

Decision

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IN THE MATTER OF
LEVIANT BROTHERS, INC., ET AL.

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

Docket 7194. Complaint, July 17, 1958—Decision, July 31, 1959

Order requiring a New York City furrier to cease violating the Fur Products Labeling Act by failing to comply with invoicing requirements, by setting forth fictitious prices on invoices, by failing to maintain adequate records on which such pricing representations were based, and by furnishing a false guaranty that fur products were not misbranded, falsely invoiced, and falsely advertised.

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

Mr. Manfred H. Benedek, of New York, N.Y., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that respondents have engaged in practices which are in violation of the Fur Products Labeling Act (hereinafter referred to as the Fur Act) and the Rules and Regulations promulgated thereunder (hereinafter referred to as the Rules), which practices constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Respondents, by answer, deny that they have violated either Act. Hearings have been held, at which evidence was presented in support of and in opposition to the allegations of the complaint, and counsel have filed proposed findings of fact and proposed conclusions. Upon the basis of the entire record, the following findings of fact are made, conclusions drawn and order issued.

1. Respondent Leviant Brothers, 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 place of business located at 350 Seventh Avenue, New York, New York. Respondents Morris Leviant and Bernard Leviant are president and secretary-treasurer, respectively, of said corporation. They formulate, direct and control its acts, policies and practices. Their address is the same as that of the corporate respondent.

2. Subsequent to the effective date of the Fur Products Labeling Act, August 9, 1952, respondents have been, and are now, engaged in introduction into commerce and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised,

offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

3. There are four charges in the complaint which will be discussed under separate headings—False Invoicing, False Advertising, Inadequate Records, and False Guaranty.

False Invoicing:

(a) *Under §5(b)(1) of the Fur Act*

4. The complaint charges that respondents falsely and deceptively invoiced their fur products in two respects. There is a charge that they have violated §5(b)(1) of the Fur Act, without any specification as to which of its six subsections have not been complied with. The evidence related only to respondents' failure to disclose on the invoices covering certain garments the name of the country of origin of the furs of which they were made.

5. In March, 1956, respondents purchased one lot of 2,195 skins from Danish Fur Sales, Copenhagen, Denmark. As these skins were made into fur garments, the number 2195 was used as part of the identification. Two garments from the lot were identified as 2195/32 and 2195/54 on a consignment memorandum from respondents to Arnold Constable, dated March 1, 1957, but no country of origin is shown. Two other garments, 2195/59 and 2195/27, were sold to Constable and covered by an invoice dated January 7, 1957, which shows "Fur Origin—Denmark." Still another garment, 2195/38, was sold to Constable and invoiced January 15, 1957, also showing "Fur Origin—Denmark."

6. Since under §2(f) of the Fur Act a consignment memorandum is by definition an invoice, respondents violated §5(b)(1)(F) of the Act by their failure to show the country of fur origin on the consignment memorandum of March 1, 1957. The fact that on earlier invoices, respondents had properly shown country of origin, indicates that they had not carefully read the Fur Act and did not realize that consignment memorandums and invoices, looked upon by the trade as different types of documents, are, under the Act, both covered by the "invoice" definition. This circumstance may mitigate but not excuse the violation.

(b) *Under §5(b)(2) of the Fur Act*

7. The second false-invoicing charge is that §5(b)(2) of the Fur Act has been violated in that respondents set out on their invoices covering certain fur products prices which were in fact fictitious. On a consignment memorandum dated January 23, 1957, two fur

garments were listed as "Regular" \$2,100 and \$1,875, but were offered to Constable at \$1,795 and \$1,385, respectively. On a consignment memorandum dated March 1, 1957, garments were similarly listed as "Regular" \$2,500, \$425 and \$650, but offered to Constable at \$1,995, \$365 and \$495, respectively. A consignment memorandum dated February 19, 1957, showed a "Former Price" of \$725 and an offering price to Constable of \$525. Invoices dated December 31, 1956, January 7, 1957, and January 15, 1957, charged garments to Constable at \$1,385, but showed also for each garment a "Regular" price of \$1,895.

8. Two garments on which the "regular" price had been shown as \$425, offering price \$365 on the consignment memorandum of March 1, 1957, had previously, on March 7, 1956, been consigned to Constable at \$495. A garment listed as "Regular" \$2,100 and offered for \$1,795 January 24, 1957, was sold to Constable April 3, 1957, for \$1,472. Another garment on the January 24, 1957, consignment memorandum as "regular" \$1,875, offered then for \$1,385, was sold to Constable April 11, 1957, for \$1,173. To show "regular" prices, respondents presented evidence of offering garments similar to some of those referred to above at various times and prices, but there was no showing of price uniformity.

9. Respondents maintained no records relative to prices of specific fur garments except as shown on invoices, including consignment memorandums. The evidence is clear that respondents had no regular or usual price for their fur garments, and that the prices listed by them as "regular" or "former" were in fact fictitious. Section 5(b)(2) of the Fur Act has been violated by respondents.

False Advertising:

10. The complaint charges that respondents have falsely and deceptively advertised certain fur products by setting out on invoices prices which were in fact fictitious, in violation of Section 5(a)(5) of the Fur Act, and reliance to establish this charge is upon the facts as to pricing practices discussed above. That respondents used fictitious prices on their consignment memorandums issued in connection with their fur-products transactions with Arnold Constable is clearly established. These documents were received by Arnold Constable prior to the purchase by that firm of the fur products listed therein. The fictitious prices set forth in these documents were in excess of the offering prices of the fur products to which they related and constituted false representations that such fur products were being offered for sale at a reduction from such fictitious prices. The documents themselves were used by respondents to aid and assist in the sale or offering for sale of the fur products listed

therein, and the false representations made therein with respect to the prices of such products were necessarily intended for the same purpose. The fur products so described in the aforementioned consignment memorandums were falsely advertised within the meaning of Section 5(a)(5) of the Fur Act.

Inadequate Records:

11. The complaint charges that respondents have violated Rule 44(e) by not maintaining full and adequate records disclosing the facts upon which their pricing and savings claims and representations are based. As hereinbefore found, respondents have falsely advertised certain fur products by representing that the prices thereof were reduced from what were, in fact, fictitious prices. Respondents have failed to maintain records disclosing the facts upon which such representations were based as required by subsection (e) of Rule 44 and, consequently, have violated that subsection.

False Guaranty:

12. The last charge is that respondents have furnished a false guaranty that certain of their furs or fur products were not misbranded, falsely invoiced and falsely advertised, when the respondents, in furnishing such guaranty, had reason to believe the furs or fur products so falsely guaranteed might be introduced, sold, transported or distributed in commerce, in violation of §10(b) of the Fur Products Labeling Act.

13. It has hereinabove been found that respondents have falsely invoiced and falsely advertised certain of their fur products which were consigned to a retailer who respondents had reason to believe would sell and further introduce such fur products in commerce. It follows that the continuing guaranty filed by respondents with the Federal Trade Commission, a copy of which is in the record, was false in that it guaranteed that "no fur or fur products in any such shipment or delivery will be falsely or deceptively invoiced or advertised within the meaning of the Fur Products Labeling Act and the Rules and Regulations thereunder."

CONCLUSIONS

1. Respondents are engaged in commerce and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Fur Products Labeling Act.

2. The acts and practices of respondents hereinabove found are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive

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acts and practices in commerce under the Federal Trade Commission Act.

3. This proceeding is in the public interest, and an order to cease and desist the above-found acts and practices should issue against respondents.

Upon the basis of the foregoing findings and conclusions, and all the facts of record,

It is ordered, That respondents, Leviant Brothers, Inc., a corporation, and Morris Leviant and Bernard Leviant, 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 on the manufacture for introduction into commerce, or the sale, advertising, or offering for sale, transportation or distribution in commerce, of fur products, or in connection with the manufacture for sale, 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 commerce, as "commerce," "fur" and "fur products" 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 to purchasers of fur products invoices showing all of the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Representing, directly or by implication, on invoices that the former or regular price of any fur product is any amount which is in excess of the price at which respondents have formerly, usually or customarily sold such product in the recent regular course of their business.

B. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of fur products, and which:

1. Represents, directly or by implication, that the former or regular price of any fur product is any amount which is in excess of the price at which respondents have formerly, usually or customarily sold such product in the recent regular course of their business.

C. Making pricing claims or representations of the type referred to in paragraph B.1. above, unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based.

D. Furnishing a false guaranty that any fur or fur product is not misbranded, falsely invoiced, or falsely advertised, when the

respondents have reason to believe that such fur or fur product may be introduced, sold, transported or distributed in commerce.

OPINION OF THE COMMISSION

By SECREST, *Commissioner*:

The complaint in this matter charges respondents with false invoicing and false advertising of fur products, the failure to maintain records, and the furnishing of a false guaranty in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder. Counsel supporting the complaint has appealed from the hearing examiner's dismissal of two of the allegations of the complaint and from the limited scope of the order pertaining to false invoicing.

The principal question raised on appeal is whether respondents' use of fictitious comparative prices for certain fur products on consignment memorandums constitutes false advertising within the meaning of Section 5(a)(5) of the Act. The complaint charges that this practice constitutes both false invoicing under Section 5(b)(2) of the Act and false advertising under Section 5(a)(5). The hearing examiner found that certain of respondents' consignment memorandums contained fictitious prices and held that the fur products to which these prices applied were falsely invoiced. He ruled, however, with respect to the same documents that they "do not constitute representations to the public or to any other prospective purchaser as to quality, price, or any other characteristic of the fur products to which they relate, and do not constitute advertising as the term 'advertising' is generally understood and used in the Fur Act."

We are of the opinion that the hearing examiner erred in this ruling. Section 5(a) of the Fur Act states in pertinent part that:

For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement, representation, public announcement, or notice which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale of such fur product or fur—

* * * * *
 (5) * * * contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur.

It is clear from this language that a single representation to a prospective purchaser, as distinguished from a public announcement, may constitute advertising within the meaning of the section. Moreover, there is nothing in the wording of this section or in the legislative history of the Act to indicate that a consignment memorandum may not serve as a medium for conveying a representation or notice

“which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale” of a fur product or fur.

The record shows that respondents set forth fictitious comparative prices on consignment memorandums issued by them in connection with the consignment to Arnold Constable of certain fur products which were later purchased by that firm. These consignment memorandums were received by the consignee prior to the consummation of the sale to it of the products described therein. It is clear, therefore, that these documents were intended to aid or assist in the sale or offering for sale of the products to Arnold Constable. We think the conclusion is inescapable that the fictitious prices listed therein constituted false representations to the prospective purchaser which were intended for the same purpose. It should be pointed out, in this connection, that while there is no evidence that the consignee was deceived by these representations, the statute does not require any showing that a prospective purchaser was deceived or that the false representations were made under such circumstances that a prospective purchaser might be deceived. It is our opinion, therefore, that the fur products in question were falsely advertised within the meaning of Section 5(a)(5) of the Act.

In view of this holding, we also agree with counsel supporting the complaint that the hearing examiner erred in ruling that respondents are not required to maintain records as provided by Rule 44(e) of the Rules and Regulations promulgated under the Act. This ruling was based upon the conclusion that respondents had made no pricing representations in advertising. We are of the opinion, however, that respondents have made pricing representations of a type described in subsection (a) of Rule 44 and, consequently, should have maintained full and adequate records disclosing the facts upon which such representations were based. Since the evidence shows that respondents have failed to keep such records, they have violated Rule 44(e) as charged in the complaint.

The final exception to the initial decision relates to the scope of the order pertaining to false invoicing. The hearing examiner found that respondents had falsely invoiced certain fur products in violation of Section 5(b)(1) by failing to disclose on a consignment memorandum the name of the country of origin of the fur from which such products were made. His order, however, does not require respondents to disclose all of the information prescribed by Section 5(b)(1) but is limited to requiring cessation of the particular invoicing deficiency found. The order is, therefore, not in accord with the Commission's policy concerning the scope of cease and desist orders covering violations of Section 4(2) and Section

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5(b)(1) of the Act as expressed in *Mandel Brothers, Inc.*, Docket No. 6434. The hearing examiner presumably relied upon the decision of the Court of Appeals for the Seventh Circuit reversing the Commission on this point (*Mandel Brothers, Inc. v. Federal Trade Commission*, 254 F. 2d 18) as authority for the form of the order which he employed. Subsequent to the filing of the initial decision herein, however, the Supreme Court overruled the decision of the Court of Appeals (*Federal Trade Commission v. Mandel Brothers, Inc.*, 39 U.S. 385) and, in view thereof, we believe that the order should be modified to require respondents to observe all of the requirements of Section 5(b)(1).

The appeal of counsel supporting the complaint is granted and the initial decision will be modified to conform with this opinion.

FINAL ORDER

Counsel in support of the complaint having filed an appeal from the initial decision of the hearing examiner, and the matter having been heard on briefs, no oral argument having been requested; and the Commission having rendered its decision granting the appeal and directing modification of the initial decision:

It is ordered, That paragraph 10 of the initial decision be modified to read as follows:

10. The complaint charges that respondents have falsely and deceptively advertised certain fur products by setting out on invoices prices which were in fact fictitious, in violation of Section 5(a)(5) of the Fur Act, and reliance to establish this charge is upon the facts as to pricing practices discussed above. That respondents used fictitious prices on their consignment memorandums issued in connection with their fur-products transactions with Arnold Constable is clearly established. These documents were received by Arnold Constable prior to the purchase by that firm of the fur products listed therein. The fictitious prices set forth in these documents were in excess of the offering prices of the fur products to which they related and constituted false representations that such fur products were being offered for sale at a reduction from such fictitious prices. The documents themselves were used by respondents to aid and assist in the sale or offering for sale of the fur products listed therein, and the false representations made therein with respect to the prices of such products were necessarily intended for the same purpose. The fur products so described in the aforementioned consignment memorandums were falsely advertised within the meaning of Section 5(a)(5) of the Fur Act.

It is further ordered, That paragraph 11 of the initial decision be modified to read as follows:

11. The complaint charges that respondents have violated Rule 44(e) by not maintaining full and adequate records disclosing the facts upon which their pricing and savings claims and representations are based. As hereinbefore found, respondents have falsely advertised certain fur products by representing that the prices thereof were reduced from what were, in fact, fictitious prices. Respondents have failed to maintain records disclosing the facts upon which such representations were based as required by subsection (e) of Rule 44 and, consequently, have violated that subsection.

It is further ordered, That paragraph 13 of the initial decision be modified to read as follows:

13. It has hereinabove been found that respondents have falsely invoiced and falsely advertised certain of their fur products which were consigned to a retailer who respondents had reason to believe would sell and further introduce such fur products in commerce. It follows that the continuing guaranty filed by respondents with the Federal Trade Commission, a copy of which is in the record, was false in that it guaranteed that "no fur or fur product in any such shipment or delivery will be falsely or deceptively invoiced or advertised within the meaning of the Fur Products Labeling Act and the Rules and Regulations thereunder."

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

1. Respondents are engaged in commerce and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Fur Products Labeling Act.

2. The acts and practices of respondents hereinabove found are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

3. This proceeding is in the public interest, and an order to cease and desist the above-found acts and practices should issue against respondents.

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 respondents, Leviant Brothers, Inc., a corporation, and Morris Leviant and Bernard Leviant, 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 the manufacture for introduction into commerce, or the sale, advertising, or offering for sale, transportation or distribution in commerce, of fur products, or in connection with the manufacture for sale, 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 commerce, as "commerce," "fur" and "fur products" 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 to purchasers of fur products invoices showing all of the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Representing, directly or by implication, on invoices that the former or regular price of any fur product is any amount which is in excess of the price at which respondents have formerly, usually or customarily sold such products in the recent regular course of their business.

B. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of fur products, and which:

1. Represents, directly or by implication, that the former or regular price of any fur product is any amount which is in excess of the price at which respondents have formerly, usually or customarily sold such product in the recent regular course of their business.

C. Making pricing claims or representations of the type referred to in paragraph B.1 above, unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based.

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

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

It is further ordered, That respondents, Leviant Brothers, Inc., Morris Leviant and Bernard Leviant, 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 contained herein.