

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, JULY 1, 1948, TO JUNE 30, 1949

IN THE MATTER OF

SHEPHERD KNITWEAR COMPANY, INC.

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

Docket 5336. Complaint, June 16, 1945—Decision, July 6, 1948

Where a corporation engaged in the interstate sale and distribution of knitted garments—

(a) Falsely represented through use of the expressions “Bonnie Leith—Scottish Vogue,” “Glen Eyre Shetland Type,” “English Tally-Ho” and accompanying depictions, directly and by implication, that its said garments or the materials from which they were made were imported from the British Isles, the woolen goods of which are in demand in this country; and

(b) Falsely represented as aforesaid through use of the expression “Llamora” that the garments identified by said terms were made of llama wool;

With capacity and tendency to mislead purchasers into the erroneous belief that such expressions were true and thereby induce them to purchase its said products; and with the effect of placing in the hands of purchasers for resale a means and instrumentality whereby they might mislead and deceive the public as to the true facts:

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 said proceeding the Commission was of the opinion, and found, as respects the deception engendered by use of the term “Llamora” as a trade or brand name to designate or describe respondent's product, after giving consideration to the trial examiner's recommended order and to the applicable remedy, that such deception could only be removed by the discontinuance of use of the term to designate or describe any product not composed of llama wool.

In said proceeding, in which the Commission found that the deception as respects the use of the product named “Llamora” could only be removed by discontinuance of the term to describe products which contained no llama wool: the Commission was of the opinion, as respect the recommended decision and its reference to respondent's expressed intention to change said name to “Lamora,” which appeared to imply the presence of conventional wool fibers, that use thereof to describe a product composed exclusively of virgin wool would not be in violation of the paragraph of the order relating to use of the terms “Llamora” to describe a product not composed wholly of llama wool.

Before *Mr. W. W. Sheppard*, trial examiner.

Mr. DeWitt T. Puckett and *Mr. George M. Martin* for the Commission.

Mr. Milton Handler, of New York City, for respondent.

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 Shepherd Knitwear Co., Inc., a corporation, 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 complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Shepherd Knitwear Co., Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 48 West Thirty-eighth Street, New York, N. Y. Respondent is now, and for some time past has been, engaged in the business of selling and distributing knitted garments.

Respondent causes said garments, when sold, to be transported from the State of New York to the purchasers thereof located at points in various other States of the United States and in the District of Columbia. There is now, and has been during all the time herein mentioned, a course of trade by respondent in said knitted garments in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business as aforesaid, and for the purpose of inducing the purchase of certain of its said garments by retailers for resale and by members of the purchasing public for use, respondent has made use of, and now uses, various trade names, statements, and depictions purporting to be descriptive of its said sweaters. These trade names, statements, and picturizations have appeared on labels attached to said sweaters, in newspaper advertisements, and in various other ways. Among and typical of the trade names and statements and picturizations used by respondents as aforesaid are the following:

Pure
Llamora
100% Virgin Wool
Shepherd Knitwear Co., Inc.

Complaint

100% Virgin Wool
Bonnie Leith
Scottish Vogue
Shepherd Knitwear Co., Inc.

Glen Eyre
Made in U. S. A.
Shetland Type

English Tally Ho
100% New Wool
Shepherd Knitwear Co., Inc.
(with a picture of a coach and drivers)

PAR. 3. Through the use of the expressions "Bonnie Leith—Scottish Vogue," "Glen Eyre—Shetland Type," "English Tally-Ho," and the accompanying depiction, the respondent has represented and now represents, directly and by implication, that its said garments, or the materials from which they are made, are imported from the British Isles. Respondent also represents through the use of the expression "Llamora" that the garments identified by said term are made of llama wool.

In truth and in fact none of the aforesaid garments are imported from the British Isles nor are they made of materials imported therefrom. The garments identified or sold under the brand name "Llamora" are not made of llama wool.

PAR. 4. There is a demand among the purchasing public in the United States of America for woolen goods imported from the British Isles and the use by respondent of the expressions and depictions set out and referred to in paragraph 2 hereof in connection with the offering for sale, sale, and distribution of its said products, has had and now has the capacity and tendency to, and does, mislead and deceive purchasers and prospective purchasers thereof into the erroneous and mistaken belief that such expressions and representations are true and to induce them to purchase respondent's said products because of such erroneous belief. By said acts and practices, respondent also places in the hands of purchasers of its products for resale a means and instrumentality whereby they may and do mislead and

deceive the purchasing public as to the true facts in regard to respondent's said products.

PAR. 5. The aforesaid acts and practices of respondent as herein alleged 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 June 16, 1945, issued and subsequently served its complaint in this proceeding upon the respondent, Shepherd Knitwear Co., Inc., a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of the complaint and the filing of the respondent's answer thereto a hearing was convened by a trial examiner of the Commission theretofore duly designated by it, for the purpose of receiving testimony and other evidence in support of and in opposition to the allegations of the complaint. At said hearing there was placed in the record a stipulation of facts which had theretofore been agreed upon by counsel for the respondent and counsel in support of the complaint, and at the same hearing there was included in the record a letter, dated October 15, 1946, from counsel for the respondent to counsel in support of the complaint, containing a proposal for the settlement of all of the issues involved in the proceeding. Thereafter, the proceeding regularly came on for final hearing before the Commission upon the complaint, the respondent's answer thereto, the stipulation of facts, respondent's proposal for settlement and certain statements made on the record in explanation thereof, and the recommended decision of the trial examiner (no briefs having been filed or oral argument requested); 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, accepts the respondent's proposal for settlement, and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Shepherd Knitwear Co., Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 48 West Thirty-eighth Street, New York, N. Y. Re-

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spondent is now, and for some time past has been, engaged in the business of selling and distributing knitted garments.

Respondent causes said garments, when sold, to be transported from the State of New York to the purchasers thereof located at points in various other States of the United States and in the District of Columbia. There is now, and has been during all the time herein mentioned, a course of trade by respondent in said knitted garments in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business as aforesaid, and for the purpose of inducing the purchase of certain of its said garments by retailers for resale, and by members of the purchasing public for use, respondent has made use of various trade names, statements, and depictions purporting to be descriptive of its said garments. These trade names, statements, and picturizations have appeared on labels attached to said garments, in newspaper advertisements, and in various other ways. Among and typical of the trade names and statements and picturizations used by respondent as aforesaid are the following:

Pure
Llamora
100% Virgin Wool
Shepherd Knitwear Co., Inc.
100% Virgin Wool
Bonnie Leith
Scottish Vogue
Shepherd Knitwear Co., Inc.
Glen Eyre
Made in U. S. A.
Shetland Type
English Tally-Ho
100% New Wool
Shepherd Knitwear Co., Inc.
(with a picture of a coach and drivers)

PAR. 3. Through the use of the expressions "Bonnie Leith—Scottish Vogue," "Glen Eyre—Shetland Type," and "English Tally-Ho" and the accompanying depictions, the respondent has represented, directly and by implication, that its said garments or the materials from which they were made were imported from the British Isles. The respondent has also represented through the use of the expression "Llamora" that the garments identified by said term were made of llama wool.

The stipulation of counsel provides, and on the basis of said stipulation the Commission finds, that in truth and in fact none of the aforesaid garments were imported from the British Isles nor were they made of materials imported therefrom. The garments identified or sold under the brand name "Llamora" were not made of llama wool.

PAR. 4. The Commission further finds that there is a demand among the purchasing public in the United States of America for woolen goods imported from the British Isles, and the use by respondent of the expressions and depictions set out and referred to in paragraph 2 hereof in connection with the offering for sale, sale, and distribution of its said products has had the capacity and tendency to mislead and deceive purchasers and prospective purchasers thereof into the erroneous and mistaken belief that such expressions and representations were true and to induce them to purchase respondent's said products because of such erroneous belief. By said acts and practices, the respondent has also placed in the hands of purchasers of its products for resale a means and instrumentality whereby they could mislead and deceive the purchasing public as to the true facts in regard to respondent's said products.

PAR. 5. The Commission has given consideration to the recommended order of the trial examiner and to the remedy which might be applied to remove the deception engendered by the use of the term "Llamora" as a trade or brand name to designate or describe respondent's products and is of the opinion, and so finds, that such deception can only be removed by the discontinuance of the term "Llamora" when used to designate or describe any products not composed of llama wool.

CONCLUSION

The aforesaid acts and practices of respondent, 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 on the complaint of the Commission, the respondent's answer, a stipulation of facts agreed upon by counsel, the respondent's proposal for settlement of the proceeding, and the recommended decision of the trial examiner; and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the

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provisions of the Federal Trade Commission Act, and having accepted the respondent's proposal for settlement:

It is ordered, That the respondent, Shepherd Knitwear Co., Inc., 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 of knitted garments and other similar merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Llamora" or any other term which includes the word "llama" or any colorable simulation thereof, or using any other term of similar import or meaning on labels, in advertisements, or otherwise, to describe, designate, or refer to any product which it not composed wholly of llama wool; *Provided, however*, That in the case of products composed in part of llama wool and in part of other fibers such term may be used as descriptive of such llama-wool content if they are used in immediate connection or conjunction therewith, in letters of at least equal size and conspicuousness words truthfully describing and designating each constituent fiber or material thereof.

2. Representing by use of the words "Scottish" or "English," or any other word of similar import, that garments or materials are made in the British Isles unless such products are in fact manufactured or woven in the British Isles; *Provided, however*, That nothing herein shall prohibit respondent from representing that the patterns or designs thereof are similar in appearance to or in imitation of patterns styled in those countries when such is the case.

3. Using the term "Bonnie Leith" to designate or describe garments or materials of domestic origin unless in immediate conjunction therewith it is adequately disclosed through use of the words "Made in the U. S. A." that the garments or materials are of domestic origin.

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.

OPINION OF THE COMMISSION

The recommended order submitted by the trial examiner proposes to permit use of the term "Llamora" to designate respondent's products containing no llama wool, provided the constituent materials or fibers are set forth in connection with the use of such term. In the

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opinion of the Commission, the word "Llamora" is so representative of llama fiber content that its use under such conditions would be a contradiction. As set forth in paragraph 5 of the findings as to the facts, the Commission is of the opinion that the deception can be removed only by discontinuance of the term "Llamora." The order to cease and desist does not prohibit its use to describe products composed in part of llama wool and in part of other materials if in conjunction therewith each of the constituent fibers is named. *Gimbel Bros., Inc. v. Federal Trade Commission*, 116 F. (2d) 578 (C. C. A. 2nd. 1941).

The recommended decision makes reference to respondent's expressed intention (RX 2) to change the product name to "Lamora." Inasmuch as this term appears to imply the presence of conventional wool fibers, it is the opinion of the Commission that use thereof to describe a product composed exclusively of virgin wool would not be in violation of paragraph 1 of the order to cease and desist.

Syllabus

IN THE MATTER OF

AMERICAN CHEMICAL PAINT COMPANY

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

Docket 5135. Complaint, Mar. 2, 1944—Decision, July 12, 1948

While the rule is now well settled in many decisions by the Commission and by the courts that actual deception of purchasers need not be proven in proceedings before the Commission, such fact does not mean that actual deception of the public is not present in the instant or other similar cases, since if a seller falsely advertises a product and thereafter sells a substantial amount thereof, it is obvious that members of the purchasing public who read the advertisements and who purchased that product were misled or unfairly influenced by the false statements made by the seller in his advertising. And in such cases it is unnecessary to expend public funds and to cause the respondents to incur the expense of being represented at hearings for the sole purpose of placing in the records the testimony of purchasers who were actually deceived by false representations which are clear and not ambiguous. *Charles of the Ritz Distributors v. Federal Trade Commission*, 143 F. (2d) 676; 39 F. T. C. 657.

As to the question of the decision of the Commission as to what a respondent actually represents in a particular advertisement, it is reasonable to conclude that the Commission can, without the assistance of the testimony of others, correctly construe advertisements phrased in simple understandable English. *Zenith Radio Corporation v. Federal Trade Commission*, 142 F. (2d) 29; 38 F. T. C. 903; *Federal Trade Commission v. Cement Institute et al.*, 333 U. S. 683, 727; 44 F. T. C. 1460.

To say that objectionable representations in advertisements which invite prospective purchasers to send their money directly to the seller-advertiser and thereby purchase the product by mail must be construed with reference to a "non-warranty" printed on the package containing the product, which (1) states that since the product is used under conditions beyond the seller's control, the seller makes no warranty of any kind, expressed or implied, concerning the product or its effects, and (2) states that the buyer assumes all risks of use whether in accord with directions or not, and which (3), printed in small type, is not seen by purchasers, if at all, until after they have bought the product relying on the representations in the advertisements; propounds a proposition which, simply stated, is its most effective refutation; namely: may a seller publish unlimited false advertisements but avoid liability therefor by inserting in small print a disclaimer on the package of his product? To hold otherwise is to make the law which protects the consuming public by prohibiting false advertising, practically impotent.