

ELDER AND JOHNSTON COMPANY ET AL.

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

Docket 8481. Complaint, Apr. 24, 1962—Decision, Dec. 11, 1962

Order dismissing—following merger of respondent furrier with a corporation operating seven or eight retail department stores in Dayton, Ohio, and major organizational changes—complaint charging misbranding, false invoicing, and false advertising in violation of the Fur Products Labeling Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority

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vested in it by said Acts, the Federal Trade Commission having reason to believe that Elder and Johnston Company, a corporation, and Thomas Marshall, Robert Marshall and Phillip Pond, individually and as officers of Elder and Johnston Company, 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 Elder and Johnston Company is a corporation, organized, existing and doing business by virtue of the laws of the State of Ohio, with its office and principal place of business located at 111 South Main Street, Dayton, Ohio.

Respondents Thomas Marshall, Robert Marshall, and Phillip Pond* are president, vice president and secretary-treasurer, respectively, of Elder and Johnston Company. They formulate, control and direct the acts, practices and policies of said corporate respondent including the acts and practices complained of herein. Their office and place of business is the same as that of the 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 sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which 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 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:

1. To disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.
2. To show the name, or other identification issued and registered by the Commission, of one or more of the persons who manufactured such fur product for introduction into commerce, introduced it into com-

*The correct name is Philip R. Pond.

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merce, sold it in commerce, advertised or offered it for sale, in commerce, or transported or distributed it in commerce.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was mingled with nonrequired information, in violation of Rule 29(a) of said Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not completely set out on one side of labels, in violation of Rule 29(a) of said Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on labels with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

(d) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices pertaining to such fur products which failed:

(1) To disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

(2) To show the country of origin of the imported furs used in the fur product.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

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(b) The term "Dyed Mouton Lamb" was not set forth in the manner required, in violation of Rule 9 of said Rules and Regulations.

(c) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondents caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements, concerning 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. 8. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisement of respondents, which appear in issues of the Journal Herald and the Dayton Daily News, newspapers published in the city of Dayton, State of Ohio, 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, respondents 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 product 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 that fur products were composed in whole or in substantial part of flanks, when such was the fact, in violation of Rule 20(a) of the Rules and Regulations promulgated under the Fur Products Labeling Act.

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

(e) Failed to set forth the term "Persian Lamb" in the manner required, in violation of Rule 8 of said Rules and Regulations.

(f) Failed to set forth the term "Dyed Mouton Lamb" in the manner required, in violation of Rule 9 of said Rules and Regulations.

(g) Failed to set forth the term "Dyed Broadtail-Processed Lamb"

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in the manner required, in violation of Rule 10 of said Rules and Regulations.

PAR. 9. 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.

Mr. Aaron R. Fodiman for the Commission.

Mr. Jerome Goldman, of Cincinnati, Ohio, for respondents Elder and Johnston Company and Thomas Marshall.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

The Federal Trade Commission, on April 24, 1962, issued and subsequently served its complaint, charging the respondents named in the caption hereof with violations of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder by misbranding, false invoicing and false advertising of fur products. Answer to the complaint was filed on June 1, 1962, on behalf of the corporate respondent and Thomas Marshall. No answer to the complaint was filed by Robert Marshall. Motion to dismiss the complaint as to Philip R. Pond (erroneously named in the complaint as Phillip Pond), filed May 24, 1962, which was not opposed by counsel supporting the complaint, was granted by order of June 7, 1962.

A prehearing conference was held on August 17, 1962, and, as a result of information there developed, counsel supporting the complaint requested, and was allowed, time within which to move for amendment of the complaint or other appropriate action. On October 10, 1962, counsel supporting the complaint filed a motion for dismissal of the complaint as to all parties, and no opposition thereto has been filed.

The record herein consists of the complaint, answer thereto, transcript of the prehearing conference, motions and orders. Attached to the motion to dismiss are three affidavits and a letter, which also constitute a part of the record. Having considered the record herein, and being of the opinion that the motion to dismiss the complaint should be granted, the hearing examiner makes this initial decision pursuant to Section 4.6(e) of the Commission's Rules of Practice.

FINDINGS OF FACT

1. Respondent Elder and Johnston Company was incorporated under the laws of the State of Ohio, and its office and principal place of business is located at 111 South Main Street, Dayton, Ohio. On

January 29, 1962, Elder and Johnston Company and Beerman Stores, Inc., entered into a merger agreement whereby Elder and Johnston Company was the continuing corporation. On May 19, 1962, Elder and Johnston Company changed its name to The Elder-Beerman Stores Corp. At the time of the merger the shareholders of Beerman Stores, Inc., acquired substantial majority control of the corporation resulting from the merger.

2. Prior to the merger, respondent Elder and Johnston Company operated one large retail department store in Dayton, Ohio, with an annual sales volume of approximately \$10,000,000, and Beerman Stores, Inc., operated about seven or eight retail department stores in Dayton, Ohio, with a total annual sales volume of about \$12,000,000 to \$15,000,000. All of these stores are now operated by the corporation resulting from the merger. The charges herein relate only to the acts and practices of the single store previously operated by Elder and Johnston Company, and to the activities of the individual respondents in connection therewith.

3. Respondent Thomas Marshall, prior to the aforesaid merger, was the President and chief executive officer of respondent Elder and Johnston Company; and he is now President of The Elder-Beerman Stores Corp., but is not its chief executive officer. The chief executive officer of The Elder-Beerman Stores Corp. is Arthur Beerman, Chairman of the Board, who, prior to the merger, did not own any stock in, and was not otherwise connected with, respondent Elder and Johnston Company.

4. Respondent Robert Marshall, prior to the aforesaid merger, was a vice president of respondent Elder and Johnston Company, and was a director and substantial owner of voting stock in said corporation. He is not connected in any capacity with The Elder-Beerman Stores Corp., and has no voting stock in said Company.

5. Respondent Philip R. Pond (erroneously named in the complaint as Phillip Pond) was employed by the corporate respondent from December 1956 until November 1961, when he resigned to enter the Investment Counsel field. During that period he had no responsibility or authority with respect to advertising, merchandise labeling or salescheck writing by the corporate respondent; and he was not in a position to formulate, control or direct any of the acts, practices, or policies which may have contributed to any alleged violation of law involved in this proceeding. On June 7, 1962, the complaint was dismissed as to him.

6. After the aforesaid merger, and at the present time, over 80% of the voting stock of The Elder-Beerman Stores Corp. was and is

owned by Arthur Beerman and relatives, trusts, and corporations in which he or they are interested. Prior to said merger, and during the period in which it is contended that the violations alleged in the complaint herein occurred, neither Arthur Beerman nor any of his relatives or corporations in which he or they are interested had any stock at all in the corporate respondent. None of the officers of the corporate respondent prior to the aforesaid merger is now connected with The Elder-Beerman Stores Corp., except Thomas Marshall, who is its President, but not its chief executive officer.

7. It is asserted that the acts and practices upon which the violations of law alleged in the complaint are based occurred in 1960 and in January and February 1961, and counsel supporting the complaint does not propose to offer evidence of later violations. During that period, the fur department of the corporate respondent was operated by the company, but it is now being operated as a leased department by another company. There is no indication that any of the alleged violations occurred in the fur department of the corporate respondent during its operation as a leased department.

8. The persons who were buyers of, and in charge of advertising and selling, garments having fur trimmings during the period covered by the alleged violations are no longer with the company. They have been replaced by others who have been thoroughly acquainted with the requirements of the Fur Products Labeling Act and the Rules and Regulations thereunder, and who have been warned to comply therewith by company management.

9. During the time he was chief executive officer of the corporate respondent, individual respondent Thomas Marshall had no personal knowledge of the record keeping, labeling, and invoicing practices in the fur department or in the department in which coats with fur trimmings were sold. He had, however, given general instructions that all Federal laws and regulations with regard to fur products should be complied with, and was unaware of any failure in that respect.

10. During the time he was a vice president of the corporate respondent, individual respondent Robert Marshall did not attempt to supervise the fur department or the department handling coats with fur trimmings, other than to give instructions that the Fur Products Labeling Act and Rules and Regulations thereunder were to be complied with. He left it up to the department heads to take care of such details, and assumed that they were doing so.

11. Counsel supporting the complaint has no information and proposes to offer no evidence contrary to the foregoing facts, and refers

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to information available to him tending to support and corroborate those facts. Under these circumstances, he moves that the complaint be dismissed as to all parties.

CONCLUSION

1. The foregoing facts disclose that there have been major changes in the organization, stock ownership, management, method of operation, and policies of the corporate respondent since the period during which, it is contended, the alleged unlawful acts and practices occurred. Counsel supporting the complaint has no information and proposes to offer no evidence with respect to violations of the Fur Products Labeling Act, or the Rules and Regulations promulgated thereunder, by the corporate respondent as presently organized, and operating under its present management, methods and policies.

2. The foregoing facts also disclose that the individual respondents were unaware of the alleged violations, that they did not knowingly participate in or contribute to them, and that they were responsible for them only by virtue of their respective positions in the management of the corporate respondent.

3. It is apparent, therefore, that there is no basis in the present record for a finding that the alleged violations occurred; and that there is no public interest in continuing this proceeding. The motion for dismissal of the complaint, filed on October 10, 1962, by counsel supporting the complaint, is fully supported by the record in this proceeding.

ORDER

It is ordered, That the complaint herein be, and it hereby is, dismissed as to all parties.

DECISION OF THE COMMISSION

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective June 1, 1962, the initial decision of the hearing examiner shall, on the 11th day of December 1962, become the decision of the Commission.

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IN THE MATTER OF

HALSAM PRODUCTS COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE
CLAYTON ACT*Docket 8230. Complaint, Dec. 22, 1960—Decision, Dec. 13, 1962*

Order requiring a Chicago toy manufacturer to cease violating Sec. 2(d) of the Clayton Act by making payments to certain toy catalog companies controlled by its jobber customers as compensation for advertising its products in the catalogs, while not offering such payments on proportionally equal terms to all its other customers who were in competition with those so favored.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Halsam Products Company is a corporation organized and doing business under the laws of the State of Illinois, with its principal office and place of business located at 3610 Touhy Avenue, Chicago 45, Ill.

PAR. 2. Respondent has been engaged, and is presently engaged, in the business of manufacturing and distributing toys. These toy products are sold and distributed by respondent to wholesalers, department stores and chain stores located in various parts of the nation. Respondent's sales in 1959 exceeded \$2,600,000.

PAR. 3. Respondent has sold and distributed, and now sells and distributes, its products in substantial quantities in commerce, as "commerce" is defined in the amended Clayton Act, to competing customers located throughout various States of the United States, and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale, of products sold to them by re-