

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, JULY 1, 1957, TO JUNE 30, 1958

IN THE MATTER OF

JULIUS HOFFERT, INC., ET AL.

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

Docket 6726. Complaint, Feb. 18, 1957—Decision, July 2, 1957

Consent order requiring a furrier in New York City to cease invoicing fur products falsely through setting forth required information in abbreviated form, in violation of the Fur Products Labeling Act.

Mr. Robert E. Vaughan and Mr. Ross D. Young for the Commission.

Mr. Arthur J. Goldsmith, of New York, N.Y., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on February 18, 1957, issued its complaint herein under the Federal Trade Commission Act, and the Fur Products Labeling Act against the above-named respondents Julius Hoffert, Inc., a corporation, and Julius Hoffert and Bert Edwards, individually and as officers of said corporation. The complaint charges respondents with having violated in certain particulars the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act. The respondents were duly served with process. Upon being advised that Commission's counsel and the respondents were negotiating an agreement for a consent cease and desist order pursuant to § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, the time for answer was extended and the initial hearing postponed by appropriate order pending the negotiation of such an agreement.

On May 13, 1957, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order to Cease and Desist," which had been entered into by and between each of the said respondents

Decision

54 F.T.C.

and their attorney, Arthur J. Goldsmith, and Robert E. Vaughan and Ross D. Young, counsel supporting the complaint, under date of April 11, 1957, and subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by the Director and Assistant Director of the Commission's Bureau of Litigation.

On due consideration of the said agreement containing consent order to cease and desist, the hearing examiner finds that said agreement both in form and content is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed that:

1. The corporate respondent, Julius Hoffert, 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 226 West 29th Street, New York, New York.

Respondent Julius Hoffert is president and secretary of said corporate respondent. Respondent Bert Edwards is treasurer of said corporate respondent. These individual respondents formulate, direct and control the acts, policies and practices of said corporate respondent. Their address is the same as that of said corporate respondent.

2. Pursuant to the provisions of the Fur Products Labeling Act and Federal Trade Commission Act, the Federal Trade Commission, Act, the Federal Trade Commission, on February 18, 1957, issued its complaint in this proceeding against respondents, and a true copy was thereafter duly served on respondents.

3. Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The parties have further specifically agreed that the proposed order to cease and desist included in said agreement may be entered in this proceeding by the Commission without further notice to respondents; that when so entered it shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order to Cease and Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order to Cease and Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the persons of each of the respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act and the Fur Products Labeling Act and the Rules and Regulations promulgated by the Commission under the latter Act, against each of the respondents both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding, such order to become final only if and when it becomes the order of the Commission; and that said order therefore should be, and hereby is, entered as follows:

ORDER

It is ordered, That respondent Julius Hoffert, Inc., a corporation, and its officers, and respondents Julius Hoffert and Bert Edwards, 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, or offering for sale in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the manufacture for sale, sale, offering for sale, transportation, or distribution of fur products, which have been made in whole or in part of furs which have been

Order

54 F.T.C.

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 invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

a. The name or names of the animal or animals producing the fur or furs contained in the fur products as set forth in the Fur Products Name Guide and as prescribed by the Rules and Regulations;

b. That the fur product contains or is composed of used fur, when such is the fact;

c. That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

d. That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

e. The name and address of the person issuing such invoice;

f. The name of the country of origin of any imported furs contained in the fur product.

2. Setting forth on invoices of fur products:

a. Information, required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, in abbreviated form.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 2nd day of July, 1957, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

Decision

IN THE MATTER OF
MANHATTAN BRUSH COMPANY, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 5814. Complaint, Sept. 27, 1950—Decision, July 3, 1957*

Order requiring a manufacturer in New York City to cease using the terms "Pure Bristle" or "bristle" to refer to paint and varnish brushes which contained quantities of horsehair or were not composed wholly of hog bristles.

R. P. Bellinger, Esq. for the Commission.

Edward S. St. John, Esq. and *Thomas P. Dougherty, Esq.*, of New York, N.Y., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

THE PROCEEDING

The Federal Trade Commission, by virtue of authority vested in it pursuant to the provisions of the Federal Trade Commission Act, did, on September 27, 1950, issue its complaint against respondents, Manhattan Brush Company, Inc., a corporation organized and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at No. 42 West 18th Street, New York, New York, and its officers in their representative capacities and as individuals, they being Robert S. Gillman and Norman B. Bloom respectively President and Secretary-Treasurer of respondent corporation. The address of all respondents is as above recited.

The complaint charges respondents with false and misleading representations that paint and varnish brushes manufactured and sold by them were composed of bristles, meaning and importing thereby, the hair derived from the swine or hog, for which bristles there is a decided preference on the part of the purchasing public; that such representations were in fact false in that respondents caused the fiber content of said brushes to be adulterated with a cheaper and inferior product, to wit, horsehair.

The then officiating Hearing Examiner, having received testimony and exhibits on behalf of, and in opposition to, the allegations of the complaint, all of which said testimony was stenographically reported and, together with the exhibits and documentary evidence related thereto, duly recorded in the office of the Federal Trade Commission in Washington, D.C., as required by law, then proceeded with the preparation of his Initial Decision based upon such records.

Decision

54 F.T.C.

RÉSUMÉ OF THE RECORD

From this point the proceedings are rather lengthy and involved for which reason it is considered that a résumé thereof, in chronological form, will be of assistance in a ready appreciation of the matter and its history in the Commission.

On August 28, 1951, the said then Hearing Examiner filed an Initial Decision ordering that the complaint in this proceeding be dismissed, from which decision an appeal was noted by the attorney in support of the complaint. September 13, 1951 said appeal was perfected.

During the interim, and while said appeal was pending and undisposed of, Petitions for Leave to Intervene were filed by the American Brush Manufacturers Association, the Eastern Paint Brush Manufacturers Association, Inc., and the New York Metropolitan Brush Manufacturers Association, all of which said Petitions were granted by the Commission, with certain limitations, and, pursuant to permission contained in the granting orders, all of the petitioners filed briefs in support of their respective positions concerning the appeal from the Hearing Examiner's order of dismissal, said briefs, and the replies thereto, appearing of record in the formal proceeding.

On June 9, 1952, formal argument before the Commission was had on the appeal from the Hearing Examiner's Initial Decision and thereafter, before rendition of decision on said appeal, and on October 21, 1952, counsel in support of the complaint formally moved for withdrawal of his aforesaid appeal and for remand of the entire matter to the Hearing Examiner for the purpose of receiving additional testimony in support of the charges of the complaint.

On February 17, 1953, pursuant to the foregoing motion, the Commission passed its formal order which:

- (1) Granted the motion of counsel supporting the complaint to withdraw his appeal from the initial decision;
- (2) Vacated and set aside the Hearing Examiner's Initial Decision;
- (3) Appointed a substitute Hearing Examiner, (the services of the Hearing Examiner who had rendered the Initial Decision being no longer available to the Commission by reason of his retirement from public service);
- (4) Reopened and remanded the proceeding to the Hearing Examiner for the purpose of receiving additional testimony; and

(5) Directed that after receipt of such additional testimony the Hearing Examiner render "an initial decision on the entire case."

By order of the Commission dated August 6, 1953, the undersigned Hearing Examiner was substituted with directions to proceed as authorized by law.

Hearings were held on February 24 and April 7 and 8, 1954, and thereupon, by reason of a decision of the Circuit Court of Appeals¹ and insistence by respondents that such decision made obligatory the trial of this matter *de novo*, the Hearing Examiner, on April 26, 1954, certified the question to the Commission for its determination of the future course of the proceedings, pursuant to which certification the Commission did, on October 29, 1954, order the Hearing Examiner:

to grant a new hearing for the purpose of resubmission of evidence bearing on the issues in this case which was not received by the present Hearing Examiner,

and that:

to the extent all parties expressly waive rehearing as to any evidence previously presented, rehearing shall not be directed.

At a formal hearing held in Washington, D.C., on November 10, 1954, specially called for the purpose of determining the status and future course of the proceeding in the light of the afore-quoted order of the Commission, all parties to the proceeding entered into a formal stipulation on the record, by the terms whereof it was agreed, in substance, that the entire record containing the testimony and evidence had before the original Hearing Examiner, as well also the testimony and evidence theretofore had subsequent to the remand, and thereafter to be had before the present Examiner, shall constitute the record on which the present Examiner shall base his findings and conclusions, the respondents thus abandoning their position contending for a trial *de novo*. Pursuant to such agreement the proceeding, after the reception of additional testimony and evidence in support of, and in opposition to, the allegations of the complaint, went forward to a normal conclusion, all of such additional testimony and evidence being likewise filed of record as required by law.

Thereafter the parties filed their Proposed Findings as to the Facts and Conclusions based thereon and, additionally, the attorney in support of the complaint submitted a Proposed Order, all of which have been separately ruled upon as required by the Rules of Practice.

¹ Gamble-Skogmo, Inc. v. F.T.C., 211 F. 2d 106 (1954).

Decision

54 F.T.C.

THE ISSUE

The complaint, in Paragraphs 4, 5, 6, and 7, clearly, concisely and succinctly sets forth the one and only charge upon which the proceeding is based, such being paraphrased as follows:

In the course and conduct of their business and for the purpose of inducing the purchase of their said brushes, respondents have caused their handles of certain brushes to be stamped, marked or labeled with the words "*Pure Bristle*"; that the practice of stamping their brushes with the words "*Pure Bristle*" constitutes a representation to the public that the material of which said brushes is composed consists entirely of the bristle of swine; that there is a decided preference on the part of members of the consuming public for paint and varnish brushes that are made entirely of genuine bristle; and, finally, that in truth and in fact respondents' brushes are not composed entirely of bristle of swine but contain various quantities of horsehair.

The foregoing charge is simple and direct and raises but one question to be tried, that is:

Are respondents' brushes "Pure Bristle" as represented; or are they adulterated with horsehair?

On the subject matter of the above statement of the issue to be tried, the Commission's order of remand of February 17, 1953, contains certain language which is thought worthy to be quoted for its very definite value of putting the *sole issue* in this matter in its proper setting and perspective, as well also the steps necessary to be taken subsequent to the remand in order to rectify the apparent conflict of evidence and to overcome the obstacles pointed out by the order of remand, which obstacles made a clear-cut decision, one way or the other, impossible on the record as it then stood:

* * * *It appearing to the Commission that the sole issue presented by the appeal is whether or not the respondents, by stamping on certain of their paint brushes the words "Pure Bristle," have represented, contrary to the fact, that such brushes are composed entirely of bristles of swine, and that the disposition of this issue depends primarily upon the answer to the question whether or not the brushes so stamped are in fact made entirely of bristles; and*

It further appearing that the evidence now in the record on this point is in sharp conflict, there being testimony of a microscopist of the National Bureau of Standards, based on his microscopic examination of cross-sections of fibers removed from four brushes manufactured by the respondents and the application of his "pattern of pigmentation" theory, that three of such brushes were in fact composed in substantial part of horsehair; and testimony of seven other witnesses, six of whom are experts in the field of bristle and horsehair and one of whom is a technical expert in the general field of animal

hair, that all of the samples of fiber examined by them were composed entirely of bristles; and *

*It further appearing that the record as so constituted does not provide an adequate basis for an informed determination of the issues presented by the appeal; * * * etc.*

(italic supplied)

Pursuant to the order of remand the attorney in charge of the complaint introduced the testimony of four additional witnesses on the matter of fiber identification of contents of brushes, while the respondents offered testimony of four witnesses on the same subject.

THE ANSWER

To the foregoing complaint respondents filed formal written answer whereby they admitted the allegations of Paragraphs 1, 2, 3, and 5 of the complaint and denied all other charges and conclusions. The admissions, all of which are hereinafter incorporated as Findings of Fact are paraphrased as follows:

(1) The corporate setup and the official connection of the individual respondents with the corporate respondent and that the latter dominate and control the policies, acts and practices of the former.

(2) That respondents are engaged in interstate commerce in the sale of their brushes and that their volume of sales in such commerce is substantial.

(3) That they are in substantial competition in the sale of brushes with other manufacturers of products similar to theirs among and between the various states.

(4) That in the course of their business, and with the purpose of inducing the purchase of their merchandise, respondents have caused the handles of certain of their brushes to be stamped or labeled with the words: "PURE BRISTLE."

(5) That such legend or stamp, so used, constitutes a representation to the public that the material of which said brush is composed consists entirely of the bristle of swine.

With the issue thus joined, and the foregoing judicial admissions of record, the matter proceeded to trial.

PRELIMINARY STATEMENT CONCERNING THE TRADE PRACTICE RULES FOR THE PAINT AND VARNISH BRUSH MANUFACTURING INDUSTRY

On January 14, 1939, the Commission promulgated its Trade Practice Rules for the Paint and Varnish Brush Manufacturing Industry, to which said Rules some twenty-seven paint and varnish

* The above quotation is correct as it appears in the order but the order is in error in the number of brushes examined and the number of witnesses heard. This error is deemed inconsequential.

Decision

54 F.T.C.

brush manufacturers throughout the United States became signatory. These signers represent a large and important segment of the industry who, undoubtedly, would not have accepted such rules for their guidance and observance had they felt the rules to be onerous or impossible of obedience, such as, for example, the production of a 100% pure swine bristle product, sans horsehair or extraneous fiber admixture, as the respondents herein have contended. A certified copy of said Rules was introduced and accepted in evidence.

At the outset of any consideration of these Rules let it be said that it is realized that this proceeding is not, in nature, an attempt to enforce the Rules as such, (respondents not being parties signatory thereto and the Rules not having standing in law nor enforceable as such), yet, as said by the Circuit Court in the recent case of Northern Feather Works, Inc., v. F.T.C. (#11,727 3d Cir. June 5, 1956) :

These trade practice rules were not taken as legal commands by the hearing examiner, the Commission or ourselves. But we think that a set of rules worked out in conference between a government agency and an industry can be taken as a guide if, to those responsible for enforcement, they are reasonable and fair. That is what was done here.

See also Buchwalter v. F.T.C. (Decided July 9, 1956) (#23,805 2nd Cir.)

The foregoing reasoning being applicable to the circumstances of the instant matter it is felt that, for present convenience, the excerpted quotations from the Rules as here footnoted will demonstrate their applicability to and coverage of the subject matter of this proceeding and that consideration of same will be enlightening and almost imperative as an adjunct to an informed decision.²

² "GROUP I. The unfair trade practices which are embraced in these Group I rules are considered to be unfair methods of competition. * * * prohibited, within the purview of the Federal Government, by acts of Congress; * * * and appropriate proceedings in the public interest will be taken by the Commission to prevent the use, * * * of such unlawful practices in * * * interstate commerce."

Definitions: The * * * word 'brushes' as used in these rules embrace all types of brushes manufactured in the industry for use in applying paint, varnish, lacquer, calcimine or other similar decorative or protective materials.

The term 'bristle' as used in these rules is not to be construed as including any hair, fiber or material other than the bristle of swine.

"RULE 1—Misrepresentation of Industry Products:

It is an unfair trade practice to make or publish, * * * any false, misleading or deceptive statement or representation, by way of advertisement or otherwise, concerning the grade, quality, quantity, use, size, material, content, origin, preparation, manufacture or distribution of any products of the industry or concerning any component of such products * * *.

"RULE 2—Misbranding of Industry Products:

(a) The marking or branding of brushes with the words 'All Bristle', '100% Bristle', 'Pure Bristle', or 'All Pure Bristle', * * * when such brushes are in fact composed in whole or in part of material * * * other than bristle, or the use of the word 'bristle' in any manner having the tendency and capacity or effect of misleading or deceiving the

It will thus be noted from the opening paragraph of the Rules that the Commission declares, and gives interested parties clearly to understand, that any violation of the Rules comprising "Group I" shall be considered a violation of the law and that appropriate proceedings will be taken looking to the enforced cessation of the proscribed acts.

Supplementing the Group I rules there appears, as Rule E of Group II, the following:

ALL-Bristle Brushes:

The industry records its approval of the marking or branding of all brushes composed wholly of bristle with the words "All Bristle," "100% Bristle," "Pure Bristle" or "All Pure Bristle," or with word or words of similar import or meaning, on the handle or ferrule thereof, to the end that the purchasing and consuming public may be correctly informed as to the content of such brushes.

From the foregoing it will be observed that the acts and practices charged in the instant matter have been the subject of official concern and attention of the Commission and of the industry for many years prior to the issuance of the within complaint. The rules are clear as to what is and what is not a "Pure Bristle" brush, and it will be further observed that no tolerances for foreign or adulterating matter, hair or fiber, are authorized or permitted.

Due consideration having been given to the evidence adduced, the contentions of counsel for all parties, and the proposed findings and conclusions submitted by them in accordance with the Commission's

purchasing or consuming public with respect to the bristle content of such brushes, is an unfair trade practice.

(b) The deceptive marking or branding of brushes with respect to the grade, quality, * * * or in any other material respect, is an unfair trade practice.

"RULE 2—Disclosure of Composition:

It is an unfair trade practice to sell, offer for sale, or distribute any brush the brushing part of which is composed, in whole or in part, of any material which by reason of its natural appearance or as a result of special processing simulates bristle, without clear and nondeceptive disclosure of the true composition thereof, where failure to so disclose the same has the tendency and capacity or effect of misleading or deceiving the purchasing or consuming public.

(a) Such disclosure should be made by branding, stamping, or otherwise marking the handle or ferrule of the brush with the name of each of the constituent materials of the brushing part thereof in the order of its predominance.

(Illustration: A brush composed of 60% horsehair and 40% bristle should be marked 'Horsehair and Bristle' or '60% Horsehair and 40% Bristle'.)

Provided, however, (1) That the name of any such constituent material shall not be set forth in type or manner so inconspicuous, remotely placed, or disproportionately minimized as thereby to have the tendency, capacity or effect of misleading or deceiving the purchasing or consuming public in respect to the proportion of such material contained therein, or in any other respect, and

(2) when bristle as a material is not contained therein in a substantial quantity, the percentage in which such material is present should be specifically stated, to the end that purchasers may not be misled or deceived into the belief that this material is present in greater proportion than is in fact true.

(Illustration: A brush composed of 90% horsehair and 10% bristle should be marked 'Horsehair and 10% Bristle' or '90% Horsehair and 10% Bristle'.)"

Decision

54 F.T.C.

Rules of Practice, the Hearing Examiner makes the following findings as to the facts, conclusions of law and order based thereon:

1. Respondent Manhattan Brush Company, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at No. 42 West 18th Street, New York, New York; respondent Robert S. Gillman is an individual and the President of respondent corporation; respondent Norman B. Bloom is an individual and the Secretary-Treasurer of respondent corporation. The individual respondents direct and control the policies, acts, and practices of the corporate respondent. The addresses of the individual respondents are likewise No. 42 West 19th Street, New York, New York.

2. Respondents are and have been for some years last past engaged in the manufacture, sale, and distribution of paint brushes and have caused their said products, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in the various states of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products among and between various states of the United States and in the District of Columbia.

Respondents' volume of business in said commerce is substantial.

3. Said respondents, during the periods covered hereby, were engaged, and are now engaged, in the manufacture and sale of paint brushes and at all times have been, and are now, in substantial competition with other corporations, individuals, firms and partnerships in the sale and distribution of like products in commerce among and between the various states of the United States and the District of Columbia.

4. The word or term "bristle," used in connection with the manufacture of brushes, particularly paint and varnish brushes, indicates and means the strong resilient hairs which grow on the back of the hog or swine. For the manufacture of painters' brushes, no material has been found as acceptable or efficient as the bristles of the hog or swine, which bristles in the great volume of the aggregate, have a split or fork (in trade parlance designated a "flag"), at the apical end of each bristle, thereby enabling a paint brush composed of bristle to retain and spread paint to better advantage and with greater efficiency than a brush composed of any other material or materials. The best quality of bristle is imported. The better quality of bristles obtained from hogs slaughtered in the United States are also used in the industry. Notwithstanding the great variety of possible materials that could be employed in the manufacture of

brushes, a large percentage of all brushes are made from the bristles of the hog or swine.

All swine bristle, irrespective of place of origin, have certain identifiable characteristics in common such as taper, flag, scale, elasticity, spring, etc., differing only in certain qualitative particulars which make bristles from certain localities more desirable for specified uses and purposes.

Among the better known, but cheaper and inferior products, used as adulterants or substitutes in the manufacture of paint and varnish brushes, are horsehair and wood or vegetable fibers, the two latter substances not being here involved, the evidence showing that the foreign matter or fibers found to exist in respondents' brushes being horsehair. From the standpoint of excellence, quality, effectiveness and efficiency, horsehair is decidedly inferior to the higher priced genuine bristle, for which reason there is a decided preference on the part of the consuming public for paint and varnish brushes made of genuine bristle, unadulterated with horeshair.

5. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said brushes, respondents have caused their handles of certain of said brushes to be stamped, marked or labeled with the words "Pure Bristle," the use of which words constitutes a representation to the public that the material of which said brushes is composed consists entirely of the bristle of the hog or swine.

6. It is found as a fact that during the course of the manufacture of their said products respondents have sold and introduced in commerce certain of their brush products which are not in fact composed entirely of the bristle of swine but, on the contrary, contain varying quantities or percentages of horsehair, this practice leading to the production of an inferior product and constituting a direct misrepresentation in a material aspect.

7. In the matter of fiber identification, and particularly to enable differentiation between true or pure bristle and horsehair, there are two methods pursued:

(1) The "eye and feel," or "see and feel," tests, commonly used in the trade, based primarily on visual examination and appraisal for known identifying characteristics of taper, flag and color, coupled with tactile examination for spring, texture and ability of fibers to regain their original positions after having been subjected to stress.

This method was availed of by witnesses on both sides of the controversy.

(2) The "pattern of pigmentation" test in the use of which the fiber or filament is cross-sectioned by means of a slicing machine

called a microtome, to thicknesses of from 15 to 40 microns and then, after mounting the specimens thus procured on slides, they are subjected to microscopic examination at 100 or more diameters for "pigmentation pattern," the distinction between true bristle and horsehair being determined by the fact that, in bristle, the granules of pigment are concentrated in the medulla or center and diminish in density as they approach the periphery or outside skin of the fiber, whereas in horsehair there is little if any pigment granules appearing in the center, such pigmentation being mainly concentrated at the periphery or outside sheath of the hair.

This method was made use of by two witnesses testifying at the instance of the Commission and was not availed of by any witness for the respondents except in an effort to disprove the validity of such a test. Respondents' witnesses did, however, make use of the microscope, but solely for what might be described as a "gross" examination for taper, flag, cellular structure and similarity or dissimilarity with various other strands or fibers.

In considering the weight to be accorded the testimony of the respective witnesses, the maxim *testes ponderantur, non numerantur*, has been observed, which Black defines as:

Witnesses are weighed, not numbered. In case of conflict the truth is to be sought by weighing the credibility as well as the capability of the respective witnesses—not by the mere counting of noses on one side or the other.

THE TESTIMONY

8. The testimony in this matter involving two distinct and separate schools of scientific and empirical-expert opinions as to the positive identification of brush fibers, (the scientific school being based upon the "pattern of pigmentation theory," aided by microscopic examination of specially prepared fiber sections, supplemented by experience of the operator and comparison tests with other fibers of known origin), and the other, or empirical-expert procedure, employing the "eye and feel test," (based upon macroscopic and tactile examination plus the knowledge derived from experience), it would appear in order that a more detailed analysis of the testimony of the material witnesses for the respective parties than ordinarily pursued should be undertaken in order to form an enlightened opinion, as well to overcome the deficiencies pointed up by the Commission in its Order of Remand.

There is a further reason for this review which is to negative the thought of arbitrary action by this Examiner in according especial weight to one school of thought over the other, and to

Decision

demonstrate that each school has been accorded due consideration in its proper sphere. Such will likewise serve to assist the ultimate deciding authorities to determine the issue, based upon the facts as known to the experts, and the opinions of the latter thereon, (and that the process of evaluation of such opinions by this examiner may be known), and to arrive at an interpretation and evaluation of the testimony in the light of the ultimate deciding authorities' own expertise and/or judgment.

In order to maintain the issues on its part joined Commission counsel produced witnesses whose testimony is briefed as follows:

9. Witness, Dr. Sanford B. Newman, a technician in charge of the Microbiological Laboratory which is the Testing and Specifications Section of the Organic and Fibrous Materials Division; U.S. Bureau of Standards; B.S. from Long Island University; M.S. George Washington University; tested samples of fibers from brushes Comm. Exs. Nos. 1 and 2 and, in his official capacity as above, made his formal report thereon which appears herein as Comm. Ex. No. 17.

Witness has had extensive experience since the year 1945 in assaying paint brushes as to fiber content. The method used by him is the cross-sectional pigmentation pattern of identification whereby thin slices across the bristle, hair or fiber are procured by a machine called a microtome, which slices or cross-sections are then mounted on a glass slide and subjected to microscopic examination and, in some instances microphotographs thereof are made; in addition, respecting Comm. Ex. 2, compared the bristle flags with synthetic and natural flags in the files of the laboratory and selected some fibers which appeared to have unnatural flags and subjected these to examination by the cross-sectional method; that the absence of flag on a fiber is not to be construed as proof positive that the fiber is not bristle because there are bristles in commerce, as well also bristles on hogs, without flags, but the presence of a natural flag is proof positive that it is a true bristle.

Witness is familiar with the so-called scale method of identification of hair and bristle but did not use the same to support his cross-sectional experiments because, in his opinion, the scale method is unreliable and, while referred to in the literature is not accepted. He believes, after having surveyed the field, that the test he used in observing the distribution of pigment granules is the most reliable of all tests and is, succinctly stated, that "if the pigment distribution is dense in the center and fans out toward the periphery the fiber is bristle. If the center of the fiber contains little or no pigment and the concentration increases toward the periphery, it is horse-hair."

Decision

54 F.T.C.

Confirming the findings of horsehair and bristle present in the two brush exhibits, as reported by the National Bureau of Standards in Comm. Ex. No. 17 witness testified, based on the samples assayed, that Comm. Ex. No. 1 contains from 10% to 20% horsehair and Comm. Ex. No. 2 contains "at least 30% horsehair."

Six months later this witness was recalled by the Commission in rebuttal and testified further:

That he had made additional tests on brushes Comm. Exs. Nos. 1 and 2 by removing samples from each and sectioning same by means of the Hardy microtome; explained the operation of the machine, and supplemented his explanation by photographs of the machine.

Witness thereupon testified in great detail throughout 100 pages of the transcript, supplementing his prior testimony with additional details on the new tests and, in support of his testimony, there were received into the record some 28 microphotographs of considerably over 200 cross-sections of fiber magnified to a power of 230 in some instances and 450 to 500 power in others. Upon the introduction in evidence of these exhibits the then examiner permitted the respondents' counsel, out of the regular order of procedure, to practically conduct a cross-examination on each exhibit as it was offered in evidence during the course of direct examination so that it may be truly said that a detailed and searching cross-examination was had during the course of the direct, a perusal of which fails to disclose that the witness' testimony was other than sound, reasonable, and worthy of belief in all of its segments. These microphotographs are singularly clear in the matter of pigment distribution and were used by the witness to demonstrate his theories and to support his sincere belief that this method of identification is the most reliable yet devised for differentiation between bristle and horsehair and, in fact, he was so strongly of this opinion that he used this method to the exclusion of all other methods except that he availed himself of the normal gross examination of the fibers for the presence of taper and flag.

In preparing the specimens the witness cross-sectioned the individual fibers to thicknesses within the range of 25 to 33 microns,³ this being, in the opinion of the witness, the optimum thickness to permit light transparency on the microscopic stage for pigment observation and photographing.

He made no change in his before-expressed opinion as to the percentages of hair and bristle contents of the respective brush exhibits.

10. Another expert witness, called at the instance of the Commission, Dr. Thora M. P. Hardy, conducts a commercial laboratory;

³ A micron is one one-thousandths of one millimeter or, expressed decimals in inches is .00003937 of one inch, or fractionally 1/24,500 inch.

holder of A.B. degree with the Master of Science Certificate majoring in chemistry; M.S. and Ph.D. from the University of Chicago, majoring in Botany; from 1935 to 1938 with the United States Bureau of Standards, Division of Organic and Fibrous Materials, engaged in research concerning paint brush fibers whether plant, animal, or synthetic; employed by United States Department of Agriculture carrying on research on fur fibers upon termination of which employment witness, in conjunction with her late husband, Dr. John I. Hardy, established the present laboratory in 1951, the function thereof being to carry on any research or testing relating to fibers of any nature; she is the authoress of various articles either directly pertinent to the subject matter of this inquiry or related thereto, a list of such publications appearing of record.

The above mentioned Dr. John I. Hardy was the inventor of a number of devices to assist him and others in developing new methods for the examination of diverse fibers, and among such devices was the Hardy microtome.

This witness did not use the cross-sectional pigmentation pattern of identification.

In order to conduct her investigation and research she first removed, by means of a hammer and chisel, chunks of bristle from the exhibit brushes by cutting from one edge to the opposite edge of the ferrule and through the entire thickness of the brushes, which samples included the mastic materials encased by the ferrule embedding the fibers in order that she might observe the complete length from base to tip of every fiber, for this purpose using a chemical compound to dissolve the mastic and separate the fibers; she first visually examined individual fibers for their general appearance, their smoothness, curvature, taper at the tip and taper near the root, as well also, where present, the flag at the tip end; the fibers were then placed under the microscope to examine the root and permit longitudinal observation for taper and flag; then followed a comparative test of representative fibers from the samples with authentic samples from known sources of horsehair and bristles. Witness also procured an impression of the surfaces of the fibers, is known as the scale method of identification, the scale formations differing significantly as between bristle and horsehair, which test was used as a supplemental check or aid in proving or disproving, as the case may be, true fiber identification. The above combined methods witness holds to be accurate and dependable for the purposes for which the tests were conducted and she knows of no more reliable or efficient methods of procedure in this connection.

Testifying specifically on the subject of fiber content of brush Comm. Ex. No. 1, and on the basis of her experiments as aforesaid,

Decision

54 F.T.C.

she gave as her opinion that said brush was composed of 90% bristle and the balance horsehair with a 10% tolerance plus or minus. This plus or minus tolerance of 10% witness explained to be a recognized formula by the National Bureau of Standards and is applied to the findings of a qualified analyst in connection with "difficult" analyses. The word "difficult" was explained as the labor and time involved where a full count and examination of each and every bristle in the entire brush would be impracticable for the purpose of arriving at a quantitative analysis, and that the result of the application of this formula means that if the results of the sample analysis were projected to the entire mass of fibers of the whole brush the bristle content thereof would vary anywhere from 80% to 100%.

Testifying concerning her tests conducted on brush Comm. Ex. No. 2, the methods used were the same as hereinabove delineated regarding Commission's Exhibit No. 1. Specifically testifying as to the fiber content her results showed that the brush was composed of 80% bristle and 20% horsehair, plus or minus 10% tolerance, hereinabove explained.

Witness supplemented her testimony by a formal report giving fiber percentages found to exist in brushes Comm. Exs. Nos. 1 and 2, which report appears of evidence herein.

This witness was attempted to be qualified as an expert on brush manufacturing processes and while such qualification failed, nevertheless, the Examiner has ruled that, because of the experience of the witness in the matter of paint brushes, and the empirical knowledge gained through such years of experience, she be permitted to testify that if she were searching for horsehair as an adulterant in a brush she would expect to find such in the center or middle portion of the brush rather than among the outside layers of the fibers contiguous to the metal ferrule. This is important only in connection with the subject to "casing" a brush, herein elsewhere referred to, and which means that the outside fibers around the full periphery of the brush, and thus subject to easy inspection, would be bristles with the adulterant fibers in the center.

Upon being tendered for cross-examination, counsel for respondent had no questions.

11. Another expert witness on behalf of the Commission, Mary E. Hourihan, testified she has been employed by the United States Department of Agriculture since 1948 as a fiber technologist in the field of animal fibers: worked with Dr. John I. Hardy for three years and upon his retirement took over the laboratory; Dr. Hardy was a recognized authority in the field of fiber identification and the inventor of the cross-sectional device used in microscopical identifica-

tion of fibers by the pigmentation pattern; witness conducts such tests for United States Government agencies; identified Comm. Exs. Nos. 1 and 2, (two brushes manufactured by respondents), and testified she personally subjected them to scientific tests to determine fiber contents, using the cross-sectional microscopic method to identify patterns of pigmentation; that the cross-sections were of a thickness of approximately 15 microns, secured by means of the Hardy cross-sectional device; she then described in detail the *modus operandi* of her tests and that the tests used are recognized by her agency as accurate, dependable and the most reliable test known, for which reason it has been adopted as standard procedure in her agency.

From Comm. Ex. 1 witness examined and tested approximately 995 individual fibers which she procured by extracting samples of fibers from two sectional cuts *through* the entire depth or narrow portions of the brush from one edge of the ferrule to the other, which samples comprised approximately 10% of the entire fiber content of the brush, she considering such extracted portion sufficient to enable her to make a representative and informed calculation as to the identity of the entire fiber content of the brush. Her conclusion as to brush Comm. Ex. No. 1 was stated to be 85% hog bristle and 15% horsehair; that the distribution of horsehair was quite uniform in this exhibit.

As to brush Comm. Ex. No. 2, witness actually tested about 900 fibers, using the same protocol and methods as above described for Comm. Ex. No. 1; that the sample extracted was approximately 10% of the entire fiber content of the exhibit and sufficient in her judgment to enable her to make an informed calculation of the fiber content of the exhibit as an entirety. Her conclusion as to brush Comm. Ex. No. 2 was stated to be 75% hog bristle and 25% horsehair, the latter being quite uniformly distributed throughout the specimen extracted by her.

This witness used only the pigmentation pattern of identification and did not make use of the scale, or any other, identification method.

12. Another Commission witness, Charles S. Cox, originally appearing in support of the complaint, testified that, pursuant to specific authorization, certain samples of fiber were extracted from Comm. Exs. Nos. 1 and 2 at the request of the respondents, to be submitted to a testing laboratory for report on fiber identification; that at the time of extracting said samples respondent, Bloom, did the actual cutting of the fibers by use of scissors and that the samples or swatches were secured from both exhibits from the outside rows of fibers; that at that time the brushes were complete, no samples having been taken by cutting entirely through the brushes for a cross-section which would disclose a representative sample of all fibers

Decision

54 F.T.C.

contained in the two exhibits; that when the exhibits were presented to him cross-sectional samples had been extracted and the brush ferrules were separated to permit bristle removal. An examination of the two exhibits tends to support witness' testimony as to the extraction of fibers from the outside rows of fibers of both exhibits, such rows evidencing a cutting of fibers completely around the circumference of each brush, and it will be noted that these are the extracted samples which were submitted by respondents to their testing laboratory and which form the basis for that laboratory's report on fiber content. The testimony of this witness is uncontraverted and becomes of importance when considering the testimony of other witnesses as to "casing" of brushes, that is, the placing of horsehair or other adulterants in the center or middle of the fibers and surrounding such (or casing as the term is), with pure hog bristles.

13. Another Commission witness, Reginald T. Rogers, is an officer of a brush manufacturing company, his chief duty being to purchase bristle; has in excess of 35 years experience buying and selling bristles; former Consultant to the U.S. War Production Board in the matter of brushes and bristles; for identifying fibers he uses the "eye and feel test" exclusively and considers same adequate for his purposes and from a practical standpoint, using it constantly in his business.

Upon examination by this method of brush Comm. Ex. No. 1 gave as his opinion that same contains about 10% of horsehair which would adversely affect the quality of the brush. Examination of brush Comm. Ex. No. 2 brought forth the opinion that same contains between 15% and 20% of horsehair, which percentage would cheapen and adversely affect the worth of the brush; that the presence of horsehair in brush Comm. Ex. No. 2 is more readily identified because of the greater quantity than that in Comm. Ex. No. 1.

Testifying generally he said that, with rare exceptions, imported bristles from China or elsewhere do not contain horsehair and in his entire experience of 35 years recalls only one such instance, the adulteration there he estimated to amount to but 2% horsehair; that he did not make use of this shipment to manufacture brushes to be sold as "Pure Bristle"; that a brush manufacturer is at all times in a position to know if his product contains horsehair and there is no way in which horsehair can become accidentally intermingled with bristle, such mixture ensuing only by deliberate intention and action on the part of the producer; that the trade does not recognize that there is an element of impurity, including horsehair, in all stocks or imports of bristles; that there is a definite and well-recognized demand and preference on the part of consumers for "All Bristle" or "Pure Bristle" brushes; that both of the last mentioned designa-

tions used in connection with brushes connote that the fiber content thereof is 100% pure bristle from the pig or swine, and further, it is not difficult from a practical commercial standpoint to manufacture a brush of 100% bristle content and his company is doing so every day; that he does not rely upon the honesty or good faith of his suppliers but makes independent examination of his bristle purchases for manufacturing purposes.

Witness is in charge of his company's operations in the matter of blending bristles and, if examining a brush labeled "All Bristle" which was suspected of containing horsehair, he would look for same in the center of the brush "because it is more easy to hide it there."

14. Another witness on behalf of the Commission was Isidor A. Rubin, a brush maker by trade with (in 1954) 57 years of experience; in 1913 joined in the formation of a brush manufacturing company serving as Vice-President and President thereof and so remains as of the date of testifying; has had extensive experience in the purchasing, vending and dressing of bristles; has given many lectures on the subject of brushes and bristles to schools, paint and sales organizations and has authored published articles; has been called upon by the United States Government to write brush specifications and served as Government consultant on the stockpile bristle program, and in that capacity passed upon the quality of bristle imports by or for the Government; also served as advisory committee-man with the National Production Authority and the National Production Board on the subject of bristles and brushes; for the past 20 years has been Chairman of the Bristle Specifications Committee of the American Brush Manufacturers Association, such Association having widely distributed members throughout the country engaging in all segments of the brush making industry.

Witness uses the "eye and feel" method of fiber identification and testified such method is practically uniform in the trade and adequate for trade purposes.

Upon having exhibited to him for inspection brush Comm. Ex. No. 1 testified the brush "has been cased," (a trade term hereinelsewhere defined); that the brush contains horsehair "anywhere from 10% up" but he could not give a definite percentage.

Contrary to contentions of respondents, witness testified that horsehair is never found intermingled with bristle importations from China or elsewhere, and there is no way in which horsehair can be mixed with bristle, either in the importations or manufacturers, other than by human design and intention; that the trade does not recognize there is an element of impurity, including horsehair, in all stocks or shipments of bristle.

Further, there is a decided consumer demand and preference for brushes composed of pure bristle and that the term "pure bristle"

Decision

54 F.T.C.

implies and means that the brush so stamped is composed of 100% pure bristle;

Purchasers of raw or dressed bristle importations do not rely solely on the honesty or good faith of their suppliers but rather upon their own inspection and evaluation of purchases.

Upon an examination of brush Comm. Ex. No. 2 gave as his opinion that same contained horsehair to an extent which cheapened the value and quality of the brush thus producing an inferior product, adversely affecting the "working" quality of the brush.

Cross-examination of the witness, which consisted principally of testing his powers of, or capabilities for, fiber identification by submitting to him various unidentified (to him) samples of fibers other than from Comm. Exs. Nos. 1 or 2 was had, concerning which the witness gave his opinions on such fibers and their places of origin, as to all of which testimony, insofar as the record discloses, witness was not in error.

15. In all of the final results as to percentages of horsehair found to exist in respondents' brushes it will be noted there are variances in the stated percentages found and expressed by the several witnesses. These variances are found to be unavoidable and inherent in the nature of the experiments due to the great number of fibers present in a given brush and the impossibility of counting and evaluating each individual fiber. This lack of uniformity in results has no significant weight in discounting the testimony or findings of any of the witnesses but, on the contrary, had there been any pronounced uniformity of findings such might have constituted a suspicious circumstance worthy to be considered. Such lack of uniformity lends weight to the credibility of the witnesses, the significant end fact being that all of the witnesses testifying at the instance of the Commission having found horsehair to be present in significant, and observable and measurable quantities.

Therenpon, the respondents, to maintain the issue on their part joined, produced certain witnesses who testified as follows:

16. An expert witness Arthur B. Coe, testifying on behalf of the respondents, is chief microscopist of a commercial laboratory located in Hoboken, N.J. with eight years of active experience in the field of fiber identification. This witness conducted an examination of two sample batches of fibers which were transmitted to his company for tests which samples had been extracted from Comm. Exs. Nos. 1 and 2. The result of his examination, as reflected by his testimony and the report which he made thereof, being Respondents Exhibit 7-A-B, discloses the following under the head of "Conclusions:"

As to Exhibit No. 1: "These fibers were established to be not less than 99% hog hair and not more than 1% horsehair," and as to

Decision

Exhibit 2: "These fibers were established to be not less than 98% hog hair and not more than 2% horsehair." Appended to the foregoing conclusion is the following note:

The size of each sample and the manner of sampling restrict the accuracy of this report to the hairs tested from each exhibit.

Said note is supplemented by the following printed matter at the foot thereof as follows:

[this] report applies only to samples tested and cannot be considered indicative of the general production of the product or products tested.

On page one of the aforesaid exhibit, at the foot thereof and on the printed form of the Testing Company, likewise appears a notation to the effect that

[this] report applies only to sample tested.

On the printed form of the same company appears (Res. Ex. No. 10), the following:

Our letters and reports apply only to the sample tested and are not necessarily indicative of the qualities of apparently identical or similar products.

From the foregoing quotations it will be observed that the laboratory restricts its findings *solely to the samples tested* and does not undertake to use the percentages arrived at in order to project or extrapolate those percentage figures to the entire mass of fibers from which the samples were extracted and hence the foregoing figures, percentagewise, are not to be construed that Comm. Ex. No. 1 is 99% hog hair and 1% horsehair and Comm. Ex. No. 2 is 98% hog hair and not more than 2% horsehair.

The foregoing restrictions and limitations are found to render nugatory the findings and conclusions stated in these reports insofar as rendering any probative assistance, pro or con, in the resolution of the issue here involved, that issue being: Do the *brushes* contain horsehair—not the *samples*? In other words, the unwillingness of the laboratory or of the witness to express an opinion as to the quantitative constituents of the *brushes*, and restricting an opinion to the *samples* is of no value or assistance. It will be noted in this connection that the witnesses called by the Commission willingly gave their opinions, percentagewise, as to the finished brushes on the basis of their tests of the samples. This is significant in the light of other facts, herein found to be true, to the effect that these samples of bristle that had been submitted to this laboratory were extracted from the outer or peripheral rows of fibers from Comm. Exs. Nos. 1 and 2; that such were not obtained by opening the ferrule of each of the two brushes and extracting therefrom representative samples through the brush which would give a more comprehensive idea and

Decision

54 F.T.C.

accurate finding of the true fiber composition of these brushes which method of sampling, it will be noted, was the method of sample extractions by Commission witnesses Hardy and Hourihan. This extraction of peripheral fibers becomes of further importance in the light of certain other testimony to the effect that where "casing" is practiced in brush production the outside or peripheral rows of fibers often consist of true hog bristle and where horsehair or other fiber is used as an adulterant it more often appears in the center or middle longitudinal section of the brush because it is thus more easily hidden and less obvious upon casual or macroscopic examination.

This witness, who was the author and proponent of the aforesaid report, Res. Ex. 7-A and B, complained that one of the most reliable aids to the identification of true bristle is the examination of the base end of the fiber whereto is attached a root which is retained by the manner in which the hair is removed from the flesh of the hog and that, because of the manner of extraction of the samples by him examined, such roots have been cut off at the ferrule edge leaving the root or foot end imbedded in the mastic setting within the ferrule in which the hairs are imbedded; that he was thus deprived of a valuable indicia of identification and thus was restricted to determination of fiber characteristics as disclosed by flag, taper and microscopic technique. The witness testified that his laboratory set up its microscopic procedure on the recommendation of the National Bureau of Standards:

Wherein we were advised that the Laboratory leaned rather heavily on the study of cross-sections of the fiber, in order to determine its identity.

Pursuing this method, witness made cross-sectional cuts of the various fibers in the two samples, one of which disclosed "characteristics resembling those of other than hog hair."

Supplementing the aforesaid *modus operandi*, the witness made testings of certain fibers from each of the groups aforesaid for the purpose of studying the epidermal characteristics, or scales, which procedure consists of procuring an impression of the fiber by impressing same longitudinally, in the presence of sufficient heat, on a thermo plastic material, the heat causing the plastic material to soften which, upon hardening, permits the removal of the fiber and retention of the surface characteristics presented by the scale. This is a supplementary examination used for corroboration of the findings established by the microscopic procedures hereinabove delineated.

At no place in his testimony did this witness undertake to state quantitatively, the percentages of horsehair or hog bristle extant in Comm. Exs. Nos. 1 and 2, nor did he undertake to say that these

Decision

brushes were each 100% hog bristle, and likewise did not testify, based upon his laboratory findings, that Comm. Ex. No. 1 consisted of 99% hog hair and 1% horsehair or that Comm. Ex. No. 2, consisted of 98% hog hair and 2% horsehair.

Cross examination of this witness developed that, despite the fact he testified in chief that he had made many hundreds of tests to determine fiber identification, it is significant to note that the witness must have felt some insecurity in the validity of his procedural processes theretofore used by him because, at his instigation, a request was sent by his Laboratory to the United States Department of Commerce, National Bureau of Standards, the reply to which request seeking information on procedural steps to differentiate hog bristle from horse hair, appearing in these proceedings as Comm. Ex. No. 19. That reply so clearly states the position of the Bureau of Standards in this matter that excerpts therefrom are considered worthy of quoting *in extenso*:

This is in answer to your letter of May 17, [1950] requesting a procedure for differentiating hog bristles from horsehair.

The procedure used in this laboratory leans heavily on the study of cross-sections of the fiber. These are readily prepared by means of the Hardy microtome. The distribution of the pigment granules in the cross-section is one of the best indicators of the origin of the fiber. Photomicrographs and descriptions that are of assistance in this aspect of the microscopical study will be found in the "Textile Fiber Atlas" by Von Bergen and Krauss. Evidence of dyeing can also be detected in cross-section.

Flags are of secondary importance in this analysis. Many bristles will be found to be without flags so that their lack is not a positive means of identification. Synthetic flags can be recognized after some experience has been acquired and the use of known comparison samples of bristle and flagged horsehair is practically a necessity for this work.

There do not appear to be any publications dealing primarily with the analysis of horsehair and bristle.

The foregoing states the official position of the Bureau of Standards regarding the validity of the cross-sectional method of pigment pattern identification.

The complaint in this case, it will be recalled, bears date September 27, 1950, and indications from the record are, that this matter was under investigation by the Commission for many months prior to the issuance of the complaint and this fact was known to the respondents.

The original examination of this witness went into great detail concerning his tests and likewise tests of other fibers, all of which this examiner does not consider to be relative to the issue herein, as for example the identification of other animal fibers, such as the Cashmere goat and hog bristles selected from other sources by the

Decision

54 F.T.C.

respondents and submitted to the testing laboratory of which this witness was an employee and which other fibers were the subject of independent reports by this witness appearing of record in this proceeding. To all such extraneous and inapposite testimony this hearing examiner accords no evidential weight in determining the issue here framed.

As one of his criteria the witness used the microscopic pigmentation pattern of identification, having testified, (which testimony corroborates that of other witnesses in this behalf), that in the true hog bristle the main concentration of pigment appears in the medulla or central portion of the bristle gradually growing less dense as it approaches the periphery.

The foregoing is a résumé of the testimony of this witness prior to the Order of Remand of this matter to the examiner, in which order the Commission stated that the remand was made necessary because of conflict in [scientific] testimony.

Subsequent to the remand the witness was again recalled by respondents for the purpose of attacking the validity of the testimony of certain witnesses testifying at the instance of the Commission. Pursuing this tenor, the witness gave his opinion as to the detailed procedure necessary to be pursued by the witness appearing on behalf of the Commission before they would be in position to express any opinion on the quantitative appraisal of the presence of horsehair and bristle in a particular brush and concluding that such would be impossible, because irregular distribution of horsehair and fiber appearing in a restricted analysis of a sample thereof, would be erroneous and inconclusive; that it would be necessary to take apart all of the thousands of fibers in each brush and separately arrive at a determination of each fiber. In this connection, as hereinabove pointed out, this witness refrained from expressing a quantitative appraisal of the entire brush on the basis of his examination of samples but the witnesses on behalf of the Commission did not hesitate to do so under similar circumstances. He also attacked the validity of the scientific tests performed by Commission witnesses on the grounds, among others, that such witnesses did not avail themselves of various other tests known and which would tend to corroborate their findings. Among these, what might be called auxiliary tests, he cited the scale test, above described, of which this witness availed himself in making his own determinations, as well also microscopic examinations for taper, flag, sheen, elasticity, etc. These criticisms have been carefully considered and it is found that they are of insufficient weight to invalidate the testimony of the Commission's scientific witnesses on many grounds, among such being the microphotographs of cross-

sections of fiber appearing of record; the disinterestedness of the witnesses in the outcome of this matter; their official experience and connections; their uniform testimony that to them the cross-sectional and other methods of identification used by them were the best and most accurate available and their unhesitancy to express an opinion percentagewise on the presence of horsehair and bristle where such an admixture existed.

The witness further went on to say that any attempted expression of quantitative analysis, no matter how carefully done, would have to be subject to some sort of tolerant figure. This statement, because of the practical difficulties inherent in separating many thousands of bristles and appraising each one on its merits has been tacitly accepted by each of the Commission's scientific witnesses, one witness in particular qualifying her expressed quantitative analysis with a plus or minus 10% tolerance and stating, in connection therewith, that such was the uniform practice allowed and advocated by the National Bureau of Standards in tests of this character.

This witness, for some reason rather obscure to the hearing examiner, undertook to specifically attack the validity of the pigmentation pattern process despite the fact that he, himself, had made use of this method according to his own testimony and report on his analysis and, as illustrative of his criticism, introduced a microphotograph of six cross-sectional cuts of bristle which he had personally clipped from the belly of a live pig and hence was aware of the unquestioned source. Why he took the specimens from the belly portion of the pig, which is usually curly and known as pig wool, not customarily used in the manufacture of paint brushes, and which fact was known to the witness because he had testified in this case many months prior to the facts now related, and the bristles submitted to him from Comm. Exs. Nos. 1 and 2 were all straight and all approximately four inches in length, when he could, and should have, had he wished to draw a valid comparison, have extracted the bristles from the jowls, neck or back of the pig which he then had before him, is not explained of record.

When he undertook his laboratory tests of these bristles he related that the cross-sections were secured by use of the Hardy microtome and when he was questioned as to the thickness of the individual slices expressed in microns said that it was impossible to testify accurately, that his only desire was to slice the bristles thin enough to procure transparency for microscopical examination to observe the pigmentation pattern and could not say whether the thickness was greater or lesser than 15 microns. When his attention was called to the fact that the microphotograph disclosed an almost complete opacity which precluded an appraisal of pigmen-

Decision

54 F.T.C.

tation pattern, he was unable to say that this was due to abnormal thickness of cuts. Therefore no significance can be attached to the witness' testimony which would in any wise detract from the validity of the pigmentation pattern method of identification, especially in view of the fact that there are of record herein some 29 excellent microphotographs of cross-sections introduced and fully explained by a Commission witness, all of which photographs show, with singular clarity, the pigmentation pattern.

On the basis of the above criticisms by the witness he gave as his opinion that he does not believe that the use of the cross-sectional examination is the only criterion to the exclusion of other methods known to have proved equal or more valid than the information obtained from the cross-section only. Counsel for the Commission has not contended that the cross-sectional pigmentation method is the sole or exclusive method of fiber identification, despite the fact that two of the Commission experts, because of their familiarity with, and belief in, the effectiveness of this method, used it exclusively and based their opinions thereon. On the contrary, this type of experiment was used as corroborative only of the testimony of other witnesses, some of whom used the scale method, the "eye and feel tests", and experts of many years standing in the trade who, because of their empirical knowledge, were deemed well qualified. In other words, these laboratory tests were corroborative and not all-sufficient or exclusionary, and were used only as any scientific method would be used as, for example, finger-printing, blood tests, analysis of hair and fingernail clippings, scientific ink and paint analyses, handwriting and the like, which types of testimony are commonly accepted by all the courts in the land and accord to such evidence its proper weight, dependent upon the character and qualifications of the witnesses testifying, the reasonableness of the evidence and protocol set up for the tests themselves, as well whether or not the results sought are particularly scientific in nature and not tainted by preconceived ideas of the end results to be attained. There is no tangible and probative evidence in this case to indicate, much less to prove, that any of the scientific experiments used by the witnesses for the Commission are subject to such a challenge.

17. Respondent's witness Kramer, Chief chemist of New York Testing Laboratories, after giving his qualifications as an expert, testified he received samples of fibers from the Federal Trade Commission, (sent at the instance of the respondents), which had been extracted from brushes Comm. Exs. 1 and 2, for purpose of analysis or assay; that he first examined the samples visually, taking into account the taper and flag, separating them into two separate piles

consisting of those readily identifiable as bristle and those which were questionable; that in order to verify those identified by visual examination as bristle such were further subjected to longitudinal microscopical examination (not cross-sectioned), by individual fibers being placed on a slide and covered with a 10% solution of sodium hydrochloride, then subjected to heat so that the fiber became swollen and the internal structure visible under the scope.

This method furnished a quick means of identification i.e. (and according to the witness), a dark line running down the center of the fiber was indicative of bristle, and two dark lines running down the margins of the shaft indicated same to be horsehair.

The witness at this point confirmed the formal report on his tests, (as disclosed by Rx. No. 3), which showed samples from Comm. Exs. Nos. 1 and 2 to be composed of:

No. 1—Bristle, 99.4%: Horsehair 0.6%.

No. 2—Bristle, 99.4%: Horsehair 0.6%.

It will be observed that this test is not of the cross-sectional pigmentation pattern variety, as used by certain Commission witnesses, but tends to strongly confirm the cross-sectional method by developing the mainstay of the latter method of postulating the working hypothesis that true bristle evidences a concentration of pigment in the medulla, while horsehair, under a similar test, exhibits its pigment concentration in the form of two dark lines along the margins of the shaft without pigmentation in the center.

In view of the testimony of all of the witnesses for the Commission to the effect that Comm. Exs. 1 and 2 contained greatly in excess of the percentages of horsehair actually present, compared with the percentages found by this witness, it is most singular and inexplicable that the witness was able to find exactly the same distribution of bristle and horsehair in both exhibits, down to one-tenth of one percent, even in such small samples as tested by him.

The results, as above, reported in writing by this witness contains the following printed addendum:

Report on sample by client applies only to sample. Report on samples by us applies only to lot sampled.

The witness expressed no opinion on the fiber contents of *brushes*, Comm. Exs. 1 and 2, as such.

On the basis of the above résumé and reasoning, the testimony of this witness is found to be of no value to a determination of the sole issue here involved.

18. Respondent's witness, Gelman, is a bristle merchant who was called upon by respondents to extract samples of reputedly South American, Baltic, Indian and Chinese bristles from shipments in

Decision

54 F.T.C.

the possession and stock on hand of respondents which samples he mailed to a testing laboratory. These bristles form the basis for testimony of another witness for respondents; that witness knows the respondents and that his firm is a supplier of bristles to the respondents.

Witness, although undoubtedly conversant with the subject of bristles, was not qualified as an expert and was not asked to express an opinion on the fiber content of the brushes herein, although he did testify he would be able to recognize the presence of a 10% or larger quantity of horsehair in a brush, but that as little as 5% would be difficult.

19. Another witness for respondents, Firestone, is engaged in the dressing and selling of bristles; so engaged since 1932 in China and later in this country; testified to the possibility of foreign substances being present in batches of bristle purchased by him while operating in China but further testified that he used every means at his disposal to see to it that the bristles, when exported, were free of all adulterants although he was "always suspicious" of his Chinese suppliers and it is possible that some shipments got through which contained adulterants despite his vigilance; acknowledged that the responsibility of excluding foreign substances was his and that the presence of such would adversely affect his business reputation and good will with his customers.

Witness expressed no opinion on the fiber content of brushes hereunder inquiry.

20. Another witness for respondents, Stryer, entered the bristle business in China in 1938 as a buyer for a foreign firm, remaining there for fourteen years, the last four thereof as a brush manufacturer; now a brush salesman on his own account, purchasing and reselling various types of brushes, including paint brushes.

This witness was not qualified as an expert on bristle but rather his testimony was devoted to economic conditions respecting bristles before and during the Korean incident, including prices, artificial weighting, speculating in bristles by amateurs in the field, wilful adulteration of bristles with foreign fibers by the producers thereof, and kindred matters totally unrelated to the single issue herein, wherefore this testimony is disregarded because not pertinent to the issue.

21. Another witness for respondents, Schlachter, is a brush maker employee of respondents who was introduced by them in an attempt to demonstrate the economic infeasibility, because of excessive labor cost, of manufacturing "cased" brushes, (which he described as placing one type of fiber or bristle in the middle of the brush and sur-

rounding it with another type of bristle or fiber); that he has had experience in making up both "cased" and "uncased" brushes.

This testimony is considered of importance because, coming from respondents, it supports the testimony of Commission witnesses who testified on the subject of "casing" and gives great weight to their testimony as to the different results which might be expected upon analysis depending upon the location or portion of the brush from which sample fibers are extracted, that is, if fibers from a cased brush with bristle on the outside and horsehair admixture in the center, then samples taken from the outside, would assay 100% bristle, but, were the sample taken by cutting through the brush, rather than around it, one would get a fairly representative specimen.

22. Another witness for respondents, Kulasky, has been in the bristle processing business for seventeen years; also buys and sells bristle; makes use of the "eye and feel" method of bristle identification by which test he can recognize the difference between bristle and horsehair; that this method is universally made use of in the trade and he has never known of the use of a microscope for bristle identification.

Upon examining the two brushes, Comm. Exs. Nos. 1 and 2, gave as his opinion that both were pure bristle brushes, although, as he testified on cross-examination, he did not examine all of the fibers, contenting himself merely with the general "feel" of the brush and saying: "If there is horsehair, it strikes you just looking at it."

Witness has been, for 14 or 15 years, a supplier of bristles, mixed and unmixed, to respondent Manhattan.

23. Another witness for respondents, Sztein, is a bristle dresser and dealer in bristle of thirty years experience, using the "eye and feel" method for bristle identification. The burden of this witness' testimony is two-fold: First: That in manufactured brushes containing up to 8% to 10% horsehair one could not tell whether the brush was "Pure Bristle" or not, and, Second: That in the course of dressing "some sort of hair" is always found and that this percentage would be from one-half to one percent. He admitted he had never examined a brush with a view to determining the respective percentages of bristle and horsehair.

He expressed no opinion concerning the fiber content of Comm. Exs. Nos. 1 and 2.

24. Supplementing the testimony of certain of respondents witnesses there are of record three separate "reports of tests," being Respondents Exhibits Nos. 3 and 5, made by the New York Testing Laboratories, and No. 10, made by the United States Testing Company.

Decision

54 F.T.C.

In Res. Ex. No. 3 the New York Laboratories reported its analysis of samples of brushes, Comm. Exs. Nos. 1 and 2 to be each composed of bristle 99.4% and horsehair 0.6%. A printed notice at the foot of the report states:

Report on sample by client applies only to sample. Report on samples by us applies only to lot sampled.

Obviously the report, expressing no results of analysis relateable to the fiber contents of the brushes proper and as entities, is of no material assistance in determining the issue herein.

In Res. Ex. No. 5 the New York Laboratories undertook to report on analyses of five various samples of bristle reputedly selected from the bristle stocks of respondents, (not samples from Comm. Exs. Nos. 1 and 2), and which analyses were used by respondents ostensibly and presumably for the purpose of showing a trace of horsehair or foreign substance in all bristle stocks owned by respondents. This analysis showed the *percentages of adulterants* present ranged within 0.2% to 1% of the *percentages of adulterants* reported present in Comm. Exs. 1 and 2, as reported in Res. Ex. No. 3, above. This report was also, by its terms, limited to the samples submitted.

Res. Ex. No. 10, made by the United States Testing Company, were reports on tests of five samples of bristles selected from the respondents' stock. This was intended, presumably, although not stated, to be a duplication or check on a similar test of similar samples by the New York Laboratories represented by Res. Ex. No. 5, above. The bristles examined were not taken from Comm. Exs. Nos. 1 and 2.

At the foot of this report appears:

Our letters and reports apply only to the sample tested and are not necessarily indicative of the qualities of apparently identical or similar products.

All of respondents' exhibits Nos. 3, 5 and 10 are without probative effect to disprove the affirmative testimony in support of the charges of the complaint and are disregarded.

25. It is found, as a fact, that respondents have caused their paint and varnish brushes to be labeled "Pure Bristle", notwithstanding the same have been substantially and significantly adulterated by means of the use of horsehair, and that the charges have been sustained by, and in accordance with, the reliable, probative and substantial evidence of records.

26. It is found there is a decided preference on the part of members of the purchasing and consuming public for paint and varnish brushes composed entirely and exclusively of genuine bristle.

CONCLUSIONS

1. In arriving at the findings and conclusions necessary to support an order to cease and desist special consideration has been accorded to recent decisions of this Commission,⁴ the complaints in both of which matters were dismissed by the Commission on the principal grounds that the scientific testimony adduced on behalf of the contesting parties was irreconcilable and nonconclusive of the issues, and that the testimony of consumer or lay witnesses adduced by the respondents, in conjunction with respondent's own scientific testimony, was sufficient to overcome the charges of the complaint and presented a good and adequate basis for a finding that the Commission had failed to sustain the burden of proof cast upon it under the provisions of Section 7(c) of the Administrative Procedure Act. It is concluded that the evidence adduced by the Commission in the instant case is not subject to such infirmities for the following reasons:

The, what may be truly called scientific testimony, offered on behalf of the Commission by witnesses Newman, Hourihan, and Hardy, all being disinterested witnesses and motivated solely by a desire to report truly upon their individual experiments as hereinabove found, coupled with what may be termed "quasi expert" opinions given upon the basis of empirical knowledge and experience by those witnesses availing of the "see and feel tests," persuade this Examiner in his finding and conclusion that the burden of proof in support of the allegations of the complaint has been adequately borne. The scientific tests on behalf of respondents by the witness Coe, and the testimony and reasoning of that witness wherein he attempts to attack the validity of the cross-sectional pigmentation tests, is found to be without merit or weight and that the laboratory report of this witness is of no evidential value whatsoever in determining the issue joined in this matter because of the specific findings of the witness to the effect that the results of his experiments are confined to the samples examined under laboratory conditions and that such results are not to be projected or extrapolated to the entire fiber content of the brushes. Concerning the testimony of the "eye and feel" experts adduced on behalf of the respondents, for various reasons not necessary to be recited, this Examiner was not particularly impressed.

2. It is concluded that the proof in support of the charges of the complaint is overwhelming and that the evidence in opposition presents no substantial conflict which would bring this matter within

⁴ F.T.C. v. Pioneers, Inc., Docket No. 6190 and F.T.C. v. Courant, Docket No. 5867.

Conclusions

54 F.T.C.

the scope of the Commission decisions in the Courant and Pioneer cases cited *supra*. It was in order to demonstrate the basis for this conclusion that the Examiner felt constrained to set forth a fairly replete analysis of the pertinent testimony pro and con on the single issue of fiber identification, enunciated in the case of Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474, which opinion, although quite lengthy, is aptly epitomized by editorial comment appearing in Vol. 95, No. 7. Supreme Court Advance Opinions, as follows:

The essence of Mr. Justice Frankfurter's opinion, to this extent concurred in by all the other Justices, is that the Administrative Procedure Act and the Taft-Hartley Act direct that reviewing courts must now assume more responsibility for the reasonableness and fairness of decisions of the National Labor Relations Board than some courts have shown in the past. In particular, it was held that, in determining whether an order of the Board is supported by substantial evidence, the court should take into account whatever in the record fairly detracts from the weight of the evidence, and that the court is precluded from sustaining an order merely on the basis of evidence which in and of itself justifies it, *without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn*. (Italic supplied.)

Pursuing the same subject, it will be observed that the Commission has introduced three scientific witnesses and several "see and feel" experts, all of whom are unanimous in declaring the presence of horsehair in both brushes. The respondents have produced but two scientific experts one of whose testimony was ostensibly directed to the objective of disparaging the validity of the theories and tests pursued by the Commission experts. The respondents, in addition to the foregoing, produced the testimony of two witnesses of the "see and feel" school whose testimony did not, in the opinion of this Hearing Examiner, have the effect of overriding the weight to be accorded to the testimony of Commission witnesses, wherefore it is concluded that the Commission has amply sustained the burden of proof in the matter of production of "reliable, probative, and substantial evidence" cast upon it by the provisions of Section 7(c) of the Administrative Procedure Act.

3. Respondents contend that it is almost impossible to produce a pure bristle brush without the intrusion of horsehair. It is concluded that this contention is without merit: First, because of the testimony of several well informed witnesses that it is not difficult or impossible to produce a 100% pure bristle brush, and this they were doing in the ordinary everyday course of their production processes: Second, the testimony of several witnesses, long in the industry, that the presence of extraneous or foreign fibers among importations of bristles is not, and never has been in their experi-

Conclusions

ence, a problem to the industry and: Lastly, the testimony of several witnesses to the effect that horsehair, when found among bristles in the raw, dressed, or manufactured state, are there solely by reason of human design and intention.

4. It is concluded that it is the duty of respondents to see to it, at all hazards, by close inspection or careful selection, (only spot checks were made of large bristle importations or purchases), that their products, offered to the trade or to the public, are as represented. This they have not done, their misrepresentations resulting in injury to the public and to their competitors.

5. Stress was placed by the respondents, in the examination of their own and opposing witnesses, upon the impracticability, for use in the trade, of microscopical examination of bristles, either by the cross-sectional pigmentation pattern method or for taper, flags, surface scale, etc. It is concluded that no weight should be given this contention because, first, no one, so far as this record discloses, ever advocated the adoption of microscopic examination for use by the trade and, second, such examination was conducted by Commission witnesses purely as a scientific procedure for the more certain identification of the fibers involved, much along the lines of fingerprinting, blood analysis, urinalysis and kindred procedures, the results of which are accepted as competent evidence by all the courts in the land in appropriate instances.

6. Much testimony was introduced by the respondents concerning comparative prices of bristle and horsehair in various grades and lengths, the announced object being to sustain the contentions of respondents that it would work to their economic disadvantage to use horsehair as an adulterant. To this type of testimony the Examiner accords no weight or consideration because of the narrowness of the issue herein as above pointed out and, further, that the economic advantages or disadvantages accruing to respondents by their use of horsehair is of no moment under the charges of the complaint.

7. Respondents have attempted, during the course of the proceedings, and in their request for Proposed Findings Nos. 12 and 13, to give some color of respectability to the term "commercially pure" as applied to the fiber contents of brushes which have been adulterated or debased by the presence of horsehair or other foreign substances, contending that:

The words "Pure Bristle" intended to convey to the public that the material of which the brush was composed consists of material accepted *by the trade* to be "commercially pure." (Italic supplied.)

This may be true, and *the trade* may not be deceived because of its knowledge and experience, but we are not here concerned with the *trade*, which probably needs no protection on fiber identifica-

Conclusions

54 F.T.C.

tion, but rather with the protection of the great body of the consuming public. In support of this conclusion certain language from the opinion of Mr. Justice Brandeis is quoted in the case of F.T.C. v. Winsted Hosiery Co., (258 U.S. 483) :

By means of the labels and brands of the Winsted Company bearing such words part of the public is misled into selling or into buying as all-wool underwear which in fact is in large part cotton. And these brands and labels tend to aid and encourage the representations of unscrupulous retailers and their salesmen, who knowingly sell to their customers as all-wool underwear which is largely composed of cotton.

In that case, as here, it was contended that the trade is not deceived by use of the label indicating the product to be "all wool"; that there was no unfair competition for which another manufacturer could maintain a suit; and that even if consumers are misled because they do not understand the trade signification of the label, or because some retailers deliberately deceive them as to its meaning, the result is in no way legally connected with unfair competition. Dealing with this attempted defense the Court said:

* * * The labels in question are literally false. * * * All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public. That deception is due primarily to the words of the labels and not to deliberate deception by the retailers from whom the consumer purchased. * * * The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition as against manufacturers of all-wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the truthfully marked goods.

* * * * *

Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived. The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product. That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.

It is concluded that nothing appearing in this record gives credence or support to the use or recognition of this term and, in fact, based upon the credible testimony of record to the effect that 100% pure bristle brushes are being continually produced, and the further fact that the Rules for the Industry heretofore considered make no allowance for tolerances for extraneous fibers, as well also the provisions of Paragraph 5 of the Federal Trade Commission

Act prohibiting false and misleading representations, all unite in forcing the inescapable conclusion that there is no such thing as a "commercially pure" bristle brush. Webster defines the word "pure" as—"Separate from all heterogeneous or extraneous matter; without alloy, stain or taint; clear; unmixed; free from what vitiates, weakens or pollutes."

8. The Federal Trade Commission has jurisdiction over the parties respondent and over the subject matter hereof, and this proceeding is in the public interest.

9. The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Manhattan Brush Company, Inc., and Robert S. Gillman and Norman B. Bloom, individually, and as officers of Manhattan Brush Company, Inc., and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the sale, offering for sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' product paint brushes, do forthwith cease and desist from:

1. Using the words "Pure Bristle" or "bristle," or any other word or term of similar import or meaning, either alone or in connection with other words, to designate, describe or refer to any product which is not composed wholly of bristle of the hog or swine: Provided, however, that in the case of a product composed in part of bristle and in part of horsehair or other fibers, the word bristle may be used as descriptive of such fiber content if there are used in immediate conjunction therewith, in letters of equal conspicuously, words truthfully describing, in the order of their predominance, all constituent materials.

2. Representing in any manner that any of respondents' brushes contain bristle in greater quantity than is actually the case.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The respondents manufacture and distribute paint brushes in commerce, some of which have been stamped or marked with the words "Pure Bristle." In the initial decision, the substitute hearing examiner held that certain of the brushes so marked have contained

Opinion

54 F.T.C.

substantial quantities of horsehair. Bristle is the coarse hair of the hog or swine. Because no other fiber is as efficient and satisfactory for applying paint and varnish, there is a wide public preference for brushes composed exclusively of bristle.

In their appeal, the respondents challenge the initial decision's findings that they have misrepresented their brushes' fiber content as contrary to the weight of the evidence and as erroneously based on contradictory scientific evidence. The evidence presented in support of the allegations of the complaint included the testimony of three fiber technologists relating to their separately conducted laboratory studies and tests of fiber samples from the respondents' brushes and the testimony of two trade witnesses who based their opinions on the "eye and feel" method of examination, a procedure used in the trade. On the basis of their examinations, they testified variously to the effect that the exhibit brushes contained 10% or more of horsehair or contained substantial quantities of horsehair.

The laboratory procedures used in differentiating fibers by two of those technologists placed emphasis on pigmentation patterns observed in cross-sections of the fibers. On the other hand, the third scientific witness relied primarily on another classification method. This circumstance, however, corroborates rather than detracts from the conclusiveness of their scientific studies which resulted in substantially similar though not identical test findings. That two of them deemed their respective but differing laboratory procedures to be more reliable than other scientific methods does not render the results afforded by the other's testing method contradictory or defective. Both were well qualified to conduct the scientific studies engaged in by them; and the above-mentioned trade witnesses similarly appear well qualified by their experience to express opinions with respect to the fiber content of brushes. We also have carefully considered the evidence presented by the respondents, including the testimony of two fiber technologists who expressed views that the sample fibers examined by them contained only small quantities of horsehair ranging from 6/10 of 1% up to 2%. We concur in the hearing examiner's conclusions that the evidence presented in support of the complaint clearly outweighs the evidence submitted by the respondents and supports informed determinations that the brushes sold by the respondents as pure bristle have contained substantial quantities of horsehair.

Respondents also contend that a requirement that brushes sold as pure bristle be in fact so composed would result in hardship to them and would be incapable of enforcement. The appeal cites in this connection that horsehair is often found intermingled in shipments of bristle from the Orient and that the "eye and feel" test custom-

arilly employed in the trade is not a reliable and precise method for distinguishing fibers. Respondents also state that their brushes are "commercially pure" and that a tolerance or allowance for the presence of horsehair in brushes accordingly is justified by the record and should be permitted. As noted by the hearing examiner, however, credible evidence was received indicative that it is not impossible or difficult for manufacturers to produce a 100% bristle brush and that such brushes are continuously produced in the industry. It is evident also that the statement "pure bristle" as used by the respondents can have but one meaning to the consuming public, namely, that the fiber content of the brushes so designated are composed solely of bristle. Since respondents' brushes have contained extraneous fibers, the public interest requires issuance of an order forbidding the respondents from misrepresenting the fiber content of their brushes in the future.

The form of order to cease and desist contained in the initial decision would make it mandatory for the respondents to stamp or label brushes containing mixed fibers with the respective percentages of each of the constituent materials. For reasons stated in our opinion issued *In the Matter of Abbey Brush Corporation*, Docket No. 5802 (decided April 8, 1957), we think the provision of the order requiring quantitative identification of constituent fibers lacks sound legal basis and is unwarranted. Our order which is issuing herewith accordingly provides for appropriate modification of the order contained in the initial decision.

Inasmuch as the findings and conclusions contained in the initial decision are free from substantial error, the respondents' appeal is being denied. With the order to cease and desist modified as noted above, we are adopting the initial decision as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the above-named respondents from the initial decision of the substitute hearing examiner and upon briefs and oral argument of counsel; and the Commission having determined, for reasons stated in its accompanying opinion, that said initial decision should be modified:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

ORDER

It is ordered, That the respondents, Manhattan Brush Company, Inc., and Robert S. Gillman and Norman B. Bloom, individually,

Order

54 F.T.C.

and as officers of Manhattan Brush Company, Inc., and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the sale, offering for sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' product paint brushes, do forthwith cease and desist from:

1. Using the words "Pure Bristle" or "bristle," or any other word or term of similar import or meaning, either alone or in connection with other words, to designate, describe or refer to any product which is not composed wholly of bristle of the hog or swine: Provided, however, that in the case of a product composed in part of bristle and in part of horsehair or other fibers, the word bristle may be used as descriptive of such fiber content if there are used in immediate conjunction therewith, in letters of equal conspicuity, words truthfully describing, in the order of their predominance, all constituent materials.

2. Representing in any manner that any of respondents' brushes contain bristle in greater quantity than is actually the case.

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

It is further ordered, That the initial decision of the substitute hearing examiner, as modified herein, be, and it hereby is, adopted as the decision of the Commission.

Decision

IN THE MATTER OF
DICTOGRAPH PRODUCTS, INC., ET AL.

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

Docket 6712. Complaint, Jan. 18, 1957—Decision, July 3, 1957

Consent order requiring a manufacturer in Jamaica, Long Island, N.Y., and the corporate purchaser in Newark, N.J., of its entire production of home fire alarm systems for sale to the public through franchise dealers, whose salesmen gave demonstrations in homes of prospects, to cease the acts and representations set forth in the order below, engaged in by salesmen; and to cease supplying to said franchise dealers literature upon which they were based.

Mr. Edward F. Downs and Mr. Garland S. Ferguson, supporting the complaint.

Mr. Milton Handler, of New York City, for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above named respondents on January 18, 1957, charging them with violation of the Federal Trade Commission Act as set forth in said complaint. After issuance and service of the complaint all respondents on May 8, 1957 entered into an agreement with counsel supporting the complaint for a consent order to cease and desist from the practices complained of, which agreement purports to dispose of all the issues in this proceeding without hearing. This agreement has been duly approved by the Assistant Director and the Director of the Bureau of Litigation and has been submitted to the undersigned, heretofore designated to act as hearing examiner herein, for his consideration in accordance with Rule 3.25 of the Rules of Practice of the Commission.

Respondents in the aforesaid agreement have admitted all the jurisdictional facts alleged in the complaint and have agreed that the record may be taken as if findings of the jurisdictional facts had been duly made in accordance with such allegations. Said agreement provides further that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of

Order

54 F.T.C.

the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders of the Commission and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order and it appearing that the agreement and order cover all the allegations of the complaint and provide for appropriate disposition of this proceeding, the order and agreement are hereby accepted and ordered filed upon becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice and the hearing examiner accordingly makes the following findings for jurisdictional purposes and order:

1. Respondent Dictograph Products, Inc., is a corporation 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 95-25-149th Street, Jamaica, Long Island, New York.

2. Respondent Fire Detective, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 300 Chancellor Avenue, Newark, New Jersey.

3. Respondents Herman Perl, Richard E. Rudolph, Arthur J. Waldorf and Malte J. Carlson are individuals and officers of corporate respondent Fire Detective, Inc., and respondent Stanley Osserman is an individual and is Chairman of the Board of Directors of corporate respondent Fire Detective, Inc. The addresses of the individual respondents are as follows: Herman Perl, 300 Chancellor Avenue, Newark, N.J.; Richard E. Rudolph, 3 South 20th Street, Philadelphia, Penna.; Arthur J. Waldorf, 2912 Euclid Avenue, Cleveland, Ohio; Malte J. Carlson and Stanley Osserman, 95-25 149th Street, Jamaica, Long Island, N.Y.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents herein. The complaint states a cause of action under the Federal Trade Commission Act. This proceeding is in the public interest.

ORDER

It is ordered, That the respondents Dictograph Products, Inc., a corporation, Fire Detective, Inc., a corporation, and their officers, and Herman Perl, Richard E. Rudolph, Arthur J. Waldorf and

Malte J. Carlson, individually and as officers of Fire Detective, Inc., and Stanley Osserman, individually and as Chairman of the Board of Directors of Fire Detective, Inc., their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined by the Federal Trade Commission Act, of fire detection or fire alarm systems do forthwith cease and desist from:

1. Representing, directly or by implication:
 - (a) That respondents' salesmen only desire to make fire prevention talks or demonstrations;
 - (b) That respondents' representatives are not salesmen but are only demonstrators;
 - (c) That prospective purchasers or their homes have been specially selected for demonstration purposes;
 - (d) That the total or monthly cost of respondents' fire alarm system will be reduced in any amount by the submission of names of prospective purchasers under respondents' referral program;
 - (e) That the identity of those supplying names of prospective purchasers will not be revealed to said prospective purchasers;
 - (f) That the contract or promissory note for the purchase price of the system will not be discounted or failing to reveal that such will be discounted;
 - (g) That carrying charges will not be added to the total cost of the system or failing to reveal that carrying charges will be added.
2. Inducing the purchase of respondents' products by employing "scare tactics" by exhibiting newspaper clippings and horror pictures calculated to unduly arouse parents emotionally as to the need to protect themselves and their children from the hazards of fire.
3. Misrepresenting in any manner the amount of money any purchaser or prospective purchaser will probably or may reasonably expect to receive from the submission of names of prospects under respondents' referral program.
4. Using any referral program in inducing the sale of their fire alarm system unless, (1) all of the terms and conditions thereof are fully explained to the purchaser or prospective purchaser prior to consummation of the sale, (2) any person submitting the name of a prospect who cannot be solicited for any reason is given the option of submitting a replacement name, and (3) the promised sum of money is actually paid to the purchaser who submitted the name of a prospect to whom a demonstration or sale of the system is made pursuant to such referral.
5. Supplying franchise dealers or their representatives with any literature or other material containing or suggesting any of the

Decision

54 F.T.C.

statements, representations, acts or practices prohibited by paragraphs 1 through 4 of this order.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 3rd day of July, 1957, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

Decision

IN THE MATTER OF
ROBERTS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS*Docket 6715. Complaint, Jan. 22, 1957—Decision, July 3, 1957*

Consent order requiring furriers in Oklahoma City, Okla., and trading also in Beverly Hills, Calif., to cease violating the Fur Products Labeling Act by labeling fur products with fictitious prices and removing required labels; by invoicing falsely with respect to artificially colored furs and the name of the animal producing certain furs; by advertising which gave other than the producing animal names for certain furs, falsely represented prices as wholesale or less and as reduced, and "sales" as liquidating their entire stock; and by failing in other respects to conform to the requirements of the Act.

Mr. George E. Steinmetz and Mr. Daniel J. Murphy for the Commission.

Mr. Victor Halote and Mr. Samuel Halote, of Beverly Hills, Calif., pro se, and for Roberts, Inc.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding issued January 22, 1957, charged respondents Roberts, Inc., an Oklahoma corporation, with its principal office located at 9555 Wilshire Boulevard, Beverly Hills, California; Victor Halote and Samuel Halote, individually and as officers of said Roberts, Inc., located at 9555 Wilshire Boulevard, Beverly Hills, California; and Victor Halote and Samuel Halote, individually and as copartners trading as Halote Bros., located at 9555 Wilshire Boulevard, Beverly Hills, California, with the use of unfair and deceptive acts and practices in interstate commerce in violation of the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

After the issuance of said complaint, the respondents Roberts, Inc., and Victor Halote and Samuel Halote, individually and as officers of Roberts, Inc.; also individually and as copartners separately trading as Halote Bros., entered into an agreement for consent order with counsel in support of the complaint disposing of all the issues in this proceeding, which agreement was duly approved by the Director and Acting Director, Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by

Order

54 F.T.C.

respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the said respondents admitted all the jurisdictional facts alleged in the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations.

By said agreement the respondents expressly waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

Respondents further agreed that the order to cease and desist, issued in accordance with said agreement, shall have the same force and effect as if made after a full hearing.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein, that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement, and that said order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and, in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That the respondents, Roberts, Inc., a corporation, and its officers, and Victor Halote and Samuel Halote, individually and as officers of said corporation; and the said Victor Halote and Samuel Halote, individually and as copartners separately trading under the firm name of Halote Bros., or under any other name, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the offering for sale, sale, advertising, transportation, or distribution of fur products which

have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such product as to the regular price or value of such product when such price or value is not that at which such product is regularly sold by respondents.

2. Failing to affix labels to fur products showing:

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 and as prescribed in the Rules and Regulations;

b. That the fur product contains or is composed of used fur when such is a fact;

c. That the fur product contains or is composed of bleached, dyed, or artificially colored fur when such is a fact;

d. That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur when such is a fact;

e. The name of the country of origin of any imported furs used in the fur product.

3. Setting forth on labels attached to fur products:

a. The name or names of any animal or animals other than the name or names provided for in Paragraph A(2)(a) above.

b. Required information in handwriting.

B. Removing or participating in the removal of labels required by the Fur Products Labeling Act to be affixed to fur products, prior to the time any fur product is sold and delivered to the ultimate consumer.

C. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

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 and as prescribed by the Rules and Regulations;

b. That the fur product contains or is composed of used fur, when such is a fact;

c. That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is a fact;

d. That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is a fact;

e. The name and address of the person issuing such invoices;

f. The name of the country of origin of any imported furs contained in the fur product;

g. The item number or mark pertaining to such products as required by Rule 40 of the regulations under the Fur Products Labeling Act.

2. Using on invoices the name or names of any animal or animals other than the name or names provided for in Paragraph C(1)(a) above.

3. Setting forth required information in abbreviated form.

4. Using the term "blended" to describe any fur products which are dyed or tip-dyed.

D. Falsely or deceptively advertising fur products through the use of any advertisement, 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 products as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

b. That the fur products contain or are composed of bleached, dyed, or otherwise artificially colored fur, when such is a fact;

c. That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is a fact;

d. The name of the country of origin of imported furs contained in fur products.

2. Contains the name or names of any animal or animals other than the name or names provided for in Paragraph D(1)(a) above.

3. Represents directly or by implication:

a. That fur products are offered at prices at or below wholesale prices when contrary to fact, or that the regular or usual price of any fur product is any amount in excess of the price at which the respondents have usually and customarily sold such products in the recent regular course of their business;

b. That any of such products represent a clearance or a liquidation of their stocks of fur products, contrary to fact;

c. That any such products are for sale at reduced prices as a special clearance or liquidation of stocks of fur products, contrary to fact.

E. Using percentage savings claims and comparative prices in advertising unless such claims and prices are based upon current market values, or unless the designated time of a bona fide compared price is given.

F. Making use of pricing claims or representations in advertising of the type referred to in Paragraph D(3)(a) and E above, unless respondents maintain full and adequate records disclosing the facts upon which such claims or representations are in fact based.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 3rd day of July, 1957, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

Decision

54 F.T.C.

IN THE MATTER OF
MANDEL BROTHERS, INC.

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

Docket 6434. Complaint, Oct. 27, 1955—Decision, July 5, 1957

Order requiring a Chicago furrier to cease violating the Fur Products Labeling Act by misbranding, falsely advertising, or falsely invoicing its fur products.

William A. Somers, Esq., for the Commission.

*Hopkins, Sutter, Owen, Mulroy & Wentz, by William G. Blood,
Esq., and James J. McClure, Jr., Esq., of Chicago, Ill., for re-
spondent.*

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On October 27, 1955, the Federal Trade Commission issued its complaint against Mandel Brothers, Inc. (hereinafter called respondent), charging respondent with misbranding and falsely and deceptively invoicing and advertising certain fur products in violation of the provisions of the Fur Products Labeling Act (hereinafter called the Fur Act), 15 U.S.C. 69(a), *et seq.*, and Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint, together with a notice of hearing were duly served upon respondent.

The complaint alleges in substance that respondent (1) misbranded certain of its fur products by not labeling them as required under the Fur Act and the Rules and Regulations promulgated thereunder; (2) falsely and deceptively invoiced certain fur products in violation of the Fur Act and said Rules and Regulations; (3) falsely and deceptively advertised certain fur products by misrepresenting the prices as having been reduced from regular or usual prices, and by means of comparative prices, as having a certain value, in violation of the Act, the Fur Act and Rules and Regulations; and (4) failed to maintain adequate records upon which such price and value representations were based, in violation of the Rules and Regulations. Respondent appeared by counsel and filed an answer admitting the corporate and competition allegations of the complaint, but denying the jurisdictional allegations and all alleged violations of the Act, the Fur Act and the Rules and Regulations.

Pursuant to notice, hearings were thereafter held on April 12 and June 7, 1956, in Chicago, Illinois, before the undersigned hearing examiner duly designated by the Commission to hear this proceeding. Prior to the initial hearing, respondent's motion to strike the complaint upon the grounds that the Rules and Regulations promulgated by the Commission under the Fur Act were invalid, that the Fur Act was unconstitutional, that the complaint was so vague and uncertain as to make responsive pleading impossible, and that the complaint failed to allege sufficient facts concerning commerce to vest the Commission with jurisdiction, was denied.

All parties were represented by counsel, participated in the hearings and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons therefor. All parties waived oral argument and pursuant to leave granted thereafter filed proposed findings of fact, conclusions of law and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith specifically rejected.¹

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondent

The complaint alleged, respondent admitted, and it is found that respondent is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1 North State Street, Chicago, Illinois.

II. Interstate Commerce and Competition

The complaint alleged, respondent denied, and it is found that respondent is now and has been since August 9, 1952, the effective date of the Fur Act, 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 "commerce," "fur" and "fur products" are defined in the Fur Act.

¹ 5 U.S.C. § 1007(b).

In this connection, as noted above, respondent denies that it is engaged in commerce within the meaning of the Fur Act, or that it sold, advertised, offered for sale, transported or distributed fur products made in whole or in part of fur which had been shipped and received in commerce. However, the record establishes that respondent advertised its fur products in commerce, sold fur products to customers from outside the State of Illinois and subsequently delivered such products to such customers outside the State of Illinois, and purchased and had shipped to it in the State of Illinois fur products from the State of New York.

Respondent advertised its fur products in *The Chicago Tribune*, *The Chicago American*, and *The Chicago Sun-Times*, newspapers with substantial circulation outside the State of Illinois. In addition, the record reveals a number of sales by respondent to customers outside the State of Illinois. While these sales were made at the Chicago store, respondent's officials admitted that, because no Illinois sales tax was charged, the products must have been delivered by respondent to such customers outside the State of Illinois. The foregoing facts are substantially identical to those considered by the Commission in the *Pelta Furs* case,² wherein the Commission, although in disagreement concerning the authority for Rule 44 of the Rules and Regulations under the Fur Act, unanimously agreed that the respondents therein were engaged in "commerce" within the meaning of the Act and the Fur Act.

Based upon the above undisputed facts, it is further concluded and found that respondent is engaged in commerce within the meaning of the Act, and that, in the course and conduct of its business, respondent is in substantial competition in commerce with other corporations, firms, copartnerships and individuals also engaged in the sale of fur products to members of the purchasing public.

III. The Unlawful Practices

A. Misbranding of Fur Products

The complaint alleged that respondent misbranded certain fur products by not labeling them as required under the provisions of Section 4(2) of the Fur Act and Rules 4, 29(a) and 29(b) of the Rules and Regulations. More specifically, Section 4(2) of the Fur Act requires labels on fur products showing: (a) the name of the animal as set forth in the Fur Products Name Guide promulgated by the Commission pursuant to Section 7 of the Fur Act; (b) that the fur is used; (c) that the fur is bleached, dyed, or otherwise arti-

² *Pelta Furs*, Docket No. 6297 (1956).

ficially colored; (d) that the product is composed of paws, tails, etc.; (e) the name or other identification of the person who manufactures or sells the product; and (f) the country of origin of any imported fur.

Counsel supporting the complaint proposed no findings, and there is no proof in the record, with respect to any violation of (b) and (d) above. Accordingly no such violations are found. With respect to (a), (c) and (f) above, there is no substantial dispute in the record. The record reveals some 12 instances of failure to label the fur products with the correct name of the animal producing the fur as set forth in the Fur Products Name Guide, some 15 instances of failure to disclose in the labels that the product was bleached, dyed or otherwise artificially colored, and some 58 instances of failure to disclose the country of origin of imported furs. With respect to the alleged violations of the aforesaid rules concerning labeling, the record establishes some 9 instances of required information being set forth in abbreviated form contrary to Rule 4, some 59 instances of mingling non-required information with required information in violation of Rule 29(a), and some 119 instances of required information being set forth in handwriting in violation of Rule 29(b).

While not disputing any of the foregoing violations, respondent argues that they are merely technical and trivial in nature, and accordingly the public interest does not warrant the issuance of a cease and desist order.

Respondent's argument is without merit. Admittedly, the misbranding found was not as serious or substantial a violation of the Fur Act as, for instance, calling muskrat mink or rabbit ermine, but the very purpose of Congress in adopting the provisions of the Fur Act and directing the Commission to promulgate rules and regulations thereunder was to prevent deception of the public by such practices. It cannot seriously be urged that violations of specific sections of an act adopted by Congress are too technical or trivial to warrant the issuance of a cease and desist order.

In addition, the Commission, as an expert body, was authorized and directed to adopt rules and regulations to carry out the purpose of the Act, namely, to prevent the deception of the public by misbranding or falsely advertising or invoicing fur products. Obviously, the use of abbreviations, handwriting, and the mingling of non-required information with required information are devices which can readily be used to deceive and mislead the public. Even though it be conceded that they may have been done innocently, in ignorance of the law, and without intention to deceive, they cannot be permitted. To dismiss respondent's misbranding as too trivial

Findings

54 F.T.C.

or technical to warrant the issuance of a cease and desist order would be to open the door to deception and evasion of the Act.

Although the complaint alleged, and counsel supporting the complaint proposed a finding, that respondent failed to attach labels to its fur products showing its name, as required by subsection (e) of Section 4(2) of the Fur Act as paraphrased above, the record establishes that respondent did not in fact fail to so label its products. Mr. Camenisch, an investigator for the Commission, testified that he found no instances where respondent's name was not set out on its labels. Commission Exhibit 1 is a facsimile of the form of label used by respondent. Printed thereon in large type are the words "Mandel Brothers, Chicago." Mr. Camenisch testified that the correct name of respondent is Mandel Brothers, Inc., and apparently the proposed finding of counsel supporting the complaint is based upon the failure to include the word "Inc.," even though it is undisputed that respondent placed its name and city of location upon all of its labels. I find no merit in this proposal of counsel supporting the complaint. Subsection (e) of Section 4(2) requires that the label show plainly: "The name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product . . . , introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce." Respondent has complied with this requirement literally. In addition, it included the city where it does business, more information than necessary under the subsection. The failure to attach the word "Inc." seems to me completely without significance. Respondent plainly set forth the name under which it does business and its location. To construe the omission of Inc., which respondent does not normally use as a part of its name in doing business, as a violation of the Fur Act seems to me entirely too technical and unreasonable.

B. False Invoicing of Fur Products

The complaint alleged that respondent falsely invoiced certain of its fur products in violation of Section 5(b)(1) of the Fur Act and Rules 4 and 40 of the Rules and Regulations. Section 5(b)(1) requires that the invoices show: (a) the name of the animal as set forth in the Fur Products Name Guide; (b) the presence of used fur; (c) that the fur product is bleached, dyed or otherwise artificially colored; (d) that the fur product is composed of paws, tails, etc.; (e) the name and address of the person issuing the invoice; and (f) the country of origin of any imported fur. In support of these allegations, counsel supporting the complaint offered in evidence certain invoices issued by respondent to purchasers of its

Findings

fur products. These contained four instances of failure to set forth the correct name of the animal as contained in the Fur Products Name Guide, and six instances of failing to set forth that the fur in the product was bleached, dyed or otherwise artificially colored. With respect to subparagraph (e) as set forth above, respondent's invoices show that, while its name is set forth thereon, no address is included as required by subsection (e).

Counsel supporting the complaint proposed a finding of fact under subsection (d) above, but there is no evidence in the record that respondent's invoices ever failed to show that the fur products were composed of paws, tails, etc. when such was the fact, as required by subsection (d), and accordingly no such finding is made. Counsel supporting the complaint proposed no findings of fact with respect to subparagraphs (b) and (f) of Section 5(b)(1) as set forth above, and there is no proof in the record in support of these allegations. Accordingly, no finding will be made. With respect to the alleged invoicing violations of Rules 4 and 40 which provide respectively that required information not be abbreviated and that the invoice disclose the item number of the fur product, counsel supporting the complaint proposed no findings of fact, there is no proof in the record to sustain such allegations, and no such findings are made.

C. False Advertising of Fur Products

The complaint alleged that respondent falsely and deceptively advertised its fur products in violation of the Fur Act, of Rules 44(a), (b) and (c), and of the Act, by newspaper advertisements which represented that the prices of its fur products had been reduced from their regular and usual prices when in truth and in fact such so-called regular or usual prices were fictitious, and by newspaper advertisements which represented that the sale prices of its products enabled purchasers to effectuate savings greater than the difference between such prices and current market value. Rule 44(a) prohibits such fictitious pricing and Rules 44(b) and (c) prohibit such comparative pricing and value claims unless based upon current market values or the time of such compared prices is given and such claims are true in fact. It is of course well established that such false representations in commerce concerning prices and value are violations of Section 5 of the Act.³

The record establishes that respondent by its newspaper advertising misrepresented its regular and usual prices, and misrepresented the market price or value of its fur products. Four newspaper advertisements of respondent were received in evidence, two from the

³ *The Orloff Company, Inc.*, Docket No. 6184 (1956), and cases cited therein.

Findings

54 F.T.C.

Chicago Sun-Times and Chicago American on October 3, 1954, one from the Chicago Tribune on October 2, 1954, and the other from the Chicago Tribune on October 5, 1952.

1. The Comparative Pricing

The alleged misrepresentation concerning the market price or value of respondent's products is considered first. Respondent operated two fur departments in its Chicago store, one called the Subway Fur Department in the basement and the other on the fifth floor called the Fur Salon. Respondent annually each October conducts a sale in its Subway Department during which hundreds of fur coats, jackets and other garments are sold at a single price of \$125.00 each. Respondent has been conducting this particular promotion for many years. The two advertisements dated October 3, 1954, and the advertisement dated October 5, 1952, dealt with this particular annual sale of fur products. The 1954 advertisements contain a long list of fur garments of different types of furs with a corresponding list of market prices ranging from \$195.00 to \$499.00 each, all for sale at the single price of \$125.00. The 1952 advertisement was substantially the same except that the market prices listed ranged from \$165.00 to \$599.00. In addition, the 1952 advertisement also stated that many of the fur products on sale were reduced from respondent's own stock.

The record establishes that the market price or value of the fur products advertised by respondent in 1952 and 1954 did not equal or approach \$599.00 and \$499.00, respectively. Commission Exhibits 25 through 46 are respondent's invoices showing sales made during the 1954 Subway Fur sale, together with the receiving aprons and manufacturers' invoices tied to each such sale invoice showing the original cost of each garment and also listing respondent's retail prices thereon as \$125.00. These exhibits reveal that the cost of the fur products sold by respondent during the 1954 Subway sale ranged from \$83.00 to approximately \$100.00 a unit. Commission Exhibits 55 through 60 are manufacturers' invoices of fur products purchased by respondent for its 1952 Subway sale and show costs ranging from \$87.50 to \$100.00 a garment. Counsel supporting the complaint called Messrs. Himmel and Friedman, two experienced furriers engaged in the business in Chicago for many years, who both testified that the average mark-up in the fur industry was 60 percent of the cost or 37½ percent of the retail price. Mr. Friedman testified that the maximum range of mark-up was from 50 to 70 percent of the cost. Respondent offered no evidence to contradict this testimony and accordingly it is undisputed in the record. Computing the maximum mark-up used in the industry, 70 percent, upon the maximum cost

of any of the garments listed in the foregoing exhibits would result in \$170.00 as the highest market value of any of the fur products.

Messrs. Hill and Bernstein were the buyers for and in charge of the Fur Salon and the Subway Department, respectively. They testified that they made frequent buying trips to New York City and, by careful shopping and buying in lots rather than individual pieces, were able to acquire fur products at prices substantially less than they could be purchased by competitors in single units.

Messrs. Hill and Bernstein also testified that the market prices listed in the three advertisements above mentioned were true and correct. For a number of reasons, this testimony cannot be credited. Based upon this and proof that respondent's mark-ups averaged from 5 to 10 percent less than the usual mark-up of 37½ percent of retail price, respondent argued that the market prices contained in its advertisements were in fact correct. While this would result in lower prices to the public, as contended, it by no means establishes the truth of the market value representations. As heads of the respective departments, Messrs. Hill and Bernstein either prepared or supervised the preparation of respondent's newspaper advertisements. Self-interest would dictate that they testify that such advertisements were true and correct in all respects. More conclusively, the facts established by the documentary evidence in the record reveal that the market values listed in the advertisements could not possibly have been true. As previously noted, a maximum mark-up applied to the fur products costing the most would have resulted in a market price of only \$170.00. Based upon the highest cost of the fur products, a mark-up of 400 to 500 percent would have been necessary to reach the market prices of \$499.00 and \$599.00 listed in respondent's advertisements. In view of the testimony of Messrs. Himmel and Friedman, both of whom had many years of experience in the fur business and were president and secretary, respectively, of the Associated Fur Industries of Chicago, such a mark-up would be incredible.

The argument that because respondent purchased its fur products in lots or large quantities it was able to secure them at cost prices 400 to 500 percent below market value is equally incredible. With regard to this, it will be noted that both Messrs. Hill and Bernstein testified that they were able to purchase such products at a cost considerably lower than buying each garment individually. Respondent's argument assumes that competitors could buy fur products only as individual items, an assumption which obviously is not sound. Mr. Himmel testified that his firm operated the largest exclusive fur building in Chicago and was also engaged in manufacturing. The market price or value of a product must be the average price

at which such products are sold in the industry at retail. Here this necessarily means the price at which competitors of respondent were selling such products on the retail market in Chicago. To assume that such competitors could and did purchase their fur products wholesale only individually or in small units instead of lots could hardly be accurate, yet this is the tenor of respondent's argument.

Actually, respondent's invoices demonstrate the invalidity of this argument. An examination of them reveals that, contrary to its contention concerning buying in quantity, the lowest cost prices appear on the invoices involving the smallest number of fur products. For example, Commission Exhibit 29 involving the purchase of eight garments to be sold for \$125.00 shows the cost thereof to be \$84.00 a piece. Similarly, Exhibits 40, 42, and 44, involving the purchase of only 14, 17 and 21 garments, respectively, show the cost to be \$83.00 per garment. Conversely, many of the invoices covering a purchase of substantially larger numbers of fur garments show a higher cost per item. It can hardly be contended seriously that respondent's competitors, including the largest exclusive furrier in Chicago, could not purchase lots of fur garments wholesale in quantities ranging from 8 to 21. In view of these established facts, respondent's advertised market prices representing a mark-up of 400 to 500 percent above cost cannot be true.

Another point worth noting in this connection is that if respondent's market prices or values of \$499.00 to \$599.00 were correct, the cost of such products to respondent's competitors must have ranged from approximately \$300.00 to \$350.00 per unit, and they could have effectuated great savings and substantial profits merely by purchasing such garments from respondent for \$125.00 during its sale. Respondent also argued that there was no proof in the record that the garments identified by invoice were those advertised. Actually the converse is true. Mr. Bernstein testified that respondent never used the \$125.00 price except during its Annual sale, and hence the identified garments must have been those advertised. For all of the foregoing reasons, it is concluded and found that respondent's representations concerning the market price or value of its fur products listed in the foregoing advertisements were false.

2. The Fictitious Pricing

The complaint also alleged that respondent falsely represented its usual and regular prices of such products. The proof in support of this allegation was the representations made in the advertisement in The Chicago Tribune dated October 2, 1954, Commission Exhibit 47. This advertisement dealt with a sale of fur products by

respondent in its Fur Salon. It stated that the fur products on sale at \$244.00 were "Usually \$299.00 to \$399.00. This interpretation is corroborated by the testimony of Mr. Camenisch, who contacted Mr. Hill with respect to this advertisement and asked him if he could point out the particular garments advertised. According to Mr. Camenisch, Mr. Hill replied that he had no definite record of the particular garments but suggested that Mr. Camenisch check the sales records to find any garments sold at that price pursuant to the advertisement to ascertain the validity of the claims made therein. If it be contended that the advertisement was a representation of market value rather than respondent's usual and regular prices, Mr. Hill, who prepared the advertisement and was contacted by Mr. Camenisch, could have at that time made that fact clear. Instead, however, Mr. Hill suggested that Mr. Camenisch check respondent's sales records to locate any particular garments sold by it pursuant to that advertisement. This testimony was undenied although Mr. Hill testified on two occasions. It seems clear, therefore, in addition to the wording of the advertisement itself, that respondent was representing and intended to represent that the usual and regular prices of these products were from \$299.00 to \$399.00.

Mr. Camenisch proceeded to check the sales records and found three sales invoices of garments sold pursuant to that advertisement. Such sales invoices and the corresponding manufacturers' invoices of the particular garments were received in evidence. The manufacturer's invoices show that at the time respondent purchased these garments it priced them for sale at retail at \$244.00, \$244.00 and \$288.00, respectively. Respondent's officials testified, and it was undisputed, that in connection with all of the manufacturers' invoices and receiving aprons received in evidence, respondent entered thereon its retail price to be charged for the particular garments and such price was not thereafter changed. This demonstrates that the garments sold were not usually and regularly priced by respondent for sale at from \$299.00 to \$399.00. Accordingly, it is concluded and found that respondent, by the above advertisement concerning the sale in the Fur Salon, falsely represented its usual and regular prices of such products.

3. The Failure to Maintain Records Concerning Pricing Claims and Representations

The complaint also alleged that respondent failed to maintain full and adequate records disclosing the facts upon which the pricing claims and representations discussed above were based, in violation of Rule 44(e). Rule 44(e) provides that persons making pricing

Findings

54 F.T.C.

claims or representations of the types described in subsections (a), (b) and (c) thereof, namely, fictitious and comparative pricing, must maintain full and adequate records disclosing the facts upon which such claims or representations are based. Mr. Camenisch testified that he asked both Messrs. Hill and Bernstein for such records but that none were produced or available, and that respondent's inventory records indicated that the garments advertised never had such value or price, as previously found herein. This testimony was undisputed and accordingly it is found that respondent failed to maintain the records supporting its pricing claims required by Rule 44(e).

D. Respondent's Contentions and Defense

Respondent's contention concerning the triviality and technicality of its labeling violations, and its contention with respect to interstate commerce within the meaning of the Act and the Fur Act, have previously been considered herein. In addition, respondent contended that the requirements of the Fur Act with respect to invoicing do not apply to a person engaged in the retail sale of fur products because of the definition of "invoice" in Section 2(f). This section provides that: "The term "invoice" means a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs." (Emphasis supplied by respondent.)

Because of the underscored portion of the foregoing definition, respondent contends that the term "invoice" applies only to wholesalers, manufacturers and jobbers, but not to retailers. The gist of respondent's argument is that because of the foregoing language an invoice as defined can apply only to a purchaser who is engaged in dealing commercially in fur products or furs. Such a construction of Section 2(f) appears far too limited in view of the undisputed purpose of the Fur Act to protect the ultimate consumer from deception by false invoicing. It is clear that the Commission has not so construed the meaning of invoice under Section 2(f). The various rules and regulations adopted by the Commission dealing with invoicing clearly indicate that the Commission considers the invoicing requirements of the Act applicable to retailers of fur products who sell to the purchasing public. In addition, decisions of the Commission, including the *Pelta Furs* case,⁴ establish that the

⁴ See Footnote 2, *supra*.

Commission has applied the invoicing requirements of the Act to retailers selling fur products to the public.

Respondent also argued that Rule 44 is *ultra vires* as an unwarranted extension of the power delegated to the Commission by the Fur Act. This identical issue was considered by the Commission in the *Pelta Furs* case,⁵ in which the Commission held that Rule 44 was an appropriate exercise of the Commission's power under Sections 8(b) and 5(a) (5) of the Fur Act. Respondent also contended that Rule 44 cannot operate to shift the burden of proof to respondent. Apparently this contention is based upon respondent's belief that there is no proof in the record to sustain the allegations of fictitious and comparative pricing, and that therefore the position of counsel supporting the complaint must be that respondent is required to show that its alleged fictitious and comparative prices were in fact not fictitious and were in fact true market values, respectively. Of course respondent's contention that Rule 44 cannot operate to shift the burden of proof to it is correct. However, no such position was taken by counsel supporting the complaint, and the record does not support respondent's belief. As previously found, counsel supporting the complaint established by reliable, probative and substantial evidence that respondent's pricing representations were in fact false and fictitious. The burden of proof to establish any alleged violation of the Act or the Fur Act is always upon counsel supporting the complaint, and in this proceeding counsel has clearly met that burden.

The fact that Rule 44(e) requires persons making price representations to maintain records supporting such representations does not operate to shift the burden of proof to such persons. Obviously, proof that a respondent did not maintain such records, while it would establish a violation of Rule 44(e), would not be sufficient to establish a violation of Rule 44(a), (b), or (c), and the burden of proving that a respondent's price representations were in fact fictitious or false would still be upon counsel supporting the complaint. The record establishes the pricing allegations of the complaint and accordingly respondent's argument in this respect is without merit.

E. Concluding Findings

As previously found, there is no evidence in the record that respondent misbranded its fur products by failing to affix labels showing that the fur was used, that the fur was composed of paws, tails, etc., or the name of the person selling, advertising, transporting, or

⁵ See Footnote 2, *supra*.

Findings

54 F.T.C.

distributing such products in commerce, as alleged in the complaint, nor was there any evidence in the record that respondent falsely invoiced its fur products by failing to show thereon that the fur was used, that the fur was composed of paws, tails, etc., or the country or origin of any imported furs, or by abbreviating required information or failing to disclose the required item number, as alleged in the complaint. Accordingly, it is found that there is no substantial evidence in the record to support the foregoing allegations of the complaint.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent misbranded certain of its fur products by failing to affix labels thereto showing:

(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, and as prescribed under the Rules and Regulations;

(b) The name of the country of origin of any imported furs used in the fur product; and

(c) That the fur product contained or was composed of bleached, dyed or otherwise artificially colored fur, when such was the fact.

It is further concluded and found that respondent falsely and deceptively invoiced fur products by failing to furnish invoices to purchasers showing:

(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, and as prescribed under the Rules and Regulations;

(b) That the fur product contained or was composed of bleached, dyed, or otherwise artificially colored fur when such was the fact; and

(c) The address of the person issuing such invoices.

It is further concluded and found that respondent falsely and deceptively advertised fur products by the use of advertisements and representations which were intended to and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of such products, and which represented, directly or by implication, that (1) its sale prices were reduced from the regular or usual prices of its fur products, when in truth and in fact such represented regular and usual prices were in excess of the prices at which respondent had usually and customarily sold such products in the recent regular course of its business; and (2) its sale prices enabled purchasers of its fur products to effectuate savings greater than the difference be-

tween the stated price and the current market price of such products, in violation of both the Fur Act and the Act.⁶

It is further concluded and found that respondent, in making the pricing claims and representations hereinabove found, 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 the Rules and Regulations.

F. The Effect of the Unlawful Practices

The use by respondent of the false, misleading and deceptive statements and representations found above in Section III C1, 2 and E has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public and thereby induce the purchase of substantial quantities of respondent's fur products. As a result, substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has been and is being done to competition in commerce.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce, and engaged in the above found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act and in the Fur Act.

2. The acts and practices of respondent hereinabove found are in violation of the Fur Act and the Rules and Regulations promulgated thereunder, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Act.

3. The acts and practices of respondent found in Section III C1, 2 and E are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition and unfair and deceptive acts and practices within the intent and meaning of the Act.

4. This proceeding is in the public interest, and an order to cease and desist the above-found unlawful practices should issue against respondent.

5. There is no evidence that the labels affixed to respondent's fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose respondent's name or that the invoices issued by respondent in connection with

⁶ While the Commission disagreed concerning the validity of Rule 44 under the Fur Act in the *Pelta Furs* case, *supra*, it unanimously held such practices to be in violation of Section 5 of the Act.

the sale of fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose the country of origin of imported furs, or the required item number, or that said invoices were improper in that they abbreviated required information.

ORDER

It is ordered, That respondent, Mandel Brothers, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

- A. Misbranding fur products by:
 1. Failing to affix labels to fur products showing:
 - (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 and as prescribed under the rules and regulations;
 - (b) That the fur product contains or is composed of used fur, when such is the fact;
 - (c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;
 - (d) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;
 - (e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce; and
 - (f) The name of the country of origin of any imported furs used in the fur product.
 2. Setting forth on labels attached to fur products:
 - (a) Required information in abbreviated form or in handwriting;
 - (b) Non-required information mingled with required information.
- B. Falsely or deceptively invoicing fur products by:
 1. Failing to furnish invoices to purchasers of fur products showing:

- (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 and as prescribed under the rules and regulations;
 - (b) That the fur product contains or is composed of used fur, when such is the fact;
 - (c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;
 - (d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;
 - (e) The name and address of the person issuing such invoices;
 - (f) The name of the country of origin of any imported furs contained in the fur product.
2. Setting forth required information in abbreviated form.
 3. Failing to show the item number or mark of fur products on the invoices pertaining to such products.

C. Falsely or deceptively advertising fur products through the use of any advertisement, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which represents directly or by implication that the regular or usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of its business;

D. Making pricing claims or representations of the type referred to in Paragraph C above, unless there is maintained by respondent full and adequate records disclosing the facts upon which such claims or representations are based.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

Respondent has appealed from the hearing examiner's initial decision which found that it had violated the Fur Products Labeling Act and the rules and regulations promulgated thereunder in that, in certain respects, it had misbranded, falsely invoiced, and falsely advertised fur products sold by it. Respondent's appeal essentially is to the effect (a) that the Commission lacks jurisdiction and (b) that Rule 44 of the Fur Regulations is *ultra vires* the Commission's powers under the Fur Act. Respondent also questions whether the evidence supports the findings as to misbranding, false invoicing and false advertising.

Counsel in support of the complaint have also appealed, questioning the limited scope of the order to cease and desist in the initial

Opinion

54 F.T.C.

decision insofar as the prohibitions against misbranding and false invoicing are concerned. They deem the order to be satisfactory insofar as the advertising violations are concerned.

Respondent's first contention, in effect, is that the evidence does not support the finding that respondent, Mandel Brothers, Inc., is subject to the Commission's jurisdiction under the Fur Act and the Federal Trade Commission Act. Under Section 3(a) of the Fur Act, the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced within the meaning of the Fur Act or the rules and regulations promulgated thereunder is unlawful and is an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act. Section 4 of the same Act provides that for the purposes of the Act a fur product shall be considered to be misbranded if there is not affixed thereto a label showing the proper name of the animal producing the constituent fur; that it contains used fur, when such is the fact; that it contains bleached, dyed, or otherwise artificially colored fur, when such is the fact; that it contains paws, tails, bellies or waste fur, when such is the fact; the name or other identification of the person who manufactured it for introduction into commerce, who introduced it into commerce, or who sells, advertises or offers it for sale, or transports or distributes it in commerce; and the name of the country of origin of the constituent fur; and Sections 5(a) and (b), respectively, provide that for the purposes of the Act a fur product shall be considered to be falsely or deceptively advertised or invoiced if the advertising or invoices do not show substantially the same information. Section 8 of the Fur Act, among other things, authorizes and directs the Federal Trade Commission to prevent violations of Section 3 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 made a part of the Fur Act.

As will hereinafter appear, the record discloses that respondent misbranded, falsely invoiced, and falsely advertised fur products sold by it. The record further discloses that respondent advertised and offered for sale in commerce fur products through the recognized interstate media of The Chicago Tribune, The Chicago American and The Chicago Sun-Times, newspapers with substantial circulation outside the State of Illinois. Furthermore, the record shows a number of instances where respondent shipped and delivered, or introduced into commerce, fur products sold to customers

outside the State of Illinois. In this latter connection, the hearing examiner found, in effect, that respondent's officials admitted such interstate sales because customer invoices showed that no Illinois sales tax was charged. Thus, the factual evidentiary situation in this regard is substantially the same as that which obtained in *Jacques De Gorter and Suze C. De Gorter, trading as Pelta Furs v. F.T.C.* (C.A. 9, decided April 17, 1957), and we conclude that the principles enunciated there are controlling here and that respondent's contentions as to the jurisdiction of the Commission are without merit.

Considering now respondent's second principal contention, namely, that Rule 44 of the Fur Regulations prohibiting price misrepresentations with respect to fur products is an unwarranted extension of power delegated to the Commission pursuant to the Fur Act, it is the opinion of the Commission that this point should be, and it hereby is, decided adversely to respondent—also for the reasons stated in the *Pelta Furs* case, *supra*, where the Court, upholding, in effect, the Commission's opinion that Rule 44 is a valid, substantive regulation with the full force and effect of the statute itself, held:

By applying the principles in the cases just cited, and taking into account the legislative history of the Act, it is quite evident that the intention was to reach *all misrepresentations in advertising*, including those relating to prices and value. If any doubt exists about the matter the clause under consideration indicates the intention to include them. The Commission was right in so interpreting the statute and acted within its powers in promulgating the rule under discussion. [Emphasis by the Court.]

Finally, as indicated above, respondent attacks the sufficiency of the evidence to support findings in the initial decision as to misbranding, false invoicing and deceptive advertising.

Respondent does not dispute that it has violated the *labeling* requirements of the Fur Act and the rules and regulations promulgated thereunder.¹ It contends, however, that the instances of violation were merely technical and too trivial in nature to warrant a cease and desist order in the public interest. On this subject, the hearing examiner found as follows:

Respondent's argument is without merit. Admittedly, the misbranding found was not as serious or substantial a violation of the Fur Act as, for instance, calling muskrat mink or rabbit ermine, but the very purpose of Congress in adopting the provisions of the Fur Act and directing the Commission to pro-

¹ In fact, respondent lists in its brief on appeal some seven pages of more than one hundred instances of admitted misbranding. These encompassed failure to use proper names of constituent furs, failure to properly show country of origin and that fur was dyed or artificially colored, improper use of abbreviations, the mingling of non-required with required information and labeling containing information in handwriting. Some of these are in direct contravention of the statute; others are in violation of rules and regulations promulgated under the Act, which are by statute also misbranding. (See *Pelta Furs v. F.T.C.*, *supra*.)

Opinion

54 F.T.C.

mulgate rules and regulations thereunder was to prevent deception of the public by such practices. It cannot seriously be urged that violations of specific sections of an act adopted by Congress are too technical or trivial to warrant the issuance of a cease and desist order.

In addition, the Commission, as an expert body, was authorized and directed to adopt rules and regulations to carry out the purpose of the Act, namely, to prevent the deception of the public by misbranding or falsely advertising or invoicing fur products. Obviously, the use of abbreviations, handwriting, and the mingling of non-required information with required information are devices which can readily be used to deceive and mislead the public. Even though it be conceded that they may have been done innocently, in ignorance of the law, and without intention to deceive, they cannot be permitted. To dismiss respondent's misbranding as too trivial or technical to warrant the issuance of a cease and desist order would be to open the door to deception and evasion of the Act.

The statute does not establish or specify any criteria to permit differentiation between the trivial or serious nature of instances where a retailer fails to affix a label to fur products disclosing, in the manner and form contemplated, all of the information required by the Fur Act and rules and regulations promulgated thereunder. When alleged practices of a retailer are found to constitute violations of the statute, the Commission is under an obligation to correct them. In the circumstances of record in this proceeding, the Commission has concluded that the hearing examiner's findings in the respect indicated is entirely proper and correct. The reasons urged by respondent against sustaining such finding are without merit.

On the question of *false invoicing*, the hearing examiner found four instances of failure to state the correct name of the animal producing the fur contained in respondent's fur products and six instances of failure to set forth on invoices to customers that a fur product was bleached, dyed or otherwise artificially colored. He also found that respondent's invoices, while setting forth its trade name, do not include its address, as required by Section 5(b)(1) of the Act.

Respondent contends that these findings as to false invoicing should not be sustained. It does not seriously question that its sales slips are deficient in that they fail to show the name of the animal producing the fur, or that such slips do not carry respondent's address. It does question the sufficiency of the evidence to establish the fact that the fur products to which the sales slips related were actually dyed, bleached or artificially colored.

Considering this latter point first, sales slips in evidence show sales of fur products made of muskrat and black Persian lamb unaccompanied by a statement that they are dyed. There is uncontested testimony that furs made of the skins of muskrat and

black Persian lamb are always dyed. Respondent's argument that this finding as to false invoicing, with respect to bleached, dyed, or artificially colored fur, should be stricken is without merit.

On the question of failure to show respondent's address on sale slips, it is the position of respondent that the omission is of such trivial character as not to require corrective action by the Commission. Counsel supporting the complaint point to the express provision of Section 5(b) (1) (E) of the Fur Act which requires invoices to show:

(E) the name and *address* of the person issuing such invoice * * *.
[Emphasis supplied.]

In the face of this statutory directive, the hearing examiner could not find otherwise than he did in this connection.

In Section 2(f) of the Act, the term "invoice" is defined to mean:

* * * a written account, memorandum, list or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs.

Respondent's main contention in justification of its false and deceptive invoicing practices is that the requirements of the Fur Products Labeling Act respecting invoicing are inapplicable to transactions involving the retail sale of fur products. Holding in effect that the construction advocated by the respondent misconstrues the impact of the word "other" in the context above, the hearing examiner rejected respondent's argument, and correctly so. The Commission has consistently construed the statute's proscriptions against false and deceptive invoicing to extend to invoices or sales slips furnished by retailers to the purchasing consumer. That a prime purpose of the Act was to eliminate deceptive invoicing at the consumer level is evident from its title, namely, "To protect consumers and others * * * against * * * false invoicing of fur products and furs." To accept the construction advanced by the respondent clearly would defeat the congressional declaration of purpose and render the Act ineffective in a major respect.

In the latter connection, it should be noted that the retailer's memorandum of sale or invoice constitutes documentary evidence of rightful possession by the consumer of her fur garment, a factor obviously conducive to preservation of the invoice. This consideration is not applicable, however, with respect to the garment label. Inasmuch as the invoice may serve as a documentary link connecting the sale of specific fur products back through the retailer's rec-

Opinion

54 F.T.C.

ords with advertisements therefor, the application of the invoicing provisions of the Act to transactions between retailers and consumers represents a key implement for effective administration of the Act.

Not only is the interpretation advocated by the respondent in conflict with the Act's avowed purpose and the legislative design underlying the invoicing provision, but such a construction ignores the language arrangement of Section 2(f) itself. The words "or agent" prefacing the phrase "or any other person who is engaged in dealing commercially in fur products" are set off from the preceding and succeeding parts of the sentence by commas. Hence, the words "or agent" comprise a separate and integral phrase in their own right. It accordingly seems reasonable to conclude that the final phrase extending the definition of invoice to memoranda issued to commercial dealers generally was intended to augment and expand the kindred class of persons dealt with in the preceding phrase, namely, agents.

Another consideration detracting from the force of the respondent's argument is the fact that subsection (b) of Section 3 of the Act not only proscribes misbranding and false advertising but false invoicing as well. Subsection (a) similarly forbids misbranding and false and deceptive advertising and invoicing, but its proscriptions relate only to interstate aspects of the marketing and distribution of fur products and furs. Subsection (b) confers jurisdiction over fur products made in whole or in part of fur which has been shipped and received in commerce, and clearly reaches deception engaged in at the local or intrastate level, the prime point of retail sales' consummation. The inclusion in this subsection of the provision against false invoicing is similarly suggestive of a legislative purpose that the Act's invoicing requirements be applicable to retail transactions.

Respondent further submits that "it would be an unworkable burden on the retailer at a time of an extensive sale with many inexperienced sales persons on the floor to require each of them to have the detailed and intimate knowledge of the Fur Act * * *" necessary to enter the information required by Section 5(b) of the Act on the invoice, or sales slip, delivered to each customer. The answer to this contention is that such sales person is not required to have any specialized knowledge properly to complete the sales slip. The information can be copied by the sales person directly from the required label attached to the fur product. It is no more, and in fact is less, burdensome on a retailer than on a wholesaler, whose clerical personnel may have no physical contact with the

merchandise or labels on merchandise being shipped to meet invoicing requirements of the Act. Respondent's contention that invoicing requirements of the Fur Act and rules and regulations promulgated thereunder do not apply to retail transactions is rejected.

Finally, respondent contends that the evidence does not support the hearing examiner's finding that its advertising of fur products contained false and fictitious statements. The complaint in this respect charges that respondent (1) misrepresented prices of fur products as having been reduced from regular or usual prices in that the regular or usual prices set forth in advertisements in fact were not the prices at which the merchandise was usually sold by respondent in the recent regular course of business, and (2) misrepresented by means of comparative prices and other statements as to "value" the amount of savings to be effectuated by purchasers.

As to (1)—the fictitious pricing charge—the record shows, and the hearing examiner found, that respondent placed an advertisement in The Chicago Tribune of October 2, 1954, which stated that fur products offered at a price of \$244.00 were "Usually \$299.00 to \$399.00." The record also discloses that it was respondent's customary and usual practice (never deviated from) to enter on manufacturers' invoices, at the time of receipt of merchandise, the intended regular and usual retail prices which, according to the testimony of respondent's buyers, always were observed. Manufacturers' invoices introduced into evidence herein, and concerning which the same buyers also testified, showed as usual and regular retail prices, amounts of \$244.00 or \$288.00, not the prices stated in the advertisement as "Usually \$299.00 to \$399.00." Mr. Camenisch, a witness called in support of the complaint, identified, and testified as to respondent's invoices furnished to customers on or about the date of The Herald Tribune advertisement. His testimony was that, through identifying stock item numbers appearing on these customer invoices, he traced the particular merchandise involved through respondent's records back to the manufacturers' invoices previously mentioned. He thus established that certain garments sold during the sale for \$244.00 were the same garments advertised. This testimony and evidence clearly establishes the relationship of the sales and advertising in question. The net effect of respondent's use of "fictitious" prices such as the above-quoted "Usually \$299.00 to \$399.00," in the opinion of the Commission, was to mislead and deceive purchasers as to the amount of savings to be realized if advantage were taken of the sale price of \$244.00. The evidence fully substantiates the hearing examiner's finding that respondent

Opinion

54 F.T.C.

did engage in fictitious pricing. Respondent's contention on this point, therefore, is rejected.

As to (2)—the comparative pricing charge—the respondent is alleged to have misrepresented the amount of savings possible to a prospective purchaser by stating in advertisements that fur products featured therein had a stated "market value" or "market price" when such stated value, or price, was not true in fact.

The hearing examiner found that the market value or price stated by the respondent in its advertisements exceeded considerably the actual market value or price of the fur products offered. This finding is based on his analysis of respondent's invoices of sales made, together with manufacturers' invoices, showing costs to respondent, to which are attached "receiving aprons" on which had been made notations of the retail price of the advertised garments to be \$125.00.

Of the above-mentioned manufacturers' invoices, Commission Exhibits 25 through 46, covering the 1954 Subway store sale, show costs of garments to respondent ranging from \$83.00 to \$100.00; Commission's Exhibits 55 through 60, covering the 1952 Subway store sale, show costs to respondent ranging from \$87.50 to \$100.00 per garment. There is expert testimony that maximum mark-up usually would range from 50 to 70% of cost. Using that range of mark-up on respondent's unit costs of record, the hearing examiner reasoned, would result in \$170.00 as the highest market value of any of the fur products—not the market value or price placed upon them by respondent in its advertisements as ranging from \$195.00 to \$499.00 in 1954 and from \$165.00 to \$599.00 in 1952. Also, the hearing examiner found that, "Based upon the highest cost of the fur products, a mark-up of 400 to 500 percent would have been necessary to reach the market prices of \$499.00 and \$599.00 listed in respondent's advertisements." The hearing examiner further found that such a mark-up would be incredible. He found equally incredible respondent's argument that because it purchased in lots and quantities, it was able to secure cost prices 400 to 500 percent below market value.

This reasoning of the hearing examiner, while cogent, does not establish to the satisfaction of the Commission that the respondent misrepresented, by means of comparative prices and other statements as to "value," the amount of savings to be effectuated by purchasers. In order to make such a finding, it is obviously necessary to first find what the actual market value, or price, of the fur product involved in this proceeding in fact was. There is no evidentiary basis on the record here to make such a determination. All that this record does show is what respondent's costs were, the

usual and customary trade mark-up in the Chicago area and the retail prices at which respondent sold fur products. In view of the lack of evidence establishing actual market value, the Commission cannot accept the reasoning of the initial decision as establishing the conclusion that respondent did, in fact, misrepresent savings to be effectuated by prospective purchasers of fur products advertised and sold by it. It follows that the charge in the complaint to the effect that respondent misrepresented, by means of comparative prices and other statements as to "value" not based on current market values, the amount of savings to be effectuated by purchasers of respondent's fur products has not been substantiated. The initial decision will be modified accordingly.

Turning now to a consideration of the appeal of counsel supporting the complaint, their appeal is limited to challenging the scope of the initial decision's order to cease and desist. Counsel contend, in such connection, that the hearing examiner erred in failing to require the respondent to comply with all labeling and invoicing requirements, respectively, prescribed in Sections 4(2) and 5(b)(1) of the Act. The allegations of the complaint in Paragraphs 3 and 5 are that certain of the respondent's fur products were misbranded and falsely invoiced in that they were not labeled or invoiced as required by these sections.

Under Section 4(2) of the Fur Products Labeling Act, a fur product is misbranded if it does not have affixed to it a label showing in words and figures which are plainly legible:

- (A) 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;
- (B) that the fur product contains or is composed of used fur, when such is the fact;
- (C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;
- (D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;
- (E) the name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product for introduction into commerce, introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce;
- (F) the name of the country of origin of any imported furs used in the fur product.

With slight variation, the information prescribed by Section 5(b)(1) for inclusion on invoices to avoid falsity is the same.

With respect to the charge of misbranding in violation of Section 4(2), the record discloses numerous instances of the respondent's

Opinion

54 F.T.C.

failure to label its fur products with the correct name of the animal producing the constituent fur. Also, there were about 15 occasions when the respondent neglected to disclose on labels attached to its garments the fact that they were composed of dyed, bleached or otherwise artificially colored furs. In addition, we note numerous cases of failure adequately to disclose on labels the required information as to the country of origin of the component furs of the respondent's garments. The evidence shows, however, that the respondent's labels did carry in large type print the words "Mandel Brothers, Chicago," and this we regard to be in substantial compliance with the subsection's requirement for identification of the seller.

The initial decision's findings generally reflect the foregoing, and similarly recognize that no instances were shown in which the respondent's labels were legally deficient through failure to reveal matters concerning the presence of used fur or paws and tails or relating to the seller's identity. A generally similar situation prevails as to some of the items of information on invoices. The order contained in the initial decision is limited to requiring cessation of the labeling and invoicing deficiencies found, and omits any provision making it mandatory for the respondent to likewise observe the other affirmative requirements of either Section 4(2) or 5(b)(1).

The Fur Products Labeling Act expresses a national policy against misbranding and false invoicing of fur products. Under the Act, a fur product is misbranded and the introduction, or manufacture of it for introduction, into commerce, or the transportation or distribution of it in commerce, or the sale, advertising or offering of it for sale in commerce is unlawful, unless it has attached to it a label setting forth clearly and conspicuously all the data indicated as necessary to be included thereon by Section 4(2), and is falsely invoiced unless there is issued, in connection with its sale, an invoice which incorporates each of the statements of the nature contemplated by Section 5(b)(1). The violations with which the subsections are concerned consist of the failure to attach to a fur garment an adequate label as there prescribed or to deliver to the customer in connection with the sale an invoice that imparts all required information. The subsections do not deal with separate violations in and of themselves, nor do they recognize or excuse misbranding or false invoicing in varying degrees. Under the plain language of the statute, the offense of misbranding or false invoicing occurs either by reason of failure to attach to a fur product a

label or to issue in connection with its sale an invoice, or failure to include on a label which is attached or to show on an invoice which is issued each of the items of information which the statute requires.

Further supporting this interpretation is the circumstance that the particular definitive provisions relating to misbranding and false invoicing appearing in the subsections mentioned comprise only part of the definitions contained in Section 4 and Section 5(b). Two additional definitions of misbranding appear in other subsections of Section 4, one (subsection 1) relating to deceptive representations on labels, and the other (subsection 3) specifically prohibiting use on labels of animal names other than those provided in the Fur Products Name Guide. Substantially similar supplemental definitions relating to false invoicing appear in subsection (2) of Section 5(b). Subsection (2) of Section 4 and subsection (1) of Section 5(b) evidence a clear legislative design that garments subject to the Act be at all times identified by labels and invoices revealing facts generally relevant to the utility and value of the component fur and continuously identified with a person likewise subject to the Act. Congress' inclusion of these subsections looked not only to combatting deception by insuring disclosure of material facts, but the subsections were also intended to serve as keystones for effective enforcement of companion sections of the Act likewise directed against misbranding and false invoicing and others proscribing false advertising. The requirements specified for an adequate label in subsection (2) of Section 4 are closely interrelated, and the same holds true for those contained in subsection (b)(1) of Section 5 respecting invoices.

For the foregoing reasons, the Commission is of the opinion that in any case in which it is found that the labeling or invoicing requirements of Sections 4(2) or 5(b)(1) of the statute have not been fully complied with, the appropriate conclusion is that the fur products in connection with which the deficiencies have occurred have been misbranded or falsely invoiced, and that the appropriate order to be issued in correction of the offense is one requiring cessation of the practice, namely, the misbranding or false invoicing by failure to attach proper labels or to issue proper invoices.

While the foregoing considerations are fully controlling on the scope of the order, it should be noted, too, that the Commission is not limited to prohibiting an illegal practice in the precise form in which it is found to have existed in the past. *Hershey Chocolate Corporation v. F.T.C.*, 121 F. 2d 968 (C.A. 3, 1941). In addition to proscribing specific deceptive acts, unfair methods reflecting ex-

Opinion

54 F.T.C.

pansion or variation in original basic theme also may be prohibited. *Consumers Sales Corporation v. F.T.C.*, 198 F. 2d 404 (C.A. 2, 1952).

Considerations of sound administrative policy similarly require that orders be not unduly narrow in their scope when issued in proceedings wherein proof of misbranding or false invoicing has been limited to failure to comply with some, rather than all, of the requirements of subsections 4(2) or 5(b)(1). If compliance with all criteria of the relevant subsection were not required, institution of new proceedings manifestly would be necessitated in challenging subsequent omissions not theretofore resorted to but similarly violative of the public policy expressed in the subsection. The multiplicity of actions so resulting patently would not be in the public interest.

The Commission's long established policy with respect to orders covering violations of Section 4(2) of the Wool Products Labeling Act obviates such multiplicity in the enforcement of that statute. Orders thereunder have included prohibitions against failure to disclose on labels all elements of information required by that subsection, even though failure to disclose some elements of information were not involved in various of the cases; and our orders heretofore issued under the Fur Products Labeling Act generally have contained requirements for a disclosure on labels and invoices of all information prescribed by Sections 4(2) and 5(b)(1) of that Act. An example of such an order was that approved by the Court in the *Pelta Furs* case, *supra*.

By issuing an order of the scope indicated, the Commission is not finding directly, or by implication, that respondent has engaged in any questionable practices other than those of misrepresenting that its advertised prices were reduced from regular and usual prices; and by failing to label and invoice its fur products so as to show its name and address, the name of the animal producing the constituent fur, the fact that certain of its fur products contained bleached, dyed, or otherwise artificially colored fur, and, in some instances, the country of origin of imported component furs.

These conclusions notwithstanding, it would be erroneous to conclude that the record affords adequate basis for informed determinations that the respondent's labeling has never in any instance reflected departures from the requirements of subparagraphs (b), (d) or (e) of Section 4(2); and neither does the record suffice for similarly informed determinations respecting certain of the invoicing requirements prescribed under the subparagraphs of Section 5(b)(1). Insofar as the fifth numbered conclusion of law in the

50

Order

initial decision may imply the contrary, modification of the initial decision in that respect, in addition to modification of the order contained therein, is warranted.

To the extent previously indicated herein, the appeal of counsel supporting the complaint is deemed well taken, and our order providing for appropriate modification of the initial decision is issuing herewith.

Commission Tait concurs in the result.

FINAL ORDER

Respondent and counsel supporting the complaint having filed cross-appeals from the hearing examiner's initial decision filed October 9, 1956, and the matter having come on to be heard by the Commission upon the whole record, including briefs and oral argument, and the Commission having rendered its decision granting in part and denying in part the appeal of respondent and granting the appeal of counsel supporting the complaint and directing modification of the initial decision:

It is ordered, That Paragraph 5 of the conclusions of law contained in the initial decision be modified to read as follows:

"5. There is no evidence that the labels affixed to respondent's fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose respondent's name or that the invoices issued by respondent in connection with the sale of fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose the country of origin of imported furs, or the required item number, or that said invoices were improper in that they abbreviated required information."

It is further ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondent, Mandel Brothers, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce, as 'commerce,' 'fur' and 'fur

Order

54 F.T.C.

products' are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

"A. Misbranding fur products by:

"1. Failing to affix labels to fur products showing:

"(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 and as prescribed under the rules and regulations;

"(b) That the fur product contains or is composed of used fur, when such is the fact;

"(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

"(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

"(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce; and

"(f) The name of the country of origin of any imported furs used in the fur product.

"2. Setting forth on labels attached to fur products:

"(a) Required information in abbreviated form or in handwriting;

"(b) Non-required information mingled with required information.

"B. Falsely or deceptively invoicing fur products by:

"1. Failing to furnish invoices to purchasers of fur products showing:

"(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 and as prescribed under the rules and regulations;

"(b) That the fur product contains or is composed of used fur, when such is the fact;

"(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

"(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

"(e) The name and address of the person issuing such invoices;

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

"2. Setting forth required information in abbreviated form.

"3. Failing to show the item number or mark of fur products on the invoices pertaining to such products.

"C. Falsely or deceptively advertising fur products through the use of any advertisement, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which represents directly or by implication that the regular or usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of its business;

"D. Making pricing claims or representations of the type referred to in Paragraph C above, unless there is maintained by respondent full and adequate records disclosing the facts upon which such claims or representations are based."

It is further ordered, That the initial decision of the hearing examiner, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondent, Mandel Brothers, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Commissioner Tait concurring in the result.

Decision

54 F.T.C.

IN THE MATTER OF
THE HOUSE OF KUDRA FURS ET AL.

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

Docket 6730. Complaint, Feb. 21, 1957—Decision, July 6, 1957

Consent order requiring a furrier in Trenton, N.J., to cease violating the Fur Products Labeling Act by invoicing which named an animal other than that producing a particular fur; by advertising in newspapers which falsely represented the prices of fur products as reduced when the so-called regular prices were fictitious, and misrepresented comparative prices and percentage savings and values; and by failing in other respects to conform to the requirements of the Act.

Mr. Harry E. Middleton, Jr., supporting the complaint.

Gill & Phelan by Mr. Edmund J. Phelan of Trenton, N.J., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above named respondents on February 21, 1957 charging them with violation of the Federal Trade Commission Act and the Fur Products Labeling Act and the Rules and Regulations promulgated under the last mentioned act as set forth in said complaint. After service of the complaint respondents on May 8, 1957 entered into an agreement with counsel supporting the complaint for a consent order to cease and desist from the practices complained of, which agreement purports to dispose of all the issues in this proceeding without hearing. This agreement has been duly approved by the Assistant Director and the Director of the Bureau of Litigation and has been submitted to the undersigned, heretofore designated to act as hearing examiner herein, for his consideration in accordance with Rule 3.25 of the Commission's Rules of Practice.

Respondents in the aforesaid agreement have admitted all the jurisdictional facts alleged in the complaint and have agreed that the record may be taken as if findings of the jurisdictional facts had been duly made in accordance with such allegations. Said agreement provides further that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. It has also been agreed that the record herein shall consist solely of the com-

plaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders of the Commission and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order and it appearing that the agreement and order cover all the allegations of the complaint and provide for appropriate disposition of this proceeding, the order and agreement are hereby accepted and ordered filed upon becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice and the hearing examiner accordingly makes the following findings for jurisdictional purposes and order:

1. Respondent The House of Kudra Furs is a corporation existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 999 South Broad Street, in the City of Trenton, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act and the Fur Product Labeling Act and the Rules and Regulations promulgated under the last mentioned act. This proceeding is in the public interest.

ORDER

It is ordered, That respondent The House of Kudra Furs, a corporation, and its officers, and respondent George M. Kudra, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce of fur products, or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in

Order

54 F.T.C.

commerce, as "commerce," "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to such fur products showing:

- (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 and as prescribed under the rules and regulations;

- (b) That the fur product contains or is composed of used fur, when such is a fact;

- (c) That the fur product contains or is composed of bleached fur, when such is a fact;

- (d) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is a fact;

- (e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

- (f) The name of the country of origin of any imported furs used in the fur product.

2. Setting forth on labels attached to fur products required information which is mingled with non-required information.

3. Failing to set forth on labels the information required by Rule 36 of the Rules and Regulations promulgated under the Fur Products Labeling Act, when a fur product is composed of two or more sections containing different animal furs.

4. Failing to affix labels to fur products showing item numbers required under Rule 40 of the aforesaid Rules and Regulations.

B. Falsely or deceptively invoicing fur products by:

1. Failing to show:

- (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 and as prescribed under the rules and regulations;

- (b) That the fur product contains or is composed of used fur, when such is a fact;

- (c) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is a fact;

- (d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is a fact;

- (e) The name and address of the person issuing such invoices;

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

C. 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. Represents directly or by implication that the regular or usual price of any fur product is any amount which is in excess of the price at which respondents have usually and customarily sold such products in the recent, regular course of their business;

2. Represents directly or by implication that fur products are of a certain value or quality unless such representations or claims are true in fact;

3. Makes use of comparative prices and percentage savings claims unless such compared prices or claims are based upon the current market value of the fur product or upon a bona fide compared price at a designated time;

4. Makes pricing claims or representations of the type referred to in Paragraphs C—1, 2 and 3 above unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 6th day of July, 1957, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

Decision

54 F.T.C.

IN THE MATTER OF
INTERCOAST RESEARCH CO., INC., ET AL.

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

Docket 6740. Complaint, Mar. 8, 1957—Decision, July 6, 1957

Consent order requiring a seller in New York City of printed mailing forms for use by collection agencies, merchants, etc., in obtaining information concerning their debtors, to cease using on such forms the term "Office of Security Service" or otherwise representing that requests for information concerning delinquent debtors were from the U.S. Government or its agency, and using the name "Consumers Statistical Surveys" or any similar name representing that it was engaged in research.

Mr. Michael J. Vitale for the Commission.

Mr. Sol H. Erstein, of New York, N.Y., for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with the use of misrepresentations in connection with the obtaining of information regarding delinquent debtors, in violation of the Federal Trade Commission Act. An agreement has now been entered into by counsel supporting the complaint and respondents which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

Upon consideration of the agreement and proposed order, the hearing examiner is of the view that they provide an adequate basis for

appropriate disposition of the proceeding. The agreement is therefore accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Intercoast Research Co., 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 45 West 34th Street, New York, New York. Respondent Anthony E. Malito is an individual and officer of the corporation with his office and principal place of business the same as that of the corporate respondent.

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 Intercoast Research Co., Inc., a corporation, and its officers, and respondent Anthony E. Malito, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the business of obtaining information concerning delinquent debtors or the offering for sale, sale or distribution of forms, or other materials, for use in obtaining information concerning delinquent debtors, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using or placing in the hands of others for use, any forms, letters, questionnaires, or material, printed or written, which do not clearly and expressly state that the purpose for which the information is requested is that of obtaining information concerning delinquent debtors.

2. Using the term "Office of Security Service," or any other word or phrase of similar import to designate, describe or refer to respondents' business; or otherwise representing, directly or by implication, that requests for information concerning delinquent debtors are from the United States Government or any agency or branch thereof, or that their business is in any way connected with the United States Government.

3. Using the name "Consumers Statistical Surveys," or any other name of similar import to designate, describe or refer to respondents' business; or otherwise representing, directly or by implication, that respondents are engaged in research.

Decision

54 F.T.C.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 6th day of July, 1957, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

Decision

IN THE MATTER OF
J. DAVID PAISLEY CO.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6769. Complaint, Apr. 8, 1957—Decision, July 10, 1957*

Consent order requiring an individual seller in St. Louis, Mo., of his "Wonder-Vue" sheet of transparent plastic sprayed with colored paint and designed to be fastened over the viewing screen of a television set, to cease representing falsely in circulars and advertising material supplied to dealer customers that attachment of the product "Wonder-Vue" to a black-and-white television set would produce the same visual effect as a color television, and that its use would prevent and eliminate eyestrain caused by viewing television, and eliminate snow, blurring, and haziness from television screens.

Mr. Brockman Horne for the Commission.

Mr. J. David Paisley, of St. Louis, Mo., *pro se*.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes hereinafter referred to as the Commission), on April 8, 1957, issued its complaint herein under the Federal Trade Commission Act against the above-named respondent, J. David Paisley, an individual trading as J. David Paisley Co., charging said respondent with having violated the provisions of the Federal Trade Commission Act in certain particulars. The respondent was duly served with process.

On May 24, 1957, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order to Cease and Desist," which had been entered into by and between said respondent and Brockman Horne, counsel supporting the complaint, under date of May 21, 1957, and subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by the Director and Assistant Director of the Commission's Bureau of Litigation.

In view of the subsequent approval herein of said agreement, the initial hearing set for June 13, 1957, at ten o'clock in St. Louis, Missouri, as fixed in the notice portion of the complaint, is hereby canceled.

On due consideration of the said "Agreement Containing Consent Order to Cease and Desist," the hearing examiner finds that said agreement, both in form and in content, is in accord with Section 3.25 of the Commission's Rules of Practice for Adjudicative

Decision

54 F.T.C.

Proceedings and that by said agreement the parties have specifically agreed that:

1. Respondent is an individual trading as J. David Paisley Co. His office and principal place of business is at 3423 Olive Street, St. Louis 3, Missouri.
2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on April 8, 1957, issued its complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.
3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.
4. This agreement disposes of all the proceeding as to the only respondent.
5. Respondent waives:
 - a. Any further procedural steps before the hearing examiner and the Commission;
 - b. The making of findings of fact or conclusions of law; and
 - c. All of the rights he may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.
6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.
7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.
8. This agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

In the said agreement, the parties have further specifically agreed that the proposed order to cease and desist included therein may be entered in this proceeding by the Commission without further notice to the respondent; that when so entered it shall have the same force as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein, and the said "Agreement Containing Consent Order to Cease and Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent

Order to Cease and Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the person of the respondent herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act both generally and in each of the particular charges alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the full disposition of all the issues in this proceeding, such order to become final only if and when it becomes the order of the Commission; and that said order, therefore, should be, and hereby is, entered as follows:

ORDER

It is ordered, That respondent J. David Paisley, trading under the name of J. David Paisley Co., or under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of a plastic sheet to be fastened over the viewing screen of a television set, designated as "Wonder-Vue," or any other product of substantially the same characteristics whether sold under the same or any other name, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

- A. Representing, directly or by implication, that by the use of said product:
 1. In connection with the operation of a black-and-white television set, said television will thereby produce the same visual effect as a color television set or misrepresenting in any manner the color provided by said product when used in connection with a television set;
 2. Eye strain caused by viewing television will be prevented or eliminated;
 3. Snow, blurring or haziness will be eliminated from television screens.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 10th day of July, 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondent J. David Paisley, an individual trading as J. David Paisley Co., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

HENRY MONOSSON ET AL. TRADING AS
MONO FUR COMPANY AND INTERNATIONAL FUR CO.

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

Docket 6629. Complaint, Sept. 12, 1956—Decision, July 11, 1957

Consent order requiring furriers in Los Angeles, Calif., to cease violating the Fur Products Labeling Act by advertising in newspapers which misrepresented prices, grade, and value of fur products, by failing to maintain adequate records as a basis for such pricing claims, and failing to comply with the labeling and invoicing requirements of the Act.

Mr. George E. Steinmetz and Mr. William M. King for the Commission.

Mr. Jerome S. Monosson, of Los Angeles, Calif., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding issued September 12, 1956, charged respondents Henry Monosson and Yetta Monosson, individually and as copartners trading as Mono Fur Company and International Fur Co., located at 818 South Broadway, Los Angeles, California, with the use of unfair and deceptive acts and practices in interstate commerce in violation of the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

After the issuance of said complaint, the respondents Henry Monosson and Yetta Monosson, individually and as copartners trading as Mono Fur Company and International Fur Co., entered into an agreement for consent order with counsel in support of the complaint disposing of all the issues in this proceeding, except the charge applicable to such records as pleaded in Paragraph Nine of the complaint, which agreement was duly approved by the Director and Assistant Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the said respondents admitted all the jurisdictional facts alleged in the complaint, except the charge

applicable to such records as pleaded in Paragraph Nine of the complaint, and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations.

By said agreement the parties expressly waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

Respondents further agreed that the order to cease and desist, issued in accordance with said agreement, shall have the same force and effect as if made after a full hearing.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein, that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement, except the charge applicable to such records as pleaded in Paragraph Nine of the complaint, and that said order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and, in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, and that this proceeding is in the interest of the public and issues the following order:

ORDER

It is ordered, That respondents Henry Monosson and Yetta Monosson, individually and as copartners trading and doing business under the firm names of Mono Fur Company and International Fur Co., or under any other trade name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the offering for sale, sale, advertising, transportation or distribution of fur products which have been made in whole or in

Order

54 F.T.C.

part of fur which had 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. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(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 and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

(f) The name of the country of origin of any imported furs used in the fur product.

2. Setting forth, on labels attached to fur products:

(a) Non-required information mingled with required information;

(b) Required information in abbreviated form, or in handwriting.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(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 and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of used fur, when such is a fact;

(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is a fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is a fact;

(e) The name and address of the person issuing such invoices;

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

C. Falsely or deceptively advertising fur products through the use of any notice, advertisement, representation or public announce-

ment which is intended to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of fur products and which:

1. Represents, directly or by implication, that the regular or usual price of any fur product is any amount in excess of the price at which the respondents have usually and customarily sold such products in the recent regular course of their business.
2. Misrepresents the grade, quality or value of certain of said fur products by the use of illustrations depicting higher priced or more valuable products than those actually available at the advertised selling price.
- D. Making use in advertisements of percentage savings claims and compared prices unless such claims or prices are based upon current market values or unless the designated time of a bona fide compared price is given.

It is further ordered, That the charge in the complaint applicable to such records as are pleaded in Paragraph Nine thereof, be dismissed without prejudice.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 11th day of July, 1957, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

Decision

54 F.T.C.

IN THE MATTER OF

RENA-WARE DISTRIBUTORS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6734. Complaint, Feb. 27, 1957—Decision, July 17, 1957*

Consent order requiring distributors in Opportunity, Wash., of "Rena-Ware" stainless steel cooking utensils designed for so-called "waterless cooking," to cease making false representations—through their distributors and personal solicitors whom they supplied with sales training manuals, charts, cookbooks, brochures, and other advertising literature—as to the comparative merits, unique nature and prices of their cooking utensils, the qualifications of their personnel, and their manufacturing status, among other things.

*Morton Nesmith, Esq. for the Commission.
Respondents, pro se.*

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on February 27, 1957, charging them with having violated the Federal Trade Commission Act by making false and misleading representations concerning the properties, characteristics, prices, manufacture and other details of their product, cooking utensils. Respondents entered into an agreement, dated May 17, 1957, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing, which agreement has been duly approved by the Director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made duly in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agree-

ment, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondent Rena-Ware Distributors, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at Opportunity, Washington (P.O. Box 33). The individual respondents, Fred W. Zylstra and Otto W. Zylstra, are officers and directors of said respondent corporation, and their address is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

It is ordered, That respondents, Rena-Ware Distributors, Inc., a corporation, and its officers, and Fred W. Zylstra and Otto W. Zylstra, individually and as officers and directors of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution, in commerce as "commerce" is defined in the Federal Trade Commission Act, of stainless steel cooking utensils, or any other cooking utensils of substantially similar composition, design, construction, or purpose, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That respondents' utensils are new or revolutionary or are the first or only utensils designed for both cooking and serving food;

Decision

54 F.T.C.

- (b) That respondents' utensils cook food at a lower temperature than do competing products, or that the results achieved by the use of their utensils are unique as compared with those achieved by the "waterless" method of cooking in other utensils;
- (c) That respondents' sales personnel are members of their advertising department or are other than salesmen;
- (d) That the offer to sell respondents' utensils is for the purpose of advertising, or that the prices at which their products are offered are special or reduced prices, when such is contrary to the fact;
- (e) That respondents employ, or have employed, laboratory technicians, home economists, dietitians, or engineers, or have conducted research in connection with their utensils, or that respondents own, operate, or control a factory wherein their utensils are manufactured, when such is contrary to the fact;
- (f) That all the vitamin and mineral content of food is retained when respondents' utensils and the "waterless" method of cooking are used; *Provided*, That nothing herein shall prevent respondents from representing that more vitamins and minerals are retained in food cooked in their utensils and using the "waterless" method of cooking than when cooked in other utensils requiring substantially larger quantities of water;
- (g) That minerals in food are destroyed by heat when using any kind of cooking utensils or any method of cooking;

(h) That vitamins in food, other than Vitamin C and some elements of the Vitamin B complex, are destroyed or damaged by heat in cooking, or that these vitamins are destroyed or damaged by heat in cooking, except when subjected to prolonged high temperatures.

2. Furnishing means or instrumentalities to others by and through which they may mislead and deceive the public respecting the matters set forth in Paragraph 1 hereof.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 17th day of July, 1957, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

Decision

IN THE MATTER OF
AFFILIATED BROKERS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6746. Complaint, Mar. 22, 1957—Decision, July 17, 1957

Consent order requiring two Chicago real estate advertising firms and their common officer to cease representing falsely through oral and written statements and by wording of the corporate names that they were bona fide business brokers or a cooperative organization engaged in the sale of business establishments, that they had ready purchasers, and would guarantee sale of a property or refund the substantial service fee they collected.

Mr. Terral A. Jordan for the Commission.

Blowitz & Ozman, by *Mr. Max Pastin*, of Chicago, Ill., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that respondents, in the course of their business in commerce, have represented that they operate business enterprises which offer certain services and facilities in commerce in the offering for sale, selling, buying and exchanging of business properties; and that they are bona fide business brokers or a bona fide cooperative organization engaged in the sale of business properties; that they have ready buyers, guarantee sale of properties, will make refund of "service" deposits, have funds which can be used in financing sales, and in many other respects will afford sellers exceptional brokerage services. The complaint alleges that these representations are false and misleading and in violation of the Federal Trade Commission Act.

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

The agreement states that respondents Affiliated Brokers, Inc. and Business Co-Op, Inc. are corporations existing and doing business under and by virtue of the laws of the State of Illinois; that respondent William John Madone is an individual and an officer of

Order

54 F.T.C.

each of such corporations; and that the office and principal place of business of each of the respondents is located at Suite 1700, 6 E. Monroe Street, Chicago, Illinois.

The agreement provides, among other things, that the respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the Hearing Examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of the Federal Trade Commission Act. Accordingly, the Hearing Examiner finds this proceeding to be in the public interest, and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered, That respondent Affiliated Brokers, Inc., a corporation, and its officers, and Business Co-op, Inc., a corporation, and its officers, and William John Madone, individually and as an officer of each of the said corporate respondents, and each of respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale or sale, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of advertising in newspapers and in other advertising media and of other services and facilities in connection with the offering for sale, selling, buying or exchanging of business property or any other kind of property, do forthwith cease and desist from, directly or indirectly, representing:

1. That any sum of money deposited by a prospective seller of property with the respondents on condition that respondents will effect a sale of said property on expressed or implied conditions will be returned, unless said sum is in fact returned on the failure of respondents to comply with the conditions of the agreement;
2. That respondents have available qualified or ready purchasers for businesses unless such purchasers are in fact available;
3. That respondents will undertake the sale of property without risk, obligation or expense to the prospective seller;
4. That respondents have available through their own resources, the funds or facilities necessary to finance the sale and transfer of business property or other kinds of property or that respondents are in fact engaged in the business of financing the sale and transfer of such property.

It is further ordered, That said respondent Affiliated Brokers, Inc., a corporation, and its officers, and William John Madone, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale or sale, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of advertising in newspapers and in other advertising media and of other services and facilities in connection with the offering for sale, selling, buying or exchanging of business property or any other kind of property, do forthwith cease and desist from, directly or indirectly, representing:

That they or their agents, representatives, and employees are bonded, licensed or insured with respect to or to engage in the operation of a brokerage business for the sale of business property or any other kind of property.

It is further ordered, That said respondent Business Co-Op, Inc., a corporation, and its officers, and William John Madone, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale or sale, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of advertising in newspapers and in other advertising media and of other services and facilities in connection with the offering for sale, selling, buying or exchanging of business property or any other kind of property, do forthwith cease and desist from:

Using the word "Co-Op" as a part of a corporate or trade name, or representing in any other way or by any other means, that they operate a cooperative business.

Decision

54 F.T.C.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 17th day of July, 1957, become the decision of the Commission; and, accordingly:

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