

IN THE MATTER OF
LUSTBERG, NAST & COMPANY, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2536. Complaint, Nov. 22, 1938¹—Decision, July 10, 1942

Where a corporation, engaged in the manufacture and competitive interstate sale and distribution of heavy clothing used by sportsmen and outdoor workers, including coats, shirts, mackinaws, jackets, and other garments made from woven fabrics of cotton, wool, and rayon—

Featured in advertisements in newspapers and magazines of nation-wide circulation, in trade literature and on labels attached to its products and their containers, its registered trade-marks displaying prominently "Buck Skein," with or without a deer's head, along with such additional words as "Jacket," "Trousers" and "Rain Coat," and including among its marks "Buck Skein Joe" and "Lady Buck Skein," and thereby represented that its said garments were made of buckskin, notwithstanding use of such expressions in small type and in inconspicuous place in its advertising as "looks like leather, wears forever," "all wool," "looks like buckskin," and "Double Weight Buck Skein Fabrics";

When in fact they were not made of the skin of a deer or an elk—garments of which, with their soft, pliable, lightweight and water-resistant qualities, are preferred, especially among sportsmen and those engaged in outdoor work, over the much less costly garments of woven fabric—but were made as aforesaid from wool, cotton, and rayon fabrics;

With effect of giving its advertisements a greater force and drawing power than those of its competitors who do not represent their similar products as buckskin; of placing in the hands of retailers and other dealers means of making and furthering such false representations and thus enabling them to increase sales of its products, thereby lessening the market for similar goods, the nature of which is truthfully stated; and of misleading and deceiving a substantial portion of the purchasing public into the mistaken belief that such representations were true and into the purchase, as a result, of a substantial volume of its said garments; whereby trade was unfairly diverted to it from competitors who truthfully represent their products; to the injury of competition in commerce:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before Mr. Edward M. Averill, Mr. John J. Keenan, Mr. Arthur F. Thomas and Mr. Lewis C. Russell, trial examiners.

Mr. John W. Hildrop and Mr. James M. Hammond for the Commission.

Kadel, Sheils & Weiss and Stroock & Stroock, of New York City, and Mr. Logan Morris, of Washington, D. C., for respondent.

¹ Amended.

Complaint

AMENDED COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Lustberg, Nast & Co., Inc., hereinafter referred to as respondent, has violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The respondent is a corporation, organized and existing pursuant to and under the laws of the State of New York, with its office and principal place of business located at 212 Fifth Avenue, in the city of New York, State of New York. It operates factories located at Lebanon, Pa., and Middletown, N. Y. It is, and for more than 1 year last past has been, engaged in the manufacture, among other things, of heavy clothing such as is commonly used by sportsmen, and outdoor workers. It causes said products, when sold, to be shipped from its factories, located as aforesaid, or from its principal place of business in New York City, N. Y., to purchasers thereof located in other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said clothing in commerce among and between the various States of the United States and in the District of Columbia. In the course and conduct of its business, said respondent has been at all times herein referred to in competition with other corporations, firms, partnerships, and individuals also engaged in the sale and distribution of similar products or other products designed for similar wear in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business as described in paragraph 1 hereof, the respondent adopted and now uses the term "Buck-skein" as a trade name, to designate a line of its products consisting of coats, shirts, mackinaws, jackets, and other garments manufactured from woven fabrics made of such materials as cotton, wool, and rayon. In some instances, the material used is rubberized or processed by or at the instance of the respondent, to give it waterproofing or rain-resisting qualities. For the purpose of aiding, assisting, and furthering the sale of its products to the purchasing and consuming public, the respondent causes advertisements and representations in which, among other ways, it prominently displays in very large type the term "Buck-skein," to be inserted in newspapers, magazines, and journals of Nation-wide circulation, and in its trade literature. To further stress the significance and meaning desired to be given to this

term and to increase the drawing power of its advertisements, respondent generally places immediately above, and in close juxtaposition therewith, a picture of the head of a deer. Labels, similarly embellished with this design, either with or without the deer head, are generally affixed by respondent to its products. In some instances the term "Buck-skein Joe" is used in like manner.

PAR. 3. Buckskin is the skin of either the deer or elk, which has been tanned by what is known as the oil process. It is exceedingly durable and possesses the quality of being highly resistant to wind and weather. It is also soft, pliable, light in weight, and may be washed. It is water-resistant without the disadvantage of being airtight, and permits sufficient air to pass through to allow its use as garment, shoe or glove leather. It is highly prized for these desirable qualities, especially by sportsmen and those engaged in outdoor work, and is far more expensive than any manufactured cloth or fabric used or substituted for a like purpose and is preferred by many such users to any other material for use in garments for sport or outdoor wear.

PAR. 4. The term "Buck-skein" is a slightly distorted spelling of the word "buckskin" and is unfairly simulative thereof. The respondent's use, in its advertisements and in the other ways herein mentioned, of the term "Buck-skein" and the picturization of a deer head, either separately or in conjunction therewith, to describe, designate or refer to respondent's garments made from woven fabrics serves as representations that said garments so described or designated are actually made from buckskin, the oil tanned skin of the deer or elk, or possess the desirable and preferable qualities and characteristics of buckskin. The garments manufactured, sold, and represented by the respondent, as described in paragraphs 1 and 2 hereof, are not made from buckskin, or any other leather product, but are manufactured from woven fabrics made of such materials as wool and cotton and do not possess the desirable and preferable qualities and characteristics of buckskin.

Respondent's false and deceptive representations also serve to unfairly attract the attention of the public to respondent's advertisements and gives them a greater force and drawing power to purchasers and prospective purchasers than advertisements of respondent's competitors who manufacture and sell similar garments but who do not represent the same as "Buck-Skein" or in any other way lead the public into the mistaken belief that their products are made from buckskin or possess the qualities or characteristics of buckskin.

Respondent's acts and practices as herein set out have also placed in the hands of retailers and dealers the means of making and furthering such false and misleading representations and have enabled such

retailers and dealers to increase their own sales of respondent's product so designated, described and represented, thereby lessening the market for similar goods, the nature, quality and character of which is truthfully stated.

PAR. 5. Outdoor garments of sundry competitors of respondent are and have been sold and distributed in commerce among and between the various States of the United States to the purchasing and consuming public in competition with respondent's products, but without fictitious and erroneous statements and representations with reference to the quality, nature, or character of materials used in their manufacture.

PAR. 6. The use by the respondent of the false and misleading statements and representations as hereinabove set out, in offering for sale and in selling its products, was and is calculated to, and had, and now has, a tendency and capacity to mislead and deceive a substantial portion of the purchasing and consuming public into the mistaken and erroneous beliefs that all of said representations are true, and that said garments so described and designated are actually made from buckskin or possess the desirable and preferable qualities and characteristics of buckskin and into the purchase of a substantial volume of respondent's garments in and on account of said beliefs induced by the aforesaid acts, practices and misrepresentations of respondent. As a result, trade has been diverted unfairly to the respondent from corporations, firms, partnerships, and individuals likewise engaged in the business of manufacturing, distributing, and selling similar garments in commerce among and between the various States of the United States who truthfully advertise and represent their products. In consequence thereof injury has been, and is now being, done by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 7. The foregoing acts and practices of the respondent as herein alleged are all to the prejudice of the public and of respondent's 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on the 30th day of August, A. D. 1935, issued and thereafter served its complaint in this proceeding upon the respondent, Lustberg, Nast & Co., Inc., a corporation, and on the 22d day of November, A. D. 1938, issued and thereafter served

Findings

35 F. T. C.

its amended complaint upon the respondent, charging it with unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of the provisions of said act.

After the issuance of the original complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of the complaint were introduced by the attorney for the Commission before a duly appointed trial examiner of the Commission designated by it to serve in this proceeding. After the issuance of the amended complaint and the filing of respondent's answer thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced by attorneys for the Commission and for the respondent before duly appointed trial examiners of the Commission designated by it to serve in this proceeding; and it was stipulated between the said attorneys that the testimony and evidence introduced in support of the original complaint should have the same force and effect as if introduced in support of the amended complaint. The testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, the proceeding came on for final hearing before the Commission on the amended complaint, the answer thereto, the testimony and other evidence, reports of the trial examiners and exceptions thereto, briefs in support of and in opposition to the allegations of the complaint, and oral argument. And the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of New York having its principal place of business in the city and State of New York, with factories located at Lebanon, Pa., and Middletown, N. Y. Respondent, for more than 20 years last past has been and now is engaged in the manufacture and sale of heavy clothing, such as is commonly used by sportsmen and outdoor workers, including coats, shirts, mackinaws, jackets, and other garments manufactured from woven fabrics of such materials as cotton, wool, and rayon. Respondent causes its products, when sold, to be shipped from its factories or its principal place of business to purchasers thereof located in numerous States of the United States other than the State of origin of such shipments. Respondent maintains,

and at all times herein mentioned has maintained, a course of trade in said products in commerce between and among the various States of the United States, and during all of said time has been in competition with other corporations and with individuals, firms, and partnerships engaged in the sale and distribution of similar products in commerce between and among various States of the United States.

PAR. 2. Respondent, in June 1924, registered a trade-mark in the United States Patent Office, consisting of the words "Buck Skein," and between the two words appeared a deer's head surmounted by antlers. Respondent subsequently also registered other trade-marks featuring the words "Buck Skein," sometimes with and sometimes without an accompanying deer's head, with such additional words as "jacket," "trousers," "rain coat." "Buck Skein Joe" is one of respondent's trade-marks; "Lady Buck Skein" is another.

Respondent, for the purpose of promoting the sales of its product, causes advertisements to be inserted in newspapers, magazines, and journals of nation-wide circulation, and in trade literature, in which its said trade-marks are displayed in large and conspicuous type, and on the labels attached by respondent to its various products and on the containers thereof, its trade-marks are also prominently displayed. The trade-mark most generally used by respondent in this connection is that consisting of the words "Buck Skein" and depicting the antlered deer's head between the two words. The drawing power of respondent's advertisement is enhanced by this picturization of a deer's head in connection with the words "Buck Skein," which induces the public to mistakenly believe that respondent's products are made from the skin of a deer.

Buckskin is the skin of a deer or elk. It is exceedingly durable, is highly resistant to wind and weather, is soft, pliable, light in weight and water-resistant. The cost of garments made of buckskin greatly exceeds that of garments made of cloth or other woven fabric ordinarily used for such purpose, and there is a preference, especially among sportsmen and those engaged in outdoor work, for garments made of buckskin.

PAR. 3. The term "Buck Skein" used by respondent is a slightly distorted spelling of "buckskin" and when used by respondent either separately or in conjunction with the picturization of a deer's head to describe, designate or refer to its garments made of woven fabric serves as a representation that such garments are actually made of buckskin.

The garments manufactured, sold and represented as described in paragraphs 1 and 2 hereof, are not made from buckskin or any other

leather product, but are manufactured from woven fabrics made of such material as wool, cotton, and rayon.

Respondent's said false and deceptive representations serve unfairly to attract the attention of the public to its advertisements and gives to them a greater force and drawing power than those of its competitors who manufacture and sell similar garments, but who do not represent them as "Buck Skein" or otherwise lead the public into the mistaken and erroneous belief that their products are made of buckskin.

Respondent, by its said acts and practices has placed in the hands of retailers and other dealers the means of making and furthering such false and misleading representations, and has enabled them thus to increase the sales of respondent's products, thereby lessening the market for similar goods, the nature, quality and character of which are truthfully stated.

PAR. 4. The use by respondent of the false and misleading statements and representations as herein stated has the tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public into the mistaken and erroneous belief that such representations are true, and that the garments sold by respondent are made from leather or buckskin, and because of such belief, to purchase a substantial volume of respondent's said garments. As a result, trade has been unfairly diverted to respondent from competitors selling similar garments in commerce between and among various States of the United States who truthfully advertise and represent their products. In consequence thereof, injury has been and is now being done by respondent to competition in commerce between and among the various States of the United States.

PAR. 5. The record does not disclose that anyone examining respondent's products believe they were made of buckskin, but ten persons who ordered respondent's products as a result of having seen its said advertisements, did so in the mistaken belief that the products ordered were made of leather or buckskin. Eight witnesses, after reading respondent's said advertisements, testified that they believed respondent's products were made of buckskin or other leather.

The use by respondent of the words "Buck Skein," with or without the deer's head in juxtaposition thereto, causes the purchasing public to believe that respondent's products are made of leather or buckskin, or possess some of the prized qualities or characteristics of buckskin; and such belief is not affected by such expressions as "looks like leather, wears forever," "all wool," "looks like buckskin," and "Double Weight Buck Skein Fabrics" appearing in small type in an inconspicuous place in respondent's advertisements.

Order

CONCLUSION

The aforesaid acts and practices of the respondent are all to the prejudice and injury of the public and of respondent's 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 TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission; the respondent's answer thereto; testimony and other evidence in support of and in opposition to the amended complaint introduced by attorneys for the Commission and for the respondent before duly appointed trial examiners of the Commission designated by it to serve in this proceeding and, by stipulation between attorneys for the Commission and the respondent, the testimony introduced in support of the original complaint; reports of the trial examiners and exceptions thereto; briefs in support of and in opposition to the amended complaint, and oral argument, and the Commission having made its findings as to the facts and its conclusion that respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondent, Lustberg, Nast & Co., Inc., a corporation, its officers, directors, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of coats, shirts, mackinaws, jackets, or other garments, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Buck Skein," either alone or in conjunction with the outline of a deer's head, or any other colorable simulation of the word "buck skin," in advertising, or otherwise, to describe, designate, or refer to any product which is not made from the skin of a deer or elk;
2. Representing directly or by implication in any advertisement, or on labels, or otherwise, that any product made of wool or cotton or any other woven fabric is made of buckskin or other type of leather.

It is further ordered, That the respondent shall, within 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 this order.

IN THE MATTER OF

INLAND EMPIRE BAKERS' ASSOCIATION, INC., ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 4550. Complaint, July 30, 1941—Decision, July 10, 1942

Where a nonprofit corporation, membership of which was composed of individuals and concerns engaged in the manufacture and in the sale and distribution of bread and other bakery products in the "Inland Empire," comprising eastern Washington and the Idaho "Panhandle," in the case of certain members transporting their products across the State line between the two, and, except insofar as their competition had been restrained as below set forth, in competition with one another and with other bakeries in the area mentioned; and certain representative members;

Following the court's invalidation of the "Washington Agricultural Adjustment or Triple A Act"—which, enacted shortly after the organization of the association, provided for the adoption and enforcement of marketing agreements by various industries in the State handling agricultural products, and pursuant to which the Washington bakers, acting through the association, had adopted and promulgated a marketing agreement regulating the baking industry in eastern Washington, including the fixing of uniform prices on all bakery products—and subsequent to unsuccessful efforts to embody in a contract, in substance, the provisions of said marketing agreement; with a desire of continuing the benefits which had accrued to them thereunder—

- (a) Undertook to obtain such results through means of informal agreements and understandings reached through the meetings and other activities of the association, and thereby succeeded in maintaining substantially same schedule of prices as had been obtained under said Triple A Marketing Agreement; and, while members mostly sold only intrastate, did not except or exclude from their agreements interstate sales;
 - (b) From time to time checked up on isolated instances in which bakers did not maintain prices fixed by them, and made efforts to coerce such recalcitrant bakers into maintaining fixed prices; and
 - (c) Were instrumental in obtaining State enactment of a price recording statute under which all bakers selling their products within the State were required to file their prices with its Director of Agriculture, and, could change such filed prices only on ten days' notice; and, through their association, supplied bakers with blank forms for use in such price filing and advised and assisted them therein, and thereby were enabled to keep informed with respect to prices and contemplated price changes;
- With the result that uniform prices were thus fixed in all interstate as well as intrastate sales made by any of their number; and with tendency and capacity substantially to restrain and suppress competition in the sale and distribution of bread and other bakery products in commerce, to increase the prices paid by the immediate purchasers and consequently the prices paid by the consuming public, and to deprive such purchasers and consuming public of the advantages which would prevail under conditions of free and open competition;