

which they have complied with the order to cease and desist.

IN THE MATTER OF

BERGER, SAUL & GARFUNKEL FURS, INC., ET AL.

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

Docket C-95. Complaint, Mar. 14, 1962—Decision, Mar. 14, 1962

Consent order requiring manufacturing furriers in New York City to cease violating the Fur Products Labeling Act by labeling and invoicing artificially colored furs as natural; failing to show on labels and invoices when furs were bleached or dyed; and representing falsely that they had a continuing guaranty on file with the Commission.

Complaint

60 F.T.C.

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 Berger, Saul & Garfunkel Furs, Inc., a corporation, and Alfred Saul, Osias Garfunkel, and Henry Berger, individually and as officers of said corporation, hereinafter referred to as respondents, have 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. Respondent Berger, Saul & Garfunkel Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 214 West 29th Street, New York, N.Y.

Respondents Alfred Saul, Osias Garfunkel and Henry Berger are president, vice president, and secretary and treasurer, respectively, of the said corporate respondent and control, direct and formulate the acts, practices and policies of the said corporate respondent. Their office and principal place of business is the same as that of the said corporate respondent.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which has 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 misbranded or otherwise falsely or deceptively labeled in that said fur products were labeled to show that the fur contained therein was natural, when in fact such fur was bleached, dyed or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were 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.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to show that the fur contained in the fur products was bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when in fact such fur was bleached, dyed or otherwise artificially colored, in violation of Section 5(b) (2) of the Fur Products Labeling Act.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required under the provisions of Section 5(b) (1) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices pertaining to such fur products which failed to disclose that the fur contained in the fur products was bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 7. Respondents furnished false guaranties under Section 10(b) of the Fur Products Labeling Act with respect to certain of their fur products by falsely representing in writing that they had a continuing guaranty on file with the Federal Trade Commission when said respondents in furnishing such guaranties had reason to believe that the fur products so falsely guaranteed would be sold, transported and distributed in commerce, in violation of Rule 48(c) of the Rules and Regulations promulgated under the Fur Products Labeling Act and Section 10(b) of said Act.

PAR. 8. The aforesaid acts and practices of respondents, 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 and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Berger, Saul & Garfunkel Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 214 West 29th Street, New York, N.Y.

Respondents Alfred Saul, Osias Garfunkel and Henry Berger are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

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

1. Misbranding fur products by:

A. Representing directly or by implication on labels that the fur contained in fur products is natural, when such is not the fact.

B. Failing to affix labels to fur products showing in words and figures plainly legible all the information required to be disclosed by

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each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Falsely or deceptively invoicing fur products by:

A. Representing directly or by implication on invoices that the fur contained in fur products is natural, when such is not the fact.

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

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

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

KIMBER FARMS, INC., ET AL.

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

Docket C-96. Complaint, Mar. 14, 1962—Decision, Mar. 14, 1962

Consent order requiring the Fremont, Calif., developer of hybrid chickens known as "Kimberchiks" produced by crossing different white leghorn strains, to cease restricting its dealers or distributors as to where or to whom they might sell its poultry, fixing their prices, inducing them not to handle other such chickens, and impeding expansion of their business.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Kimber Farms, Inc., and Kimberchiks, Inc., sometimes hereinafter referred to as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint, stating its charges in this respect as follows:

PARAGRAPH 1. Respondent Kimber Farms, Inc., is a corporation organized, existing and doing business under and by virtue of the

laws of the State of California with its office and principal place of business at Fremont, Calif. (P.O. Box 2008). Respondent Kimberchiks, Inc., is also a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business at Niles, Calif. Respondent Kimberchiks, Inc., is a wholly-owned subsidiary of respondent Kimber Farms, Inc.

PAR. 2. Respondent Kimber Farms, Inc., for a number of years has been engaged in the business of producing and selling poultry and poultry products including different cross strains or cross breeds of live chicks which are sold, advertised and distributed under the registered trademark or trade name of "Kimberchiks". Most Kimberchiks are cross strains of the white leghorn type and are bred by respondent to be raised as egg layers although a broiler or meat type bird is available. The eggs laid by such chickens are white as distinguished from brown or tinted eggs.

Kimberchiks are produced by crossing different strains or breeds of chickens and are thus hybrid birds which, though capable of reproducing, cannot reproduce themselves. Respondent Kimber Farms, Inc. has expended substantial sums of money and gone to considerable pains, and continues so to do, to develop and maintain the parent stock from which the various types of Kimberchiks are derived in an attempt to produce birds which, when mature, will approach optimum performance as white egg layers.

Prior to about 1955 all or most sales of respondent Kimber Farms' poultry products, including Kimberchiks, were made by that respondent to purchasers in the State of California. In or about 1955, however, respondent formed or caused to be formed respondent Kimberchiks, Inc. Sales, advertising and distribution of Kimberchiks are currently, and for some years past have been, effected by respondent Kimber Farms, Inc., through respondent Kimberchiks, Inc. All acts and practices hereinafter attributed to respondent Kimber Farms, Inc. include those performed or followed through or by its wholly-owned subsidiary respondent Kimberchiks, Inc., even though not specifically so alleged.

Direct sales and shipments of Kimberchiks by respondent Kimber Farms, Inc., through Kimberchiks, Inc., are and have been made mostly to purchasers in the State of California. However, respondents achieve a nationwide distribution of Kimberchiks through franchise arrangements with independent hatchery operators in more than 30 states.

Such franchise arrangements are entered into by respondents through Kimberchiks, Inc., with selected hatcheries through "Association Hatchery Agreement[s]". Pursuant to such agreements respondents sell to the hatcheries in the form of live chicks the parent stock from which Kimberchiks are produced. The hatcheries raise these parent stock chicks to maturity, breed them, and sell the Kimberchiks resulting from such breeding to poultrymen throughout the country. However, under the terms of the agreements, for each female Kimberchik so sold or held for further growth, each associate hatchery is required to remit a royalty of four cents to respondent Kimberchiks, Inc.

Respondents occupy a prominent place in their selected field and growth over the last few years has been substantial. Respondents have more than 50 associate hatcheries in more than 30 states and in addition have hatcheries in Greece, Spain, France, Canada, Chile, Peru, Venezuela and Mexico. Respondents' American franchised hatcheries, exclusive of those in California, sold more than 15,500,000 Kimberchiks during 1960 for which respondents received in excess of \$650,000 in royalty payments, while the total figure for such payments from all associates both foreign and domestic exceeded \$1,390,000. In 1955 respondents' income from poultry and poultry products approximated \$2,507,000 while the same figure for 1960 was \$4,414,000. Sales of Kimberchiks parent stock to associate hatcheries in the United States increased from about 20,000 in 1955, when the associate hatchery system was inaugurated, to more than 824,000 in 1960. During the period from January through September 1960, straight run sales of Kimberchiks reached or exceeded 10% of the total straight run of light breed chicks hatched in 13 states, exclusive of California, and in five of these states the figure exceeded 20%. The corresponding percentage for the State of California approached or exceeded 25%, while in advertising they have circulated respondents claim a sales figure of as high as 38% of the annual hatch of all light breeds in a state. During 1960 aggregate straight run sales of Kimberchiks were about 52,000,000 which approached or exceeded such sales of any other strain of chicken.

PAR. 3. Respondent Kimber Farms, Inc., in the course and conduct of its business of selling and distributing Kimberchiks through respondent Kimberchiks, Inc., (a) ships or causes to be shipped the parent stock thereof and, on occasion Kimberchiks themselves, from the state or states where such stock and Kimberchiks are produced to various states other than the state of production; (b) maintains a force of field representatives who call upon the various associate hatcheries from time to time; (c) requires periodic reports from such hatcheries as to

eggs hatched and sales of Kimberchiks made together with an accounting for payments due upon female Kimberchiks sold or held for further growth; (d) maintains a constant stream of communication between itself and many associate hatcheries in various states; (e) enters its Kimberchiks in numerous egg laying tests conducted in California and other states and ships or causes such Kimberchiks to be shipped from California to such other states where such tests are conducted; (f) advertises Kimberchiks in trade and industry journals circulated throughout the United States; and (g) sells and distributes from California to associate hatcheries in many other states various aids to be employed in the advertising, promotion and sale of Kimberchiks including brochures, booklets and catalogues for circulation among customers or potential customers therefor. Respondents are now and for a number of years have been engaged in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 4. Respondent Kimber Farms, Inc., through respondent Kimberchiks, Inc., in the course and conduct of selling and distributing Kimberchiks is in competition in commerce with other producers and distributors of the same or similar chickens not parties hereto, including associate hatcheries, some of which are also engaged in such competition with one another and others not parties hereto, except to the extent that actual and potential competition has been hindered, lessened, restricted, restrained and eliminated by the acts and practices hereinafter alleged.

PAR. 5. The standard, typical or representative "Associate Hatchery Agreement" by which respondent Kimber Farms, Inc., through respondent Kimberchiks, Inc., franchises associated hatcheries to breed and sell Kimberchiks is a bilateral contract wherein the parties thereto agree *inter alia*, that:

(a) The hatchery will not sell Kimberchiks in the State of California and respondent Kimberchiks, Inc., will not sell Kimberchiks in the hatchery's territory.

(b) The hatchery will sell Kimberchiks only at prices, including discounts, which have been approved in writing by respondent Kimberchiks, Inc.

(c) The hatchery will not establish any branch hatchery more than 20 miles from its present location without written consent of respondent Kimberchiks, Inc.

(d) The hatchery will not actively solicit orders for Kimberchiks by such devices as salesmen and dealers in territories assigned to other associate hatcheries.

There are also incorporated in the standard or representative associate hatchery agreement provisions relating to the limitation of egg strain chicks which a hatchery may sell and the territory wherein it may actively solicit orders for Kimberchiks. The terms and conditions of these provisions of the agreement vary from hatchery to hatchery.

All or almost all of the hatcheries with which respondents have associated themselves were going concerns at the time such association commenced, and respondents have therefore allowed them a reasonable period within which to dispose of the strain or breed of chicken or chickens formerly handled, and have raised no serious objection to an associate handling and selling chickens other than light breed white egg strain types. However, most of the hatcheries now associated with respondents have agreed to sell only Kimberchiks.

The sales territory which is allocated to an associate hatchery for active solicitation varies with the section of the country involved. In some instances no specific restriction is imposed, aside from the covenant not to sell in California, or the territory assigned may encompass very substantial areas such as an entire state or states, generally with the understanding that as more hatcheries are franchised in the particular section of the country involved some division of territory may be necessary. Under other circumstances a hatchery's exclusive area for active sales solicitation may be narrowly spelled out in terms of portions of a state, states or counties, the boundaries of which may be delineated by highways and state and county lines.

PAR. 6. Respondent Kimber Farms, Inc., through respondent Kimberchiks, Inc., has for a number of years last past engaged in fixing the prices, including discount terms, at which Kimberchiks may be sold by its associate hatcheries. This is accomplished by respondents by periodically transmitting to such hatcheries lists specifying prices to be charged for Kimberchiks, and discounts available for submitting orders and payment in advance and cumulative quantity purchases within a given time.

On occasion respondent Kimberchiks, Inc., has functioned as a focal point for price fixing by associate hatcheries in particular sections of the country by urging them to submit proposed prices for Kimberchiks to it, and thereafter issuing a list of prices based in large part upon a composite of, or compromise between, the prices suggested to it by the hatcheries located in the area or areas involved. Respondent Kimberchiks, Inc., has from time-to-time urged its associate hatcheries to exchange price lists and pricing information with one another and to compromise their differences over sales territories. Respondent

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Kimberchiks, Inc., has consistently preached, advised and advocated against competition, particularly price competition, among and between its associate hatcheries.

Respondent Kimber Farms, Inc., through Kimberchiks, Inc., has taken measures to enforce the provisions of associate hatchery agreements. Among the measures so taken were (a) requiring a hatchery to show cause why its franchise should not be terminated for soliciting business outside of its allocated sales territory and at less than the approved price; (b) serving written notice upon a hatchery that it and another hatchery were to make no sales whatsoever across a specified territorial line as of a certain date, and that in the event such conditions were unsatisfactory to the hatchery the letter whereby such notice was given should also serve to alert the hatchery that its contract would be cancelled not later than a date certain; (c) terminating an agreement with an associate hatchery when it became known to respondent that the former was handling and promoting or planning to handle and promote white leghorn type chickens other than Kimberchiks; and (d) refusing to allow one associate hatchery to make sales of Kimberchiks or maintain a dealer therefor in the territory assigned to another for active solicitation of orders thereof.

PAR. 7. The capacity, tendency and effect of respondents' acts and practices as hereinbefore alleged, the franchise agreements with associate hatcheries, and the steps taken by respondents to maintain and enforce the terms and conditions of such agreements, either individually or collectively, has been, is now, or may be, to substantially lessen, restrain, restrict and prevent competition, including price competition, between and among respondents and their associate hatcheries, between and among such associate hatcheries or some of them, and between and among respondents, their associate hatcheries and others not parties hereto, in the sale and distribution of Kimberchiks, other chickens or both, particularly in the following respects:

1. Respondents have eliminated competition in the sale of Kimberchiks between themselves and their associate hatcheries by agreeing with such hatcheries not to sell Kimberchiks in their allocated sales territories and exacting agreements from them that they will not so sell in California.

2. Respondents have eliminated or severely restricted competition between and among their associate hatcheries or some of them and between and among such hatcheries and other vendors of chickens, by establishing, fixing and maintaining the prices at which sales of Kimberchiks by such hatcheries may be made in various sections of the country, and such prices have been so established, fixed and main-

tained beyond the exception provided by the McGuire Amendment to Section 5(a) of the Federal Trade Commission Act.

3. Respondents have eliminated or severely restricted competition between and among their associate hatcheries, or some of them, by allocating and assigning exclusive sales territories to such hatcheries, and refusing to permit other associate hatcheries to solicit sales of Kimberchiks in such territories or maintain dealers therein.

4. Respondents as a condition to franchising their associate hatcheries, or some of them, have required that they agree to ultimately refrain from handling any light breed white egg producing chickens except Kimberchiks, which has the tendency and capacity to foreclose producers, distributors and vendors of other chickens of such breed and egg producing characteristics who are or may be in competition with respondents in the production, distribution and sale thereof, from the facilities afforded by and through such associate hatcheries which have in the aggregate a substantial capacity for the production, distribution and sale of such chickens.

5. Respondents have restricted, restrained, eliminated or impeded competition in that they have required an associate hatchery to show cause why its franchise should not be cancelled for selling Kimberchiks outside of its allocated sales territory and at less than prices approved by respondents; have delivered an ultimatum in writing to a hatchery that it was to make no sales whatsoever across pertinent territorial lines and that in the event such conditions were unsatisfactory and unacceptable said ultimatum should serve as notice of franchise cancellation no later than a date specified; and have terminated an agreement with a hatchery upon learning that the latter was promoting and handling or preparing to promote and handle white leghorn type chickens other than Kimberchiks.

PAR. 8. Each and all of respondents' acts and practices, the terms and conditions of their franchise agreements with associate hatcheries, and the steps they have taken to effect compliance with such terms and conditions, as hereinbefore alleged in paragraphs five, six and seven, constitutes an unfair act and practice or unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy

of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Kimber Farms, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business at Fremont, Calif. (P.O. Box 2008).

Respondent, Kimberchiks, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business at Niles, Calif.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent, Kimber Farms, Inc., a corporation, and respondent Kimberchiks, Inc., a corporation, their officers, directors, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of poultry and poultry products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Putting into effect, maintaining or enforcing any merchandising or distribution plan or policy under which contracts, agreements or understandings are entered into with dealers in or distributors of such poultry and poultry products or with dealers in or distributors of poultry and poultry products which are or may be obtained by breeding parent stock poultry sold, leased or otherwise made available by or through respondents which have the purpose or effect of:

(a) Limiting, allocating or restricting the geographical area in which, or the persons to whom, any dealer or distributor may sell or solicit sales of such poultry and poultry products; or

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(b) Fixing, establishing or maintaining the prices at which such poultry and poultry products may be sold by any dealers therein or distributors thereof; or

(c) Requiring or inducing, or attempting so to do, any dealer or distributor of such poultry and poultry products to refrain from selling or soliciting sales of such poultry and poultry products in any specified geographical area or to or from any specified persons.

(a) Requiring any dealer or distributor of such poultry and poultry products to refrain from handling, dealing in or distributing any other poultry and poultry products; or

(e) Impeding, restricting or limiting in any way, or attempting so to do, the expansion of the business of any dealer in or distributor of such poultry and poultry products.

2. Entering into, continuing or enforcing, or attempting to enforce, any contract, agreement or understanding with any dealer in or distributor of their poultry products, or the poultry and poultry products which are or may be obtained by breeding poultry sold, leased or otherwise made available by or through respondents, for the purpose or with the effect of establishing or maintaining any merchandising or distribution plan or policy prohibited by paragraph 1 of this order.

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.