

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

MODIFIED CEASE AND DESIST ORDER

Docket 2536. Orders and opinion, November 8, 1954

Order modifying cease and desist order dated July 10, 1942, 35 F. T. C. 132, 139, which required respondent to cease using the term "Buck Skein" to describe any product not made from the skin of the deer or elk, by adding the provision that nothing therein "shall be construed to prohibit the respondent from using the words 'Buck Skein Brand' * * * for garments which neither simulate nor resemble leather".

Mr. Joseph Callaway for the Commission.

Feinberg, Jerry & Lewis, of Plattsburgh, N. Y., and *Mr. Martin Whyman* and *Hays, St. John, Abramson, & Schulman*, of New York City, for respondent.

ORDER RULING ON PETITION TO MODIFY AND MODIFYING PARAGRAPH (1)
OF THE ORDER OF JULY 10, 1942

This matter coming on to be heard upon the petition filed on August 18, 1954, by the respondent requesting that Paragraph (1) of the order to cease and desist as entered on July 10, 1942, be modified, and upon the answer of counsel on the Commission's staff interposing no objection to modification of such order; and

The Commission having duly considered the matter and having determined, for the reasons set forth in the accompanying opinion, that the respondent's request for modification of the order to cease and desist should be granted and that the proceeding accordingly should be reopened for the purpose of modifying Paragraph (1) of said order:

It is ordered, That the petition of the respondent be, and it hereby is, granted.

It is further ordered, That this proceeding be, and it hereby is, reopened solely for the purpose of modifying Paragraph (1) of the order to cease and desist.

It is further ordered, That the order to cease and desist heretofore entered in this matter be, and it hereby is, modified by changing Paragraph (1) thereof to read as follows:

1. Using the term "Buck Skein," either alone or in conjunction with the outline of a deer's head, or any other colorable simulation of the word "buckskin," in advertising, or otherwise, to describe,

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designate, or refer to any product which is not made from the skin of a deer or elk; *provided, however*, that nothing herein shall be construed to prohibit the respondent from using the words "Buck Skein Brand" on labels and in advertising for garments which neither simulate nor resemble leather.

It is further ordered, That the General Counsel of the Commission be, and he hereby is, authorized and directed to initiate proceedings appropriate in the light of the Commission's foregoing action, before the United States Court of Appeals for the Second Circuit.

It is further ordered, That a modified order to cease and desist incorporating the modification provided for be issued and served upon the respondent.

OPINION OF THE COMMISSION

Per CURIAM:

This matter is presented for our consideration upon the petition filed by the respondent on August 18, 1954, requesting that Paragraph (1) of the order to cease and desist, heretofore issued by the Commission on July 10, 1942, be modified. Staff counsel have filed answer interposing no objection to modification to accomplish the objectives and purposes expressed in the petition.

The first paragraph of that order forbids use of the term "Buck Skein" either alone or in conjunction with the outline of the deer's head or any other colorable simulation of the word "buckskin" in advertising, or otherwise, to designate or describe any product not made from the skin of the deer or elk. The respondent requests that this particular provision be modified so that it will be permitted to use the expression "Buck Skein Brand" in connection with the advertising and labeling of garments which do not simulate or resemble leather.

It appears that the years since the Commission's order to cease and desist was issued have seen various changes occur in the respondent's business. When the instant proceeding was instituted, the respondent was engaged primarily in producing rough garments used by outdoor workers and others, and included in its line were jackets made from a type of cotton which, when processed, resembled leather. The company concentrates now, however, on manufacturing from textile fabrics certain highly-styled leisure and semi-dress wear which it states are in a garment category often referred to in the trade as "country club" clothing. Formerly a substantial part of respondent's volume was distributed through mail order channels. This has been discontinued and the concern's products currently are sold through

retail stores in the course of over-the-counter transactions presenting opportunity for pre-purchase visual inspection of the merchandise. Furthermore, the sale of the cotton jackets referred to above has been discontinued for more than a decade, and it additionally appears that no garments made of materials simulating leather have been distributed during that period.

To be noted also in these connections, are certain advertising practices adopted by the respondent pursuant to its report to the Commission respecting the manner in which it proposed to offer its products in the light of the order to cease and desist. Thereunder, the respondent signified its intention to use on packing labels a trademark containing the words "Buck Skein Joe" with an outline of a cowboy's head appearing between the words "Buck" and "Skein." It also expressed intention similarly to use that mark on garment labels and in advertising and, in those connections, proposed additionally to refer to the person thus depicted as maker of the garments. Designating a homespun, philosophical character, the name "Buck Skein Joe" was created to epitomize the company and had been featured in respondent's advertising for many years prior to that time. Information contained in the petition suggests that, as a designation for the more highly-styled merchandise presently offered, this name and mark lack consumer appeal and, in instances, have even served to deter retail stores from handling the respondent's garments. Since 1921, the respondent has expended very large sums in popularizing this mark and others used prior to its adoption. It is apparent, therefore, that hardship may be entailed if, in order to abandon use of the word "Joe," the respondent were obliged, likewise, to discontinue its heretofore permitted use of other words contained in that name.

Under its original decision, the Commission, in effect, found that the words "Buck Skein" constituted a distorted spelling of the word "buckskin" and that the use of the words "Buck Skein," with or without the deer's head in juxtaposition thereto, had the capacity and tendency to cause purchasers to believe that the respondent's products were made of leather or buckskin or possessed some of the latter's prized qualities or characteristics. Under the manifest view that only excision of the name would adequately protect the public and competitors, the proscription directed to use of the term "Buck Skein," as then adopted by the Commission, was an absolute prohibition. As stated by the Commission, however, in its recent decision in the matter of *Country Tweeds, Inc., et al.*, Docket No. 5957, every effort should be made in proceedings wherein deception is found to inhere in a trade name to formulate a remedy which will afford the public and

competitors reasonably accurate protection and likewise avoid unnecessary hardship or loss to the owner of the name. If less drastic measures will suffice, these valuable business assets should be saved.

In the light of our foregoing action and with due regard to the changed conditions of fact which appear here, we have concluded that the provisions of the order to cease and desist are unduly restrictive.

We are of the view that adequate protection of the public and the respondent's competitors will be afforded if our order is modified to permit use by the respondent of the expression "Buck Skein Brand" to designate and refer to garments nowise resembling or simulating leather. We accordingly are granting the petition.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding was heard by the Federal Trade Commission upon the record and the Commission, having made its findings as to the facts and its conclusion that the respondent had violated the provisions of the Federal Trade Commission Act, issued its order to cease and desist on July 10, 1942. Thereafter, the respondent filed its petition for review of such order in the United States Circuit Court of Appeals for the Second Circuit, and on May 29, 1944, pursuant to motion jointly filed by counsel, that Court entered its decree dismissing said petition for review and affirming and enforcing the order to cease and desist.

On August 18, 1954, the respondent filed with the Commission a petition requesting modification of the said order to cease and desist, and the Commission having duly considered and granted such petition, and having issued its order reopening the proceeding and modifying the order to cease and desist in the respects set out therein, now issues this, its modified order to cease and desist:

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

1. Using the term "Buck Skein," either alone or in conjunction with the outline of a deer's head, or any other colorable simulation of the word "buckskin," in advertising, or otherwise, to describe, designate, or refer to any product which is not made from the skin of a deer or elk; *provided, however*, that nothing herein shall be construed to prohibit the respondent from using the words "Buck Skein Brand"

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on labels and in advertising for garments which neither simulate nor resemble leather.

2. Representing directly or by implication in any advertisement, or on labels, or otherwise, that any product made of wool or cotton or any other woven fabric is made of buckskin or other type of leather.

It is further ordered, That the respondent shall, within sixty (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.

Complaint

IN THE MATTER OF

ALL AMERICAN SPORTSWEAR COMPANY, INC., ET AL.

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

Docket 6218. Complaint, June 23, 1954—Decision, Nov. 9, 1954

Consent order requiring a manufacturer in New York City to cease representing that its Armed Services-type jackets and parkas were manufactured for the U. S. Armed Forces and in accordance with specifications thereof.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Harold A. Kennedy and *Mr. Terral A. Jordan* for the Commission.

Lane & Winard, 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 All American Sportswear Co., Inc., a corporation, and Samuel Werber and Nathan Klimerman, individually and as officers of said corporation, 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. Respondent All American Sportswear 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 located at 745 Broadway, New York, New York. Respondents Samuel Werber and Nathan Klimerman are respectively president and treasurer of corporate respondent. The individual respondents, acting in cooperation with each other, formulate, direct and control all of the policies, acts and practices of said corporation. The address of said individual respondents is the same as that of said corporate respondent.

PAR. 2. Respondents are now, and have been for more than one year last past, engaged in the manufacture, sale and distribution of heavy outerwear, including imitation Armed Services type jackets and parkas, in commerce, among and between the various States of the United States and in the District of Columbia. Respondents