

Syllabus

IN THE MATTER OF

MERVIN E. LYONS, CLARENCE B. LYONS, AND IDA A. LYONS, DOING BUSINESS AS LYONS AND CO.

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

Docket 5207. Complaint, Aug. 26, 1944—Decision, Feb. 26, 1948

Where two individuals who were the largest distributors in the United States of "KIWI" shoe polish, imported from England and Australia—

Falsely represented that their said product would make shoes waterproof, through sale thereof in containers upon the lid of which appeared the legend "KIWI Thoroughly Waterproof Boot Polish," and through reproducing depictions of said container with the words "Thoroughly Waterproof" plainly visible thereon in their advertisements and in circulars, leaflets and other literature, distributed generally to the retail trade, and through the statement, also, in sales brochures for distribution to salesmen and occasionally to prospective retail purchasers, that "Waterproofing is another essential of the modern shoe polish; KIWI has it to a great degree";

With tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous belief that said polish would render shoes waterproof or completely impervious to water:

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 in commerce.

In a proceeding in which the representation "thoroughly waterproof," as applied to a shoe polish, was challenged, and in which the contention was made that the true meaning of the representation was that the polish would not dissolve in water, and that if applied to shoes which were thereafter subjected to water, the shine on the shoes might be restored by simply repolishing or rebuffing; and in which proceeding the testimony of a number of public witnesses showed that the words as used on the container and in the advertisements concerned did not possess the same meaning for all individuals, and in which it was agreed between respective counsel that regardless of the number of such witnesses who might be called and asked to give their impression on the point, half would testify under oath that to them the words meant that the polish, applied to their shoes, would make the same impervious to water, and the other half would testify that to them the words would mean that the polish, applied to their shoes could be regained if the shoes got wet, by merely buffing or rubbing; and in which it further appeared that the polish was only a temporary repellant of water depending for its effectiveness largely upon the amount applied, the penetration, and the quantity and force of the water to which the leather was subjected:

The Commission was of the opinion and found that the representation in question had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that said polish, applied

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to shoes, would render the shoes waterproof or completely impervious to water.

In said proceeding in which the complaint also charged the respondent with having falsely represented (1) that continued use of said polish would cause shoes to wear a great number of years, (2) that it was superior to all other shoe polishes in preserving shoes and causing them to wear longer, and (3) that it "nourishes" the leather; said charges were stricken for the reason that respondents had not used the first two since December 1941, at which time they entered into a stipulation to cease and desist their dissemination; and that charge number three was not sustained by the evidence.

Before *Mr. Charles B. Bayly*, trial examiner.

Mr. Joseph Callaway for the Commission.

Hervey, Barber & McKee, of New York City, for respondents.

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 Mervin E. Lyons, Clarence B. Lyons, and Ida A. Lyons, copartners, trading and doing business as Lyons & Co., hereinafter referred to as respondents, have violated the provisions of 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 complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The respondents, Mervin E. Lyons, Clarence B. Lyons, and Ida A. Lyons, are individuals and copartners trading and doing business as Lyons and Company, with their principal place of business at 118-120 Duane Street, New York, N. Y.

PAR. 2. Respondents are now and for more than 3 years last past have been engaged in the sale and distribution of a certain brand of shoe polish designated as KIWI.

In the course and conduct of their business, the respondents cause said products when sold to be transported from their place of business in the State of New York to the purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained a course of trade in said products 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 their said business and for the purpose of inducing the purchase of their said products in commerce, respondents have made and are now making certain false, de-

ceptive and misleading statements and representations regarding the value and results to be obtained from the use of their said products, by means of advertisements inserted in periodicals and leaflets, circulated generally among the purchasing public and in various other ways. Typical representations are as follows:

A pair of shoes continually polished with KIWI will last the wearer a great number of years.

Footwear treated with it will wear much longer than that treated with any other dressing.

KIWI shoe polish will nourish * * * the leather.

KIWI, thoroughly waterproof, boot polish.

PAR. 4. Through the use of the foregoing statements and representations and others of similar import and meaning, not specifically set out herein, the respondents have represented and are now representing that the continued use of KIWI polish will cause shoes to wear a great number of years; that KIWI shoe polish is superior to all other shoe polishes in preserving shoes and causing them to wear longer; that it nourishes leather and that its application to shoes will make them waterproof.

PAR. 5. The foregoing representations are false, deceptive and misleading in the following respects: The wearing qualities of shoes depend principally upon the materials used in making them, and the continued use of KIWI polish will not make shoes last a great number of years or any other specified period of time. KIWI shoe polish is not superior to all other shoe polishes in preserving shoes and will not cause them to wear longer than any other good wax paste shoe polish. KIWI shoe polish cannot nourish leather because it is incapable of being nourished. The application of KIWI shoe polish will not make shoes waterproof.

PAR. 6. The use by the respondents of the foregoing false, deceptive, and misleading statements and representations, disseminated as aforesaid, in connection with the offering for sale and sale of their products in commerce has had and now has the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and into the purchase of substantial quantities of such products in commerce because of such erroneous and mistaken belief.

PAR. 7. The aforesaid acts and practices of the respondents are all to the prejudice and injury of the public and constitute 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 August 26, 1944, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the filing of respondents' answer to the complaint (which answer has been treated as amended to include denials of all of the allegations of paragraphs 5, 6 and 7 of the complaint in accordance with respondents' motion made on the record and subsequently renewed before the Commission), testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, respondents' amended answer, testimony and other evidence, the recommended decision of the trial examiner and respondents' exceptions to such recommended decision, 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. The respondents, Mervin E. Lyons and Clarence B. Lyons, are copartners trading and doing business under the firm name of Lyons & Co. Prior to her death on February 10, 1945, the respondent, Ida A. Lyons, was also a partner in the business, but her former interest therein is now owned jointly by the respondents, Mervin E. Lyons and Clarence B. Lyons. The respondents maintain their place of business at 118 Duane Street in the city of New York, State of New York.

PAR. 2. Said respondents are now, and for more than 5 years last past have been, engaged in the sale and distribution of shoe findings and supplies, including shoe polishes. Among the merchandise sold and distributed by them is a product designated as KIWI shoe polish. This product is manufactured in England and Australia by the KIWI Polish Co., Pty., Ltd., and is imported into and sold in this country

by the respondents who are the largest distributors of the polish in the United States.

In the course and conduct of their business, the respondents cause the aforesaid shoe polish, when sold, to be transported from their place of business in New York, N. Y., to the purchasers thereof, primarily shoe stores and department stores, located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said product in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. On the lid of the KIWI shoe polish container appears the legend "KIWI Thoroughly Waterproof Boot Polish." The respondents advertise the product chiefly by causing pictures of this container with the words "Thoroughly Waterproof" plainly visible thereon to be inserted in advertisements published in trade publications and by causing the pictures to be printed on circulars, leaflets, and other literature, which are distributed generally to the retail trade. In sales brochures prepared for distribution to salesmen, and occasionally to prospective retail purchasers as well, the respondents have also made the following statement: "Waterproofing is another essential of the modern shoe polish; KIWI has it to a great degree."

PAR. 4. The complaint alleges that through the use of the foregoing statements and representations, and others similar thereto, the respondents have falsely represented that the application of KIWI shoe polish to shoes will make them thoroughly waterproof. The respondents contend, on the other hand, that the true meaning of the representations is that KIWI shoe polish will not dissolve in water, that if applied to shoes which are thereafter subjected to water the shine on the shoes may be restored by simply repolishing or rebuffing.

In support of their contention the respondents offered in evidence the testimony of a high school chemistry teacher who testified that he had physically tested five cans of KIWI shoe polish. His test consisted of dropping a saturated solution of epsom salts on shoes polished with KIWI shoe polish, allowing the solution to evaporate and thereafter rubbing the shoes with a cloth and so restoring the original lustre. From this he concluded that the polish itself is insoluble in water, or practically so, and therefore "thoroughly waterproof" as represented.

There is in evidence, on the other hand, the testimony of an expert from the United States Bureau of Standards who made a scientific test, using a machine developed in the Bureau, to determine the precise

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effectiveness of **KIWI** shoe polish in retarding water penetration through an ordinary good grade of leather polished with this product. This test shows rather conclusively that **KIWI** shoe polish will not render leather to which it has been applied impervious to water, that the product is only a temporary repellant of water, and that its effectiveness in this respect is dependent in large measure on the amount of polish superimposed on the leather and the amount of polish penetration into the leather in relation to the quantity and force of the water to which the leather is subjected.

On the basis of this and other evidence in the record, the Commission finds that the product **KIWI** shoe polish will not render shoes polished therewith impervious to water.

PAR. 5. Concerning the meaning to the public of the representation that **KIWI** shoe polish is "waterproof," and the tendency of such representation to mislead and deceive prospective purchasers, the record contains the testimony of a number of public witnesses. This evidence shows that while the words "Thoroughly Waterproof" on the lid of **KIWI** shoe polish and in respondents' advertisements do not possess the same meaning for all individuals, such words do create confusion in the minds of readers. Moreover, it was agreed on the record between counsel in support of the complaint and counsel for respondents that regardless of the number of other public witnesses who might be called and asked to give their impression on this point 50 percent of such witnesses would testify under oath that to them the words "Thoroughly Waterproof" on the containers and in respondents' advertisements would mean that the shoe polish when applied to their shoes would make the shoes impervious to water, and the other 50 percent of such witnesses would testify that to them the words "Thoroughly Waterproof" would mean that the polish when applied to their shoes could be regained if the shoes get wet by merely buffing or rubbing.

The Commission is of the opinion, therefore, and finds that the aforesaid representation has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the mistaken and erroneous belief that **KIWI** shoe polish, when applied to shoes, will render such shoes waterproof or completely impervious to water.

PAR. 6. The complaint also charged the respondents with having falsely represented (1) that the continued use of **KIWI** shoe polish will cause shoes to wear a great number of years, (2) that said polish is superior to all other shoe polishes in preserving shoes and causing them to wear longer, and (3) that said polish "nourishes" the leather.

This charge as it relates to the representations numbered (1) and (2) has been stricken for the reason that the respondents have not used such representations since December 1941, at which time they entered into a stipulation with the Commission to cease and desist the dissemination of these representations, and the charge as it relates to the representation numbered (3) has not been sustained by the evidence.

CONCLUSION

The acts and practices of the respondents in falsely representing that KIWI shoe polish will render shoes waterproof, as herein found, are all to the prejudice and injury of the public and constitute 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 complaint of the Commission, the respondents' amended answer thereto, testimony, and other evidence in support of and in opposition to the complaint taken before a trial examiner of the Commission theretofore duly designated by it, the recommended decision of the trial examiner and respondents' exceptions to such recommended decision, briefs in support of and in opposition to the allegations of the complaint, and oral argument; and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondents, Mervin E. Lyons and Clarence B. Lyons, individually and as copartners trading and doing business under the firm name of Lyons & Co., or trading under any other name or designation, and respondents' agents, representatives 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 KIWI shoe polish, or any other product of substantially similar composition or possessing substantially similar properties, do forthwith cease and desist from:

1. Using on the containers of said product or in advertisements or on circulars, leaflets or other literature, the word "waterproof" or any other words which represents that respondents' product is capable of rendering shoes impervious to water.

2. Representing by any means or in any manner that said product, when applied to shoes, will make them waterproof.

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It is further ordered, That the respondents shall, within 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.

It is further ordered, That the complaint be, and it hereby is, dismissed as to the respondent Ida A. Lyons, now deceased.

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IN THE MATTER OF
SHEFFIELD FARMS CO., INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4647. Complaint, Nov. 26, 1941—Decision, Feb. 27, 1948*

The production and distribution of milk, which is often distributed to the consuming public by means of dealers or distributors, rather than by the milk producers themselves—who generally make their livelihood through the sale of the milk they produce, to distributors and dealers therein—is a primary industry, affecting, in a large measure, the health and welfare of the general public, and it is the policy of the United States Government, and also that of many of the States, including the State of New York, to foster and encourage the formation and functioning of producer-controlled co-operatives composed of milk producers, as exemplified by Federal and State legislation directed to such end.

Where a corporation engaged in the competitive interstate purchase, distribution, and sale of fluid milk and cream, and in the manufacture and sale of milk products; which was one of the largest, if not the largest, distributors of fluid milk and cream in the United States, with an annual business, in 1940, of over \$56,000,000; purchased the milk sold and distributed by it, whether as fluid milk or cream or as other milk products, from dairy farmers in New York, New Jersey, Pennsylvania, Vermont, and Maryland, through some 79 country receiving plants located in said States; processed such milk in its processing plants in New York City, for distribution therefrom to and in a large number of cities and towns in New York, New Jersey, and Connecticut;

During a period beginning in 1922, following a dispute with a producer-bargaining cooperative, with which it had theretofore negotiated for the price of the milk paid to producer members thereof, and ending in 1939, when it no longer controlled membership in the association below described, and which period largely preceded the taking effect of Federal Order No. 27, fixing the price of the great bulk of milk purchased by it from the association—

- (a) Initiated and created an association of producers, composed of all persons who delivered milk to any of its creamery or milk-shipping stations, by arranging through its country plant managers, for selection by producers who delivered milk to the respective plants, of representatives who were to and did at its expense attend a meeting in New York, and to whom it submitted its plan for the organization of such producers;
- (b) Controlled the membership in such association, as exemplified by a procedure and practice under which the mere fact of delivery by a producer to one of its plants automatically made him a member, and cessation of such delivery terminated his membership, the beginning of deliveries was contingent upon consent secured from its plant manager and not the association, and so-called members were notified of their loss of membership by its employee;