show country of origin of imported furs." Similarly, Rule 38(c) gives *carte blanche* to omit all of the information required by Section 5(a) of the Act, where the advertising is "of an institutional type." The examples given are:

"X Fur Company
Famous for its Black Dyed Persian Lamb Since 1900," or
"X Company
Manufacturers of Fine Muskrat Coats,
Capes and Stoles."

It is hard to reconcile the reasonable, flexible approach followed in Rule 38 with the formalistic, technical approach taken in the Commission's opinion in this case. How, from the standpoint of protecting consumers against deception, can we distinguish between an advertisement stating generally that X Fur Company is "famous" for its furs, and one, also in general terms, that it is having a sale of furs "at 1/3 off"? The former seeks to sell by pointing to a tradition of quality, the latter by advertising a general price reduction. But, obviously,

both advertisements are "intended to aid, promote, or assist directly or indirectly" in the sale of furs and thus fall within the literal language of Section 5(a).

In the case of the one advertisement, the Commission construes the statute not to require that specific and detailed information be contained in the ad as to each and all of the particular garments offered for sale. Why should it construe the statute differently in the case of the other advertisement? The rationale of Rule 38 is that neither the statute nor its policy of protecting consumers against deception in the sale of furs requires that such particularized information be stated in *general* advertising. I cannot see why the Commission should be reluctant to apply that rationale here. As I understand the Commission's position, as expressed both in Rule 38 and in its opinion in this case, it would permit an advertisement "X Fur Company—Seller of Furs" even though the ad does not specifically disclose that some of the furs are dyed, bleached, or artificially colored. However, if X Fur Company advertises "All furs in stock on sale at 1/3 off," the Commission would apparently hold omission of such specific information unlawful. There may be a distinction between the two advertisements, but—from the standpoint of responsible administration of a statute designed to safeguard purchasers from false advertising—where is the difference?⁴

Further, the Commission's finding of a fictitious-pricing violation rests on a most strained reading of the record. Disregarding the principle that a finding should be based on all the evidence taken as a whole, the Commission resorts to patching together a case out of discrete bits and pieces. The opinion states that "if Gimbel's had in the

⁴ The majority opinion, pointing out that the statute here involved is not Section 5 of the Federal Trade Commission Act but the Fur Products Labeling Act, states that the latter is "specific" and does not afford the Commission "with the flexibility and latitude it has in the enforcement of Section 5 of the Federal Trade Commission Act." Significantly, the Commission stops short of denying that the Fur Act, like the Federal Trade Commission Act, is to be invoked in a formal proceeding only upon a determination that it would serve the public interest—a determination that, in my view, cannot be supported on these facts.

The Fur Products Labeling Act expressly states in Section 8(a) that its provisions "shall be enforced" by the Commission under the "procedure provided for in the Federal Trade Commission Act . . . in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act. . . ." Thus, it is irrelevant, for present purposes, that this proceeding was brought for violation of the Fur Act rather than Section 5 of the Federal Trade Commission Act.

Further, if the Fur Act deprives the Commission of "flexibility" and "latitude," how can we explain or justify the flexibility and latitude of administration reflected in Rule 38, which certainly cannot be reconciled with the "specific" provisions of Section 5(a) of the Fur Act. Have the "specific" provisions of Section 5(a) somehow become more specific since August 9, 1952, when Rule 38 (16 C.F.R. § 301.38) was promulgated by the Commission?

recent regular course of business sold production models of the advertised coats at the higher ('were') prices, its advertisement would be neither misleading nor deceptive." This, the opinion declares, is the "decisive point." As thus stated, there seems to be an implication, not expressly disavowed, that the burden was on Gimbel's to come forward with facts proving that the advertised price claims were truthful. It is elementary, however, that the burden was on Commission counsel to present evidence to substantiate the complaint's allegations that these claims were false and misleading.

The opinion labors mightily to overcome the deficiency of proof in the record on this issue. It states, on the one hand, that "[i]f the hearing examiner's conclusion that this issue was not met is correct, it would appear that he was instrumental in creating the hiatus" by stopping complaint counsel's cross-examination of a witness. This may have been error on the examiner's part, suggesting the possibility of a remand in order to amplify the record; but if there is a hiatus in the record as it now stands, we cannot properly find that a violation has been proved. But the Commission concludes, "on the basis of all the evidence," that "this issue was met." Its conclusion seems to rest on a dubious string of inferences drawn from remarks of the hearing examiner, silence by respondent's counsel, and an admittedly non-responsive answer made by a witness. With all deference, I am bound to say that the obvious gap in the evidence on this issue, which it was the burden of Commission counsel to present, cannot be filled simply by stating, "on the basis of all the evidence," that it does not exist.

Finally, the "*seriatim*" treatment of the charges inflates the apparent importance of the case far out of proportion. The opinion states that the case is "primarily concerned" with a single newspaper advertisement. Actually, that advertisement, which appeared in the Philadelphia *Evening Bulletin* for September 29, 1959, is all there is in the case, despite the fact that respondent placed over 75,000 lines of newspaper advertising relating to fur products in the same year, and almost 65,000 in the previous year. And, as the hearing examiner found, the advertisement appeared as the result of a solitary act of inadvertance, contrary to respondent's elaborately enforced practice of scrupulous adherence to the statutory requirements in advertising furs. Moreover, the minor loophole in respondent's advertising procedures that then existed has long since been plugged by a requirement that all fur adds must now be cleared by a high-ranking official specifically

charged with responsibility for assuring compliance with the Act.⁵

The peculiar combination of circumstances that produced this particular advertisement is not likely to be repeated, and it is hard to see how the entry of a cease-and-desist order could have any substantial effect in making any such ads less likely in the future. The purpose of a cease-and-desist order is not to punish but to prevent future violations. If, as a practical matter, entry of an order will add little or nothing by way of prevention, how is the public benefitted?

The Commission's portrayal of respondent as having a proclivity for fur advertising violations is overdrawn. First, the stipulation under the Fur Act which it cites referred to Gimbel's of New York; this case arose out of an advertisement by Gimbel's Philadelphia store. The record indicates, as respondent's counsel stated at the oral argument, that Gimbel's various stores "are pretty much autonomously operated with respect to advertising and merchandising policies." Even more important, the stipulation (No. 9245, approved November 24, 1959) did not deal with advertising at all, but only with labeling and invoicing. It is true, in a general sense, that labeling is often considered a part of advertising, insofar as it may assist in selling the product. But both the Fur Act and our orders issued under it treat labeling, invoicing, and advertising as distinct matters.

Moreover, when respondent has shown, as it has here, that its procedures for screening advertising (as distinguished from invoicing and labeling) negate the likelihood of future advertising violations, it is no justification for a cease-and-desist order directed only against *advertising* to show that there is a danger of future invoicing or labeling violations. Conversely, since there is no proof here of invoicing or labeling violations, we have no reason to doubt respondent's assurance that it has scrupulously conformed to the terms of the stipulation. Apparently, then, the Commission infers a propensity to disobey one

⁵ The hearing examiner made the following finding:

"Following the publication of this advertisement, and prior to the issuance of the complaint in this case, respondent tightened its policy rules by requiring all fur advertisements to be cleared through the office of the Assistant to the Comptroller of the Philadelphia store, this office being charged with responsibility for the store's compliance with all matters involving governmental regulations. The record shows that respondent has on many occasions conferred with Federal Trade Commission personnel for interpretations and suggestions, and has always complied with the suggestions and recommendations received. The respondent has adopted and maintains a firm policy to comply with the laws and regulations administered by the Federal Trade Commission, and has periodically so instructed its employees. This, the respondent asserts, is motivated to accord with the company's interest in maintaining good customer relationships. It was also stated in the record that it was and is against company policy to use the word 'were' in comparative pricing advertisements, and that 'were' had never been so used prior to September 29, 1959, and has not been so used since that time."

provision of the law from irrelevant facts which may even suggest a propensity to obey another.⁶

III

I do not mean to suggest by what I have said that the Commission should stand idly by, ignoring violations of law simply because they are of relatively minor significance. To object to swatting flies with a sledge-hammer is not to object to swatting them at all. The Commission is not confined to a choice between "issue a complaint" or "file and forget." The genius of the administrative process is that it affords flexibility of action in dealing with problems. The Commission may determine, for example, that although formal adjudicative proceedings would involve a disproportionate expenditure of resources, the law and the public interest would be fully served through some other kind of administrative action, *e.g.*, informal or voluntary compliance procedures, rulemaking, industry guidance, publicizing reports or studies, reference to other federal or local agencies also having jurisdiction in the matter, etc.

In his *Exposition Press* dissent, Judge Friendly characterized the opinion of Mr. Justice Brandeis in the *Klesner* case as "a summons to the Commission to do what it had been created to do, to get on with 'the great purpose of the act,' . . ." (Slip op., at p. 81). Today's decision suggests that that summons is still timely.

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 May 13, 1960, issued and subsequently served its complaint in this proceeding upon respondent, charging it with violations of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder. 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 January 31, 1961, the hearing examiner held that none of the complaint's allegations were sustained and ordered it entirely dismissed.

The Commission having considered the appeal by complaint counsel, the opposition thereto by respondent and the entire record in this proceeding, and having determined that the initial decision should

⁶ The irrelevance of stipulations entered under other statutes, mentioned by the Commission, is even more apparent; they tell us nothing of Gimbel's fur merchandising practices and they support no inferences concerning the likelihood of future fur advertising violations, since Gimbel's procedures for screening fur ads are separate and distinct.

be vacated and set aside, 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

1. Respondent, Gimbel Brothers, is a corporation organized under the laws of the State of New York, with its principal office located at 34th Street and Broadway, New York, N.Y.

2. Gimbel Brothers is primarily a department store retailer selling to the public a wide variety of goods, including women's fur-trimmed coats. Respondent's department stores are located in several sections of the country, including New York, N.Y.; Milwaukee, Wis.; and Pittsburgh and Philadelphia, Pa.

3. Subsequent to August 9, 1952, the effective date of the Fur Products Labeling Act, respondent has been, and is now, engaged in the introduction into commerce and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which have been made, in whole or in part, of fur which had been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in said Fur Products Labeling Act.

4. To aid, promote and assist it in the sale of its fur products, respondent causes advertisements prepared by it to appear and be disseminated in newspapers having substantial circulation in states other than the states in which respondent's stores are located. One such newspaper utilized by respondent is *The Evening Bulletin*, which is published in Philadelphia, Pa., but has wide circulation in other states, including the State of New Jersey.

5. This matter is primarily concerned with an advertisement which respondent caused to appear in said *The Evening Bulletin* edition of September 29, 1959. The following is a reproduction of the advertisement in question: (See p. 362a)

6. The women's coats depicted and described in the advertisement are fur products as that term is defined in Section 2(d) of the Fur Products Labeling Act.

7. Among the coats offered for sale in the advertisement in question were coats trimmed with dyed white fox and natural Norwegian blue fox. The correct names of the animals which produced the furs on these coats are not disclosed by the advertisement in question.

8. Among the coats offered for sale in the advertisement in question were coats trimmed with dyed mink, beaver, and white fox furs. The

fact that said furs were bleached, dyed, or otherwise artificially colored is not disclosed by the advertisement.

9. Among the coats offered for sale in the advertisement were coats trimmed with beaver which originated in Canada and natural blue fox which originated in Norway. Respondent did not disclose in the advertisement the countries of origin of said imported furs. The foreign origin disclosure made in another of respondent's advertisements which appeared on an adjoining page of the newspaper referred only to the furs advertised in that advertisement and was insufficient to inform the public of the foreign origin of the fur products offered in the advertisement in question.

10. The coats depicted and described in the advertisement were purchased by respondent from several manufacturers at prices one-third less than the prices charged by said manufacturers to other retailers for production models of the same coats. The coats depicted and described in the advertisement were not production models but were samples individually made to show to prospective wholesale buyers.

11. The prices at which the advertisement in question offered the coats to the public, that is, "now" prices, reflected respondent's customary markup for goods of this type of $66\frac{2}{3}$ percent of its purchase cost and resulted in its receipt of its customary profit of approximately 40 per cent of the retail price.

12. Respondent had not in the recent regular course of its business sold sample coats of the type described in its advertisement or production model coats patterned after said sample coats at the higher "were" prices set out in said advertisement.

13. Through use of the terminology " $\frac{1}{3}$ off" and the words "were" and "now", respondent represented, contrary to fact, that the higher "were" prices set out in its advertisement were the regular or usual prices charged by respondent for fur products of the type depicted in the advertisement in the recent regular course of its business. Through use of said terminology, it represented and implied contrary to fact that customers purchasing the fur products offered at the "now" prices would effect an approximate $33\frac{1}{3}$ per cent saving from the prices at which respondent had sold similar fur products in the recent regular course of its business.

14. Respondent has maintained records disclosing the facts upon which its pricing representations are based consisting solely of the invoices of the manufacturers from whom the advertised coats were purchased. Said records do not support the price representations made in respondent's advertisement.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent.

2. This proceeding is in the public interest.

3. The aforesaid acts and practices of the respondents are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and, as specified under the provisions of said Act, constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

4. The charge made in paragraph 5 of the complaint that respondent had not maintained full and adequate records disclosing the facts upon which its pricing claims were based was not sustained and the hearing examiner's dismissal of this charge was proper and correct.

ORDER

It is ordered, That respondent, Gimbel Brothers, a corporation, and its officers, and respondent's 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 fur products; or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which are 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:

A. 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:

1. Fails to disclose:

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

(b) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur;

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

2. Represents, directly or by implication, that the regular or usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of business.

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3. Misrepresents in any manner the savings available to purchasers of respondent's fur products.

It is further ordered, That the charge made in paragraph 5 of the complaint be, and it hereby is, dismissed.

It is further ordered, That respondent, Gimbel Brothers, shall