

Complaint

68 F.T.C.

Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

5. Fails to set forth all parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other.

D. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

IN THE MATTER OF

FURR'S, INC.

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

Docket 8581. Complaint, June 28, 1963—Decision, Oct. 20, 1965

Order dismissing the complaint and closing the proceeding against a large Southwestern grocery chain with headquarters in Lubbock, Texas, which had allegedly solicited payments from three milk suppliers in connection with a promotional advertising scheme in violation of Section 5 of the Federal Trade Commission Act on the grounds that the particular practice complained of had stopped and that an order is not necessary in the public interest to insure against future violations.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Furr's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 1708 Avenue G, Lubbock, Texas.

PAR. 2. Respondent is now, and for many years has been, engaged in the operation of a chain of retail grocery stores, selling a great variety of food, grocery and non-edible household products. There are presently 63 retail grocery stores composing respondent's chain, which stores are located in the States of Texas, New Mexico and Colorado.

Respondent purchases food, grocery and non-edible household products of all types from a large number of manufacturers, suppliers, and handlers of such products. To create consumer demand and acceptance for the products it sells, and to attract business to its stores, respondent engages in extensive advertising. Respondent's sales of its products are substantial, exceeding \$90,000,000 annually.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent purchases for resale a great variety of products from a large number of suppliers located throughout the United States. Respondent causes these products, when purchased by it, to be transported from the place of manufacture or purchase to stores or warehouses located in the States of Texas, New Mexico or Colorado for resale to the consuming public. There is now, and for many years has been, a constant current of trade and commerce in these products between and among various States of the United States.

PAR. 4. In the course and conduct of its business, respondent is now and has been in competition with other corporations, persons, firms and partnerships in the purchase, sale and distribution of food, grocery and non-edible household products in interstate commerce.

PAR. 5. In the course and conduct of its business in commerce, and particularly since 1956, respondent has knowingly induced and received from some of its suppliers the payment of something of value to or for respondent's benefit as compensation or in consideration for services or facilities furnished by or through respondent in connection with respondents offering for sale or sale of products sold to respondent by many of its suppliers when respondent knew or should have known that such payments were not made available by such suppliers on proportionally equal terms to all other

customers of such suppliers competing with respondent in the sale and distribution of such suppliers' products.

PAR. 6. For example, in 1962, respondent held a special promotion called "Furr's 1962 Circus." Respondent solicited participation in the promotion by all of its suppliers through personal contacts or telephone calls. In conjunction with, and as a part of, the circus promotion, respondent held a circus in eleven (11) cities located in the States of Texas, New Mexico and Colorado. Respondent also sent a brochure to all of its suppliers describing the advertising and promotional activities which were to take place during the promotion. Respondent, in its brochure, also offered participating suppliers a choice of seven different advertising and promotional deals which are described in summary as follows:

Jumbo Package

Three weeks of in-store displays in 55 of Furr's stores. 3750 cases of merchandise (68 cases per store average).

Three weeks of advertising which included:

- A. Twelve (12) column inches of advertising in 25 newspapers in 23 towns.
- B. Twelve (12) TV 20-second spots (Classes AA, A, B, C and D).
- C. Twenty (20) radio 30-second spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$5,000.

Full End Display

Three weeks of in-store displays in 55 of Furr's stores. 1500 cases of merchandise (27 cases per store average).

Three weeks of advertising which included:

- A. Six column inches of advertising in 25 newspapers in 23 towns.
- B. Nine TV spots (Classes B, C and D)
- C. Ten radio spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$3,000.

Three Quarter End Display

Three weeks of in-store displays in 55 of Furr's stores. 1,000 cases of merchandise (18 cases per store average).

Three weeks of advertising which included:

- A. Five column inches of advertising in 25 newspapers in 23 towns.
- B. Six TV spots (Classes B, C and D)
- C. Eight radio spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$2,000.

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One Half End Display

Three weeks of in-store displays in 55 of Furr's stores. 750 cases of merchandise (13 cases per store average).

Three weeks of advertising which included:

- A. Four column inches of advertising in 25 newspapers in 23 towns.
- B. Five TV spots (Classes B, C and D)
- C. Seven radio spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$1,500.

Quarter End Display

Three weeks of in-store displays in 55 of Furr's stores. 500 cases of merchandise (9 cases per store average).

Three weeks of advertising which included:

- A. Three column inches of advertising in 25 newspapers in 23 towns.
- B. Five TV spots (Classes B, C and D)
- C. Three radio spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$1,000.

Cardboard Dump Display

Two weeks of in-store displays in 55 of Furr's stores. (Displays were in "cardboard dump" and not on shelf).

Two weeks of advertising which included:

- A. Two column inches of advertising in 25 newspapers in 23 towns.
- B. Thirteen radio spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$750.

Shelf Talkers

Three weeks of in-store displays in all of Furr's 63 stores by means of "shelf talkers."

Three weeks of advertising which included:

- A. Two column inches of advertising in 25 newspapers in 23 towns.
- B. Thirteen (13) radio spots.

Store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$500.

At the end of respondent's brochures was a form which interested suppliers filled out and signed if they wished to participate in respondent's circus promotion. A substantial number of respondent's suppliers participated in respondent's circus promotion and agreed to pay, and did pay, respondent a total of \$113,120.59.

PAR. 7. Typical of the suppliers who participated in respondent's 1962 circus promotion, the products which were promoted and the amounts which they paid respondent are the following:

<i>Name of Supplier</i>	<i>Complaint</i>	<i>68 F.T.C.</i>
	<i>Products</i>	<i>Amount</i>
Rayette, Inc., St. Paul, Minn.	Hair spray	\$5,000.00
American Beauty Macaroni Co. Kansas City, Kansas	Macaroni and spaghetti	1,000.00
La Mur, Inc., Minneapolis, Minn.	Hair spray	3,000.00
Zestee Foods, Inc. Oklahoma City, Okla.	Jellies	3,000.00
New England Confectionery Company, Cambridge, Mass.	Candy	2,000.00
Eversharp, Inc., Milford, Conn.	Schick razor blades	2,000.00
Stilwell Canning Company, Inc. Stilwell, Okla.	Canned fruits and vegetables	1,000.00

PAR. 8. Many of respondent's suppliers who participated in respondent's circus promotion, including specifically those listed herein, did not offer or otherwise make available to all their customers competing with respondent in the sale and distribution of their respective products of like grade and quality similar payments or allowances, or other things of value, for advertising, display, or other promotional services or facilities on terms proportionately equal to those granted respondent. When respondent solicited and received said payments or allowances from its suppliers, respondent knew or should have known that it was inducing or receiving a payment or allowance for advertising, display or other promotional services or facilities from its suppliers which the suppliers were not offering or otherwise making available on proportionately equal terms to all their other customers who were competing with respondent in the sale and distribution of such suppliers' products.

PAR. 9. The acts and practices of respondent, as herein alleged, of inducing and receiving special payments or allowances from its suppliers which were not made available by such suppliers on proportionally equal terms to respondent's competitors are all to the prejudice and injury of competitors of respondent and of the public; have the tendency and effect of obstructing, hindering, lessening and preventing competition in the sale and distribution of food, grocery and non-edible household products; and constitute unfair methods of competition in commerce and unfair acts and practices

in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Mr. Dene L. Lusby for the Commission.

Howrey, Simon, Baker & Murchison, Wash., D.C., by *Mr. Edward F. Howrey*, *Mr. Harold F. Baker* and *Mr. Terrence C. Sheehy*, and *Crenshaw, Dupree & Milam*, Lubbock, Tex., by *Mr. James H. Milam* for the respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

NOVEMBER 27, 1964

On June 28, 1963, the Commission issued a complaint which charged that Furr's, Inc., an operator of a chain of retail grocery stores located in Texas, New Mexico and Colorado, had violated Section 5 of the Federal Trade Commission Act by inducing and receiving, from many of its suppliers, payments as compensation or consideration for services or facilities furnished by Furr's, Inc. to such suppliers in connection with the resale of products sold to it by the suppliers, which payments, to respondent's knowledge, had not been made available on proportionately equal terms by such suppliers to their other customers competing with Furr's, Inc. in the sale and distribution of those products.

Respondent's answer, filed on August 29, 1963, denied that it knowingly induced and received disproportionate promotional allowances, and further denied the presence of the requisite interstate commerce. Respondent also alleged that the complaint fails to state a cause of action upon which an order may be predicated; that the Commission is without legal authority to prosecute respondent under Section 5 of the Federal Trade Commission Act; and that the acts and practices of respondent charged to be illegal were engaged in by respondent in the normal course of business to meet the competition of others engaged in the retail grocery business.

On September 5, 1963, counsel for the parties met with the Hearing Examiner in a reported pre-hearing conference. As a result thereof, an agreed order was issued which was to control the subsequent course of the proceeding, unless modified to prevent manifest injustice. The order, among other things, required each party to file a pretrial brief containing (a) a summary of the issues of fact and law; (b) the name and address of each witness whom it intends to call at the hearings, together with a statement of the

nature of the witness' testimony; and (c) a list of the documentary exhibits which the party planned to be introduced. The order further provided that a party may not introduce any testimony or exhibits which are not referred to in the trial brief. Further pre-hearing conferences were held on October 29, 1963, March 2, 1964, and March 13, 1964, at which times matters relating to the conduct of the proceeding were discussed and resolved.

Complaint counsel filed a trial brief on September 26, 1963, followed by a supplemental trial brief submitted on December 12, 1963, and an amended trial brief filed on March 19, 1964. Respondent's trial brief was filed on April 20, 1964.

Hearings were held at Lubbock, Texas, Denver, Colorado, and Washington, D.C., commencing on April 27, 1964, and completed on May 29, 1964, at which time complaint counsel put in his case and the respondent submitted its defense. Testimony was received from a total of 47 witnesses, 43 being called by complaint counsel, and 4 by respondent. The record includes 1310 pages of transcript and over 1000 exhibits. On July 15, 1964, the parties filed proposed findings, on August 24, 1964, filed replies thereto, and on September 1, 1964, presented oral arguments thereon to the Hearing Examiner. The proposed findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

At the outset, it is the contention of respondent that the Commission does not have jurisdiction to proceed against respondent under Section 5 of the Federal Trade Commission Act. There is no merit to the position. It is now well settled as a matter of law that a buyer who knowingly induces and receives discriminatory advertising and promotional payments and allowances from his suppliers engages in an unfair method of competition proscribed by, and within the remedial scope of, Section 5 of the Federal Trade Commission Act. *Giant Food Inc. v. Federal Trade Commission*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied* 372 U.S. 910 (1963); *The Grand Union Company v. Federal Trade Commission*, 300 F.2d 92 (2d Cir. 1962); *American News Company, et al. v. Federal Trade Commission*, 300 F.2d 104 (2d Cir. 1962), *cert. denied* 371 U.S. 824 (1962). It is found that the Federal Trade Commission has jurisdiction over the acts and practices of respondent, as alleged in the complaint, and the complaint alleges a cause of action under Section 5 of the Federal Trade Commission Act.

Respondent, Furr's, Inc., is a corporation organized, existing

