

IN THE MATTER OF
JACOB SIEGEL COMPANY

MODIFIED ORDER TO CEASE AND DESIST AND SUPPORTING AND DISSENTING
OPINIONS AND MEMORANDUM IN REGARD TO THE ALLEGED VIOLATION OF
SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3403. Order, December 5, 1946¹

Order, in proceeding in question, in which (1) original cease and desist order issued April 28, 1943, 36 F. T. C. 563; (2) the Circuit Court of Appeals for the Third Circuit on November 30, 1944, in *Jacob Siegel Co. v. Federal Trade Commission*, affirmed said order, though regarding as "far too harsh" its prohibition against the use of respondent's trade name "Alpacuna" for the coats involved, and on September 20, 1945, adhered to its said decision, all as reported in 150 F. (2d) 751, 39 F. T. C. 714; (3) the Supreme Court on March 25, 1946, 327 U. S. 608, 66 Supreme Court 758, 42 F. T. C. 902, for the reasons set forth, remanded the case for the Commission to consider and determine whether qualifying language or some change of name short of excision would eliminate the deception found by it to lurk therein; and (4) said Court of Appeals, on May 23, 1946, 42 F. T. C. 907, remanded the case to the Commission for further proceedings in conformity with the Supreme Court's opinion—

¹ The complaint, findings, conclusion and original order to cease and desist are reported in 36 F. T. C. 563.

The findings, as set out at pages 569 to 572, are as follows:

PARAGRAPH 1. The respondent, Jacob Siegel Co., is a corporation, organized and doing business under the laws of the State of Pennsylvania, with its office and principal place of business located at 317 North Broad Street, Philadelphia, Pa. Respondent, is now, and for many years last past has been, engaged in the manufacture, sale, and distribution of men's clothing, including certain overcoats and topcoats designated by respondent as "Alpacuna" coats.

PAR. 2. In the course and conduct of its business, respondent causes and has caused its coats, when sold, to be transported from its place of business in the State of Pennsylvania to purchasers thereof located in various 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 its coats in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business respondent is now, and at all times mentioned herein has been, in substantial competition with other corporations, and with individuals and firms, engaged in the sale and distribution of overcoats and topcoats in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 4. In 1929 respondent, in cooperation with certain textile specialists, developed a certain fabric for use in the making of men's overcoats. This fabric, designated by respondent as "Alpacuna" fabric, has a face or pile which is composed of approximately 50 percent alpaca, 20 percent mohair, and 30 percent wool. The fibers making up this face are worked into a cotton backing. Of the entire fabric (face and backing) the face comprises approximately 70 percent and the cotton backing 30 percent.

Respondent states that its purpose in using the under surface or backing was to duplicate as nearly as possible the natural coat of the animals supplying the fibers, the backing representing the skin of the animal and the fibers representing the hairs or wool growing from the skin. The reason given for the use of a cotton rather than a worsted backing is that the former is more finely and closely woven, and that this makes possible the obtaining of a denser face of hair and wool fibers than would be permitted by a

Modifying as below set forth its original prohibition against the use of the word "Alpacuna", so as to make the same subject to a proviso permitting the use thereof to refer to respondent's garments "if in immediate connection and conjunction therewith, wherever used, there appear words clearly and conspicuously designating all the constituent materials or fibers therein contained";

Followed by supporting opinion of Commissioner Freer, concurred in by Commissioner Ferguson, and by Commissioner Mason as to the result; and statements of dissent by Chairman Ayres and Commissioner Davis, and an earlier and explanatory memorandum to the Commission by the latter.

Before *Mr. Edward E. Reardon*, trial examiner.

Mr. George W. Williams for the Commission.

Montgomery, McCracken, Walter & Rhoads, of Philadelphia, Pa., and *Guggenheimer, Untermeyer & Goodrich*, of Washington, D. C., for respondent.

worsted material. It was thought also that the cotton backing would add to the durability of the garment.

A year or two after the development of the overcoat fabric, respondent began the manufacture of topcoats. The material used in the topcoats is essentially the same as the face of the overcoating fabric, the principal difference between the two garments being that in the topcoat the cotton backing is omitted in order to make the garment lighter. A further difference is that the overcoat is full lined whereas the topcoat has very little lining. The fabrics used in the coats are not manufactured by respondent but are made by another concern according to specifications supplied by respondent.

PAR. 5. Respondent's coats are sold to the public through retail dealers. In the course and conduct of its business and for the purpose of inducing the purchase of its coats by dealers, and subsequently by the purchasing public, respondent makes use of various methods of advertising. One of such methods is the use of swatch books or books containing samples of the fabrics, which are placed by respondent in the hands of dealers purchasing its coats and also in the hands of dealers regarded by respondent as prospective purchasers. Such books are frequently displayed by dealers to the purchasing public. Some of these swatch books contain, among other advertising matter, a drawing or pictorial representation of a hemisphere, above which appears the legend, "From the Four Corners of the World." From various geographical locations shown on this hemisphere lines run to drawings or pictures of certain animals and under each of these pictures a further legend appears. Under the picture of an Angora goat appears the legend, "Strength from the Asiatic Angora." Under the picture of a sheep appears the legend, "Durability from the American sheep." Under the picture of a guanaco appears the legend, "Silkiness from the Peruvian Guanaco," and under the picture of an alpaca appears the legend, "Richness from the South American Alpaca."

Respondent also furnishes to its dealers suggested advertising copy for use by such dealers in advertising respondent's coats in newspapers published in the trade areas served by such dealers. Frequent and repeated use has been made by the dealers of this advertising copy. In certain of the copy the following advertising matter appears:

"Ques.. What is Alpacuna?

"Ans. Alpacuna fabric is made from the rare foreign hairs and wool of the Alpaca, Angora, Guanaco, and Texas Sheep.

"Ques. Is this an unusual combination?

"Ans. Yes, this combination of hair and wool is the result of 9 years of scientific laboratory research work by a textile genius.

"Studying the sources of the famous Alpacuna fabric is a real geography lesson. From the South American Andes we took the warm, light, silky hairs of the Alpaca. From the valleys of Old Peru we took the fine, lustrous coat of the Guanaco. From the plains of Turkestan we took the sturdy, durable hairs of the Angora. From the Texas Panhandle we chose the thickest, warmest, and richest sheep's wool. They were all brought together, and scientifically blended into a fabric that's unmatched for richness, luxury, warmth, light weight, long wear."

PAR. 6. Through the use of these representations and others of a similar nature the respondent has represented, directly or by implication, that the fabric used in its coats

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having heretofore been heard by the Federal Trade Commission and an order to cease and desist having heretofore been entered by it, which order was reversed pursuant to a mandate of the Supreme Court of the United States by the United States Circuit Court of Appeals for the Third Circuit on May 23, 1946, and remanded

is made entirely of wool or of wool and hair; that such fabric contains guanaco hair; and that the Angora goat hair used in such fabric is imported from Turkestan or some other Asiatic country.

PAR. 7. While the fabric used in respondent's topcoats is a wool and hair material, this is not true as to the overcoats, in which the cotton backing constitutes approximately 30 percent of the entire fabric. In some of its more recent advertising matter the respondent has referred to the fact that its overcoats contain cotton backing. However, such reference is usually in smaller and less conspicuous type than the other portions of the advertisement. In view of the fact that the overcoats are full lined, the prospective purchaser has little or no opportunity to observe the cotton backing when examining the garment.

In neither the overcoat nor the topcoat is guanaco hair used. It appears from the evidence that occasionally guanaco hairs may find their way into shipments of alpaca received by the mill which manufactures the fabrics for respondent, but in such cases the presence of the guanaco hairs is due entirely to accident and the amount is negligible. The Angora goat hair or mohair used in the fabrics is not imported from Turkestan or any other foreign country, but is a domestic product and is obtained from Angora goats raised in Texas. During the oral argument before the Commission it was stipulated by counsel for respondent that the defense of the proceeding was abandoned insofar as the points with respect to the guanaco hair and the importation of the mohair were concerned.

PAR. 8. The Commission therefore finds that the representations made by the respondent with respect to its coats, as set forth in paragraphs 5 and 6 hereof, are false, misleading, and deceptive.

PAR. 9. Another issue raised in the complaint is whether the name "Alpacuna" used by respondent to designate its coats is misleading, as representing or implying that the coats contain fiber obtained from the animal known as the vicuna. It is insisted by respondent that the name "Alpacuna" is merely a coined trade name made up by combining the first five letters of the word "alpaca" with the suffix "una," that the suffix was incorporated into the name only because it provided a euphonious ending, and that the name has no reference to vicuna fiber. Respondent further insists that the name has no significance in the trade or to the purchasing public other than as a mere trade name, or possibly as indicating an alpaca content, that it is not understood by dealers or consumers as indicating that the coats contain vicuna fiber.

Respondent's position finds support in the testimony of a number of witnesses. On the other hand, a number of other witnesses, including both persons in the trade and members of the consuming public, testified that to them the name "Alpacuna" indicated that the coat contained both alpaca and vicuna fiber, the presence of vicuna fiber being implied by the "cuna" portion of the name. Upon consideration of the entire record, the Commission is of the opinion that while in some cases the name might not be understood by prospective purchasers as indicating the presence of vicuna fiber, in a substantial number of other instances it would indicate the presence of such fiber. It is undisputed that respondent's coats contain no vicuna fiber. The Commission therefore finds that the name "Alpacuna" is misleading and deceptive to a substantial portion of the purchasing public in that it represents or implies to such persons that respondent's coats contain material which they do not in fact contain.

PAR. 10. The Commission finds further that the use by the respondent of the foregoing representations with respect to its coats, including the use of the name "Alpacuna," has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the fiber content of such coats and the origin of the materials used in such coats, and the tendency and capacity to cause such portion of the public to purchase substantial quantities of respondent's coats as a result of the erroneous and mistaken belief engendered by such representations. In consequence thereof, substantial trade has been diverted unfairly to the respondent from its competitors, many of whom do not misrepresent their products.

to the Commission for further proceedings in conformity with the opinion of the Supreme Court, particularly for the Commission to consider and determine whether qualifying language or some change of name short of excision would eliminate the deception which the Commission found lurking in respondent's trade name "Alpacuna," and in the judgment of the Commission adequately satisfy the ends of the Federal Trade Commission Act and at the same time save said trade name;

And the Commission having further considered said matter, and being of the opinion that the deception resulting from the use of said trade name can be eliminated by the use, in connection with said name, of qualifying or explanatory language as hereinafter set forth, the Commission now issues this its modified order to cease and desist:

It is ordered, That the respondent, Jacob Siegel Co., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondent's coats designated "Alpacuna" coats, or any other coats of substantially similar composition, under whatever name sold, do forthwith cease and desist from:

1. Representing that respondent's coats contain guanaco hair.
2. Representing that the Angora goat hair or mohair used in respondent's coats is imported from Turkestan or any other foreign country.
3. Representing through the use of drawings or pictorial representations, or in any other manner, that respondent's coats contain fibers or materials which they do not in fact contain.
4. Representing that coats made of fabrics which have a cotton backing are composed entirely of wool or of wool and hair.
5. Using any advertising matter or causing, aiding, encouraging, or promoting the use by dealers of any advertising matter which purports to disclose the constituent fibers or materials of coats composed in part of cotton, unless such advertising matter clearly discloses such cotton content along with such other fibers or materials.
6. Using the word "Alpacuna," or any other word which in whole or in part is indicative of the word "vicuna," to designate or describe respondent's coats, or otherwise representing, directly or by implication, that respondent's coats contain vicuna fiber; provided, however, that nothing herein shall prohibit use of the word Alpacuna to refer to respondent's garments if in immediate connection and conjunction therewith, wherever used, there appear words clearly and conspicu-

ously designating all the constituent materials or fibers therein contained.

It is further ordered, That the respondent shall, within 60 days after service upon it of this modified 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.

It is further ordered, That no provision in this order shall be construed as relieving respondent in any respect of the necessity of complying with the requirements of the Wool Products Labeling Act of 1939 and the authorized Rules and Regulations thereunder.

Commissioners Ferguson, Freer, and Mason voting in the affirmative, Commissioners Ayres and Davis in the negative.

OPINION OF COMMISSIONER FREER

Concurred in by Commissioner FERGUSON, Commissioner MASON concurring in the result.

The Jacob Siegel Co. sought review of a Federal Trade Commission order to cease and desist which contained six paragraphs (36 F. T. C. 563). Paragraph 6 thereof prohibited use of the trade name "Alpacuna" to designate and describe coats containing no vicuna fibers, and as stated by Judge McLaughlin,¹ "The first five paragraphs * * * are conceded by the petitioner [Jacob Siegel Co.] and do not concern us." The Circuit Court of Appeals affirmed the finding which was the basis of Paragraph 6 of the Commission's order and deemed itself powerless to modify the prohibition which it characterized as "far too harsh," yet an exercise of administrative discretion and a product of administrative determination respecting which the court would not "say that the power had been abused." The Supreme Court thereafter reversed the judgment of the Circuit Court of Appeals and remanded the case for further proceedings in conformity therewith.² We are now directed by the Circuit Court of Appeals³—

to consider and determine whether qualifying language or some change of name short of excision would eliminate the deception which it [the Commission] found lurking in the word Alpacuna and in the judgment of the Commission adequately satisfy the ends of the Federal Trade Commission Act and at the same time save the said trade name, Alpacuna.

Briefly, the history of this case pertaining to the form of the original order is that on September 23, 1941, oral argument was heard on this case before four Commissioners (Commissioner March not present) and on September 26, 1941, upon consideration of the record (Com-

¹ 150 Fed. (2d) 751, 752 (C. C. A. 3d, 1944) and affirmed on rehearing p. 756.

² 66 Sup. Ct. Rep. 758; 90 L. Ed. 697.

³ May 23, 1946.

missioner March still not present) the Commission was of the opinion that the evidence therein had established that respondents had violated the Federal Trade Commission Act as charged in the amended complaint and an order to cease and desist should be issued.

Tentative draft of findings as to the facts and a draft of order to cease and desist complete except for a prohibition with respect to the trade name itself were considered on October 23, 1941, again on December 11, 1941, and on a number of occasions throughout 1942. On October 23, 1941, I reported by memorandum in part as follows:

The question of the trade name is, of course, the most important one in the case from the respondent's standpoint, and I have no doubt that the matter could have been settled long before this had the charge of deception through use of the word "Alpacuna" been abandoned. * * * It is my opinion that the order [the draft] might be strengthened considerably and within the borders of the record, by adding thereto an inhibition against use of the trade name "Alpacuna" unless immediately accompanied by a truthful statement of the fiber content.

I reported again by memorandum dated April 9, 1942:

* * * the record will not support an absolute prohibition against the use of the name. This presents the question of policy as to whether the Commission wishes to permit by its order a modified use of the name when properly qualified by an equally conspicuous statement of the actual fiber content. This is the most the Commission may require, * * *.

In a memorandum dated December 15, 1942 Commissioner Davis reported:

It is my conclusion that the use of this name should be absolutely prohibited. I do not believe that any qualification would be sufficient to overcome the possible deception. Any effort at qualification would result in a mere contradiction. The word is like "Aspironal," "Buck Skein" or "Satinsilk," the use of all and many more of which in the same category the Commission has prohibited. It is also immaterial, in my opinion that respondent may be complying in full with the Wool Products Labeling Act and the regulations thereunder. Of more importance than the labels on respondent's coats is the use made of this name in other advertising.

Thereafter on December 24, 1942, upon consideration of both points of view the Commission directed revision of the tentative findings and order, such revision to follow the lines suggested in the memorandum of Commissioner Davis. Respecting this action Commissioners Ayres, Davis, and March voted in the affirmative and Commissioner Ferguson and I voted in the negative and I announced that I would file for the public record a memorandum of dissent to the inclusion in the order of an unqualified prohibition against the trade name "Alpacuna." The revised tentative findings as to the facts and proposed order to cease and desist were considered by the Commission on April 23, 1943 and were adopted and thereafter issued. As to including in the order to

cease and desist an unqualified prohibition against the use of the trade name "Alpacuna," Messrs. Ferguson and Freer voted in the negative.

It was directed that the following statement of dissent be shown on the public record and accompany the order to cease and desist:

Commissioner Freer dissents from so much of the order as *wholly* prohibits the continued use of the trade name "Alpacuna" for the reason that this trade name, which has been in use for more than 13 years, is a valuable business asset, and is neither deceptive per se, nor is the testimony concerning its tendency or capacity to deceive sufficiently clear and convincing as to render *such* prohibition of its use necessary in the public interest. [Emphasis supplied.]

It was further directed that the following statement of a majority of the Commission (Messrs. March, Davis, and Ayres) also be shown on the public record and accompany the order to cease and desist:

A majority of the Commission do not agree with either Commissioner Freer's statements of fact or his conclusions of law.

The foregoing background is recited to show that where the Commissioners were divided was on the proposition of whether the remedy should be excision or whether some explanation to accompany the respondent's use of its trade name "Alpacuna" would be adequate to protect the public against its capacity and tendency to deceive.

The findings read in part as follows:

* * * Upon consideration of the entire record, the Commission is of the opinion that while in some cases the name might not be understood by prospective purchasers as indicating the presence of vicuna fiber, in a substantial number of other instances it would indicate the presence of such fiber. It is undisputed that respondent's coats contain no vicuna fiber. The Commission therefore finds that the name "Alpacuna" is misleading and deceptive to a substantial portion of the purchasing public in that it represents or implies to such persons that respondent's coats contain material which they do not in fact contain.

No proposal was ever made that there be included in such findings as to the facts a statement that only excision would eliminate the deception. The question so long considered and finally decided by a divided Commission was whether an *absolute* prohibition (excision) of the name was to be required in our order. As to this, I noted no evidence compelling a decision to the effect that its deceptive implications could not be remedied by truth and conspicuous disclosure of the actual fiber content.

Subsequent to the return to the Commission of the case after its course through the courts the Commission again heard oral argument thereon on June 17, 1946.

In presently considering the remedy to be applied, some of the factors we again have weighed are hereinafter set forth.

The use of coined trade names derived from specialty fiber terms has become prevalent in the textile industry. The obvious purpose of

a name thus selected is to represent to the trade and to the public that the garments so advertised have some of, many of, or all the attributes and characteristics which the trade or the consuming public associates with fabrics composed of such fiber or fibers. It is the Commission's view that many and various impressions may be imparted to the trade or to the public by coined words which imply that particular fibers are present; some may infer that the garment is composed predominantly or in substantial part of the implied fibers, others that it is composed wholly thereof; to other segments of the public the name may signify nothing.

The Commission, therefore, is still of the opinion that the term "Alpacuna" constitutes a representation that the fabric so designated is composed of alpaca and vicuna fibers. Upon further consideration of the remedy to be applied however, the Commission now is of the opinion that truthful and conspicuous disclosure of the constituent fibers in advertising the garments will eliminate in many instances and effectively circumscribe in others the capacity and tendency to impart an initial false impression which, the testimony shows, may flow from use of the trade name in question. Proper labels required by the Wool Products Labeling Act on the garments when sold and delivered to the consumer should dispel any remaining confusion or false impression persisting in the minds of those consumers who in a degree are inattentive or unanalytical or who may be characterized by the trade as "impulse" buyers.

Statement of dissent by Chairman AYRES:

The Commission's order of April 28, 1943, among other things absolutely prohibited respondent from using "Alpacuna" in connection with its coats. From that provision of the order respondent appealed, and the order was affirmed by the United States Circuit Court of Appeals for the Third Circuit. On certiorari the Supreme Court of the United States reversed the Circuit Court and remanded the cause for further proceedings in conformity with its opinion. Thereafter the Circuit Court reversed the Commission's order and remanded the cause to the Federal Trade Commission for further proceedings in conformity with the opinion of the Supreme Court, particularly for the Commission "to consider and determine whether qualifying language or some change of name short of excision would eliminate the deception which it found lurking in the word Alpacuna * * *."

We are not ordered by the Court to permit the use of the trade name with qualifying language. The mandate is only to consider and determine the question presented and express our judgment thereon.

Before we issued the order from which respondent appealed we considered at careful length whether qualifying language would eliminate the deception, and by a vote of three against two decided that it would not. Our findings failed to state affirmatively that such determination was made. The finding that the name was deceptive and the absolute prohibition in the order against its use, however, accurately reflected the decision and the intention of the majority.

The present action of the majority in modifying the order so as to permit the use of the trade name with qualifying language is taken on the same record and the same findings. I voted for the absolute prohibition originally because of the factual situation disclosed by the record and because of my opinion that the qualification or contradiction of deceptive trade names is unsound and fails in substantial measure to accomplish its objective of eliminating the initial deception of the name. No new factual considerations have been offered and I can find no basis upon which a change of my position on this question is warranted.

The Court also directed that we consider and determine whether "some change of name short of excision would eliminate the deception." To give effect to the language of the Court the words, "some change of name short of excision," must be construed to mean that an actual but limited change of the name would not amount to excision. The original order as disclosed by its terms as well as by the findings was based upon the conclusion that the word "Alpacuna" deceptively indicates that garments so designated contain vicuna fiber. In my opinion, any change in the name which would eliminate the representation or implication that respondent's coats contain vicuna fiber would eliminate that deception.

The deception which we found in the name "Alpacuna" lies in the last four letters because of their implication of vicuna. It is not difficult to see how easily this portion of the name may be so changed as to eliminate its vicuna connotation and at the same time preserve its claimed euphonious ending and its substantial phonetic and visual qualities. In making such a change, however, it would be necessary to exercise care to see that the change did not itself involve a new deception. The record disclosed that respondent already uses at least two other trade names on the same coats—"Alperu" and "Andesian"—in order to permit different stores in the same city to sell them without apparent conflict. If, for its own convenience, respondent can interchangeably use these trade names for its "Alpacuna" coats, it does not seem unreasonably burdensome to require it to make the slight change in "Alpacuna" which is necessary to remove its vicuna connotation. I

have suggested that the findings and order be modified to permit this course, but my suggestion was rejected by the Commission.

I submit this statement so that the record may show the reasons for my continued opposition to the use of the deceptive trade name in connection with qualifying language, and to suggest a course which in my opinion would eliminate the deception without excising the trade name.

Commissioner DAVIS dissenting:

I am opposed to the action of the majority of the Commission, and am in favor of reporting to the court that the Commission did in effect specifically, carefully, and fully discuss and consider the question as to whether or not the ends of justice would be met by permitting the respondent to retain the use of the trade name "Alpacuna," either with the qualifying language "Contains no Vicuna," or in any other manner, and a majority of the Commission decided that its continued use could not be permitted without the probability of deception. I still adhere to that viewpoint and favor the reaffirmation of the order as issued by the Commission.

In support of my position I make the following statement:

On September 23, 1941, the Commission heard final argument and took the matter under advisement. From that date until the issuance of the order on April 23, 1943, the chief discussion among members of the Commission related to consideration and determination as to whether or not "Alpacuna" should be absolutely prohibited.

The complaint charged the respondent with making other false and misleading statements, to which reference will be later made, but respondent abandoned any defense of such charges.

At the hearing before the Commission the sole contention of respondent's Counsel was that respondent be permitted to retain the use of the name "Alpacuna," and proposed to use the modification, "Contains no Vicuna," so that the trade name would read "Alpacuna—Contains no Vicuna."

After the hearing, the Commission directed the preparation and submission to the Commission of findings of fact and proposed order. Such findings of facts and proposed order were prepared.

Thereafter Commissioner Freer submitted a report to the Commission in which he stated in part:

It is my opinion that the order submitted might be strengthened considerably and within the borders of the record, by adding thereto an inhibition against the use of the trade name "Alpacuna" unless immediately accompanied by a truthful statement of the fiber content. This would not require the respondent to abandon wholly a well-known and valuable trade name and at the same time would serve to prevent deception through that name.

Again in a memorandum of April 9, 1942, Commissioner Freer stated in part:

I am inclined to agree * * * that the record will not support an absolute prohibition against the use of the name. This presents the question of policy as to whether the Commission wishes to permit by its order a modified use of the name when properly qualified by an equally conspicuous statement of the actual fiber content. This is the most the Commission may require * * *.

In a memorandum of December 15, 1942, Commissioner Davis stated, among other things:

It is my conclusion that the use of this name should be absolutely prohibited. I do not believe that any qualification would be sufficient to overcome the possible deception. Any effort at qualification would result in a mere contradiction. The word is like "Aspironal," "Buck Skein," or "Satinsilk," the use of all and many more of which in the same category the Commission has prohibited. It is also immaterial, in my opinion that respondent may be complying in full with the Wool Products Labeling Act and the regulations thereunder. Of more importance than the labels on respondent's coats is the use made of this name in other advertising.

Reference is had to the entire memorandum submitted by Commissioner Davis and attached hereto as appendix A.¹

On December 24, 1942, the tentative findings as to the facts and order to cease and desist were ordered revised in accordance with the memorandum of December 15, 1942, of Commissioner Davis. This action constituted determination by the Commission, after careful and prolonged consideration in the light of conflicting views, that "Alpacuna" should be absolutely prohibited and that no qualification would be sufficient to overcome the possible deception. On this action Commissioners March, Davis and Ayres voted in the affirmative and Commissioners Ferguson and Freer voted in the negative, and Commissioner Freer announced that he would file a memorandum of dissent. Revised findings of facts and order to cease and desist having been returned to the Commission, on April 23, 1943, such revised findings as to the facts and order to cease and desist were approved and ordered to be entered of record and served upon respondent by the Secretary. As to including in the order to cease and desist an unqualified prohibition against the use of the trade name "Alpacuna," Messrs. Davis and March voted in the affirmative. The vote of Mr. Ayres was recorded in the affirmative in accordance with the action of December 24, 1942. Messrs. Freer and Ferguson voted in the negative. Mr. Freer dissented for the public record.

The order, which was issued on April 28, 1943, was in part as follows:

¹ See page 272 *infra*.

It is ordered. That the respondent, Jacob Siegel Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondent's coats now designated "Alpacuna" coats, or any other coats of substantially similar composition, under whatever name sold, do forthwith cease and desist from:

1. Representing that respondent's coats contain guanaco hair.
2. Representing that the Angora-goat hair or mohair used in respondent's coats is imported from Turkestan or any other foreign country.
3. Representing through the use of drawings or pictorial representations, or in any other manner, that respondent's coats contain fibers or materials which they do not in fact contain.
4. Representing that coats made of fabrics which have a cotton backing are composed entirely of wool or of wool and hair.
5. Using any advertising matter or causing, aiding, encouraging, or promoting the use by dealers of any advertising matter which purports to disclose the constituent fibers or materials of coats composed in part of cotton, unless such advertising matter clearly discloses such cotton content along with such other fibers or materials.
6. Using the word "Alpacuna," or any other word which in whole or in part is indicative of the word "vicuna," to designate or describe respondent's coats; or otherwise representing, directly or by implication, that respondent's coats contain vicuna fiber.

Commissioner Freer's dissent and the reply of the Commission were as follows:

Commissioner Freer dissents from so much of the order as wholly prohibits the continued use of the trade name "Alpacuna" for the reason that this trade name, which has been in use for more than 13 years, is a valuable business asset, and is neither deceptive per se, nor is the testimony concerning its tendency or capacity to deceive sufficiently clear and convincing as to render such prohibition of its use necessary in the public interest.

* * * * *

A majority of the Commission do not agree with either Commissioner Freer's statements of fact or his conclusions of law.

The respondent petitioned the United States Circuit Court of Appeals for the Third Circuit to review and modify this provision of the order so as to permit the use of the trade name "Alpacuna" in connection with qualifying words to indicate that the product contains no vicuna fiber.

The circuit court of appeals affirmed the Commission's order in November 1944. In its opinion the court stated, among other things:

It clearly appears that there is substantial evidence supporting the Commission's decision.

Although we sustain the Commission on its finding as to the name because of substantial evidence supporting that finding, we think strongly that the order is far too harsh.

The case went to the Supreme Court of the United States on a writ of certiorari, and the opinion of that court on March 25, 1946, stated, among other things:

Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. * * * The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

But in the present case, we do not reach the question whether the Commission would be warranted in holding that no qualifying language would eliminate the deception which it found lurking in the word *Alpacuna*. * * * We find no indication that the Commission considered the possibility of such an accommodation. * * * But we are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate. * * * The Commission is entitled not only to appraise the facts of the particular case and the dangers of the marketing methods employed * * * but to draw from its generalized experience. * * * But the courts are not ready to pass on the question whether the limits of discretion have been exceeded in the choice of the remedy until the administrative determination is first made.

The judgment of the circuit court was reversed and the cause remanded for further proceedings in conformity with the Supreme Court's opinion.

On May 23, 1946, the Circuit Court of Appeals for the Third Circuit in conformity with the mandate of the Supreme Court, reversed the Commission's order, and ordered:

That this cause be and the same is hereby remanded to the Federal Trade Commission for further proceedings in conformity with the said opinion of the Supreme Court of the United States particularly for said Federal Trade Commission to consider and determine whether qualifying language or some change of name short of excision would eliminate the deception which it found lurking in the word "*Alpacuna*" and in the judgment of the Commission adequately satisfy the ends of the Federal Trade Commission Act and at the same time save the said trade name, *Alpacuna*.

We are not ordered by the Court to permit the use of the trade name with qualifying language. We are ordered only to "*consider and determine* whether qualifying language or some change of name short of excision would eliminate the deception."

The above outline of the history of this case before the Commission shows that we have already considered whether qualifying language would eliminate the deception, and on December 24, 1942, we determined that it would not. Our findings, however, did not specifically show that determination. To comply with the mandate of the Court we are now required to show that we have considered and determined that question.

All through the trial of this case the one and only controversial issue has been whether respondent should be permitted to continue using the trade name "Alpacuna." They never contested any of the other charges of false representations.

The only proposal which has been made by respondent relating to qualifying language has been the proposal made from the beginning to qualify "Alpacuna" with the language "Contains no Vicuna." The inadequacy of such qualifying language, as before explained, was fully and lengthily considered and determined by the Commission.

If we should permit the use of the name "Alpacuna" with such qualifying language, it would be a contradiction rather than an explanation, and would be contrary to numerous court decisions as well as decisions of the Federal Trade Commission.

Furthermore, the deception would not then be eliminated. Is it not obvious that what is left of the name informs the public that the coats are composed of Alpaca and that they are entirely wool, when the overcoat is composed of one-third cotton and there are other fibers, domestic goat mohair and sheep wool contained in both coats? If the implication of Vicuna is eliminated, the Alpaca part still remains. This is clearly deceptive for the reasons stated.

Respondent has proposed no change in name, and no change of name has been suggested, and I know of none except absolute excision that would not encounter the same difficulties above explained.

As a matter of fact it appears in the record that respondent uses at least two other names, to wit, Alperu and Andesian, for designating these identical coats to be sold by merchants in the same city as those selling them under the trade name "Alpacuna."

Counsel for respondent seems to have been able to focus attention upon paragraph 6 of the order and to ignore paragraph 5 thereof, although it was invoked in the argument of counsel for the Commission before the Commission, and I understand was specifically referred to in the argument in the Circuit Court of Appeals, though apparently not in the Supreme Court. Paragraph 5 reads as follows:

Using any advertising matter or causing, aiding, encouraging, or promoting the use by dealers of any advertising matter which purports to disclose the constituent fibers or materials of coats composed in part of cotton, unless such advertising matter clearly discloses such cotton content along with such other fibers or materials.

Furthermore, paragraph 4 has been ignored, which reads thus:

Representing that coats made of fabrics which have a cotton backing are composed entirely of wool or of wool and hair.

Is it not obvious, therefore, as I have heretofore asked, that when the "cuna" part of the name is eliminated the implication still remains

that the overcoat is wholly wool and that both are composed entirely of alpaca? For this reason, aside from any other, it would seem clear that there is no reasonable way to qualify this name.

It thus definitely appears that when one evil is cured another is created, and the new evil should no more be allowed to exist than the one eliminated by it.

In view of the implications in the opinion of the Supreme Court, I think that our subsequent action should show specifically that we did actually consider and decided the question as to whether respondent should be permitted to retain the trade name "Alpacuna," with or without the qualifying language.

With respect to the argument that respondent should be permitted to retain the trade name "Alpacuna," because they have been using it thirteen years, it is well settled that long use of a misleading brand can vest no right in the user. As was said by Mr. Justice Cardozo, in *F. T. C. v. Algoma Lumber Co.*, 291 U. S. 67:

There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for deception or mistake.

The use of a trade name was involved in that case.

And again, such a name may not be used, because it *places in the hands of retailers* the "means" whereby they may deceive the public. This principle was enunciated by the *Supreme Court* in the *Winsted Hosiery case* and has been followed by the courts ever since. The respondent readily admitted that it could not control the use of the name by the retailers even though it furnished proper advertising suggestions. This principle is a very sound and salutary one and should not be destroyed after being enunciated by the Supreme Court, itself, in one of our own cases.

Another thing: The topcoats are usually advertised and sold before the overcoats. The topcoats may properly be advertised as all wool coats and it is quite natural for any one wanting thereafter to buy an overcoat would assume that the two coats, bearing the same name, were of the same fiber content. It is to be borne in mind that this is not a firm name, but the name of particular coats. This firm makes several different coats which have different names, and, in fact, these coats are sold under at least two other names, namely, Alperu and Andesian.

It was also charged in the complaint and proven in the evidence that the respondent advertised the coats contained imported Guanaco hair and "from the plains of Turkestan the sturdy, durable hairs of the Angora" and employed various misleading pictorial representations. Respondent admitted at the hearings that these claims were false and abandoned any defense as to same. Attention is called to

the inhibitions in the cease and desist order in this respect, as to which the respondent did not appeal.

The respondent does not come into court with such clean hands that the Commission should feel constrained to lean backward and to permit a continuing misrepresentation or distortion of the facts.

It was the intention of the Commission, at the time it entered the order, to provide that the fiber content of these coats should not be misrepresented. If it is sought to permit the respondent to retain the name "Alpacuna" with a modification or explanation, the only accurate, nondeceptive modification which could possibly be made with respect to the overcoats would be such language as:

Alpacuna—Contains no Vicuna; Contains Alpaca, Cotton, Domestic Mohair and Sheep Wool,

and the same with respect to the topcoats except to omit the word "cotton" from the qualification. However, I do not think that such a modification as thus suggested would entirely remove resulting deception, for the reasons above stated.

The chief controversial issue in this case was as to whether the name "Alpacuna" carried a representation that the overcoats contained Vicuna. The last paragraph of the present memorandum opinion approved by a majority of the Commission states:

The Commission, therefore, is still of the opinion that the term "Alpacuna" constitutes a representation that the fabric so designated is composed of alpaca and vicuna fibers. Upon further consideration of the remedy to be applied, however, the Commission now is of the opinion that truthful and conspicuous disclosure of the constituent fibers in advertising the garments will eliminate *in many instances* and effectively circumscribe in others the capacity and tendency to impart an initial false impression *which, the testimony shows, may flow from use of the trade name in question.*" [Italics supplied.]

This does not affirmatively negative the fact that the garments contain no vicuna. It must be borne in mind that many purchasers are not only not experts but are unwary and not discerning. Furthermore, the respondents from the beginning and all through the trial proposed to specifically state under the trade name that it "Contains no Vicuna." Such statement should appear in connection with a description of the correct fiber contents, if any modification is to be permitted.

As considerable emphasis has been put upon the use of the name and the money spent in advertising it, I would be willing for the respondent to be allowed to use it in conjunction with any new name for a reasonable length of time, say 2 years, as was permitted in the Army and Navy Trading Co. case, in which the Commission per-

mitted respondent to use the language "Formerly Army & Navy Trading Co." under its new name for a period of 2 years, although such respondent Army & Navy Trading Co. had more equities than present in this case, as they were actually dealing in Army and Navy goods at the time they were established and selected the name and so continued for many years.

Wherefore, I respectfully dissent from the action of the majority of the Commission.

APPENDIX A

MEMORANDUM FOR THE COMMISSION: ²

The complaint in this case charges that the term "Alpacuna" serves as a representation that respondent's overcoats and topcoats bearing that label are all wool and composed entirely or at least of a substantial quantity of the fur, wool and hair of the alpaca and vicuna. The only question in the case concerning which there is any doubt is whether or not this allegation has been sustained. It is admitted there is no vicuna hair at all in the garments.

I do not agree with a conclusion that the record will not support an absolute prohibition against the use of this name. If, as I believe it to be, the testimony is sufficient to make it likely that a substantial portion of the purchasing public would be misled into the belief that these garments contain vicuna fiber, the use of the name should be inhibited. If, as the respondent contends, Alpacuna is a mere fanciful name, pronounced "Alpac-una," the use of the name is equally bad for the reason that it naturally and obviously imports a coat exclusively of alpaca fiber when admittedly such is not the case.

The fact that many members of the public have a general acquaintance with vicuna fiber and the animal from which it is obtained is amply demonstrated. The word is brought to the public's attention in any number of ways. Various dictionaries, encyclopedias and other such works carry not only a definition of vicuna but also a picture of the animal itself. A number of books, pamphlets, etc., which may be found in any good library have been published on the subject. Many schools, particularly those teaching commercial geography, have regular courses of instruction dealing with the qualities and uses of vicuna and other goat hair. From time to time the word appears in newspapers and other advertisements, some of which were offered in evidence in this case. The testimony of several of the Commission's witnesses, including college professors, high school teachers, physicians, merchants and others, leads inevitably to the conclusion that a considerable portion of the public is not only acquainted in a general way with vicuna, but also has a distinct preference for it as a constituent in wool clothing. Nor is it an answer to say that these people would not expect to find it in a \$40 coat. The fact that a false statement may be obviously false to some is no defense. There is no duty resting upon a citizen to suspect the honesty of those with whom he deals. The trusting as well as the suspicious are entitled to protection against advertising which tends to mislead and confuse. An inherently false representation is no less false because there are some who do not believe it.

And that is not all. This record contains the testimony of many witnesses concerning their impression of the trade name "Alpacuna." While many of these were persons experienced in the clothing trade, others were not and in both groups there were those who said they would understand that the word

² The memorandum in question, dated Dec. 15, 1942, is that of Commissioner Davis hereinbefore referred to at page 266.

implies a vicuna content. Included among the nonexperts who so testified were the following: George W. Conner, a member of the staff of Philadelphia Better Business Bureau—"I would get the impression that the coat was made from the wool of the alpaca and the vicuna, or a mixture of them. Mrs. Nellie Fennell, a Philadelphia housekeeper—"I took cuna. I thought that might come from it." Mrs. Frederick L. Wakeman, a New York housewife—"All I know is that both of these goats are wool goats." H. J. Kenner, manager of Better Business Bureau of New York—"Would understand the word Alpacuna to mean that the coat is made of a separate (sic) combining alpaca and vicuna fibers." E. J. West, Washington, D. C., Construction Engineer, "that the fabric was from the two animals—alpaca and vicuna." Mrs. Rose Hardy, Washington housewife—"Would conclude that the overcoat was "composed of alpaca and vicuna." Moreover, while this fact is not controlling, it is not true that even the textile experts could not be misled. It might well be that knowing the scarcity of vicuna they would not expect a popular priced coat to be composed entirely of this fiber, they might nevertheless expect to find at least some.

It is my conclusion that the use of this name should be absolutely prohibited. I do not believe that any qualification would be sufficient to overcome the possible deception. Any effort at qualification would result in a mere contradiction. The word is like "Aspiranol," "Buck Skein" or "Satinsilk," the use of all and many more of which in the same category the Commission has prohibited. It is also immaterial, in my opinion that respondent may be complying in full with the Wool Products Labeling Act and the regulations thereunder. Of more importance than the labels on respondent's coats is the use made of this name in other advertising.

It is my recommendation that the drafts of findings as to the facts and order to cease and desist be returned to the special legal assistants for revision in accordance with the foregoing observations.

IN THE MATTER OF
WILLIAM A. HERMAN

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

Docket 5225. Complaint, Sept. 26, 1944—Decision, Dec. 5, 1946

Where an individual engaged as a licensed private detective and investigator, principally in obtaining information concerning persons who had, or represented themselves as having, claims against insurance companies or employers in connection with industrial insurance and workmen's compensation laws;

Making use of a plan under which he mailed to persons concerning whom information was sought, at their last known addresses, form letters which, headed "National Estates Research," and displaying at the top "Worldwide Genealogical Service," "File # ----," "----- Estate," advised the addressee that his address had been learned in the course of endeavors to locate heirs to the supposed estate and asked him to advise where he might be interviewed in order to ascertain his connection with such estate, or to return the letter filled in to supply a variety of information concerning himself, such as his address, occupation, etc., and included stamped envelopes for the return of such form letters addressed to said "National Estates Research" at his New York City address—

- (a) Represented falsely, directly and by implication, through said form letters, to the recipients thereof, that "National Estates Research" was engaged in genealogical research and was endeavoring to locate heirs to existing estates, and that the recipients might have interests in such estates of financial benefit to them; and
- (b) Represented falsely, through use of the name "National Estates Research," directly and by implication, that said concern bore some relation to estates and to the right and interest of heirs thereto;

The facts being aforesaid name was merely a disguise for the true nature of his business, and the whole plan was one for obtaining information by deceit and subterfuge;

With the effect of misleading and deceiving many of the persons to whom said form letters were sent, into the erroneous belief that such representations were true and that the name "National Estates Research" truthfully indicated the character of the concern requesting information; and with tendency and capacity thereby to cause such persons to give information which they otherwise would not have supplied:

Held, That such acts and practices under the circumstances set forth were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices.

Before *Mr. Andrew B. Duvall*, trial examiner.

Mr. J. W. Brookfield, Jr., for the Commission.

Mr. Abraham E. Glick, of New York City, for respondent.