

IN THE MATTER OF  
ATLANTIC SPONGE AND CHAMOIS CORPORATION  
ET AL.

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

*Docket 6162. Complaint, Feb. 5, 1954—Decision, Nov. 29, 1955*

Order requiring sellers of leather products in New York City to cease labeling as "Chamois," "Supreme Oil Tanned Chamois," and "Atlantic Oil Tanned Chamois," certain leather products which, while having the same general appearance, did not possess the softness, pliability, quick moisture absorption and moisture release and other desirable qualities of genuine chamois, and were not genuine chamois in the accepted meaning of the term; making false statements of similar purport on letterheads, postal cards, and other advertising media; and representing falsely, by such statements in circulars distributed to the trade as "Buy direct from Tannery and Save," that they operated their own tannery.

*Mr. Charles S. Cox*, counsel supporting the complaint.

*Weisman, Allan, Spett & Sheinberg*, by *Mr. Herbert S. Keller* and *Mr. Richard L. Sapiro* of New York, New York, for respondents.

INITIAL DECISION OF HEARING EXAMINER JOHN LEWIS

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on February 5, 1954, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint charges in substance that the respondents falsely represented certain of the leather products sold by them to be "chamois" leather, and falsely represented that they operate a tannery in which the leather products sold by them are tanned. Respondents appeared by counsel and filed a joint answer in which they admitted that the corporate respondent had represented its product as "chamois" but denied the falsity of such representation, and admitted that said respondent had on a single occasion made the statement set forth in the complaint concerning the operation of a tannery.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, theretofore duly designated by the Commission to hear this proceeding, on various dates between May

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4, 1954, and September 30, 1954, at New York, New York, Washington, D. C., and Philadelphia, Pennsylvania. At such hearing testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of said hearings proposed findings of fact and conclusions of law were filed by counsel supporting the complaint and counsel for respondents. Pursuant to leave granted, counsel also filed replies to the proposed findings filed by opposing counsel. No request for oral argument was made.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

## FINDINGS OF FACT

## I. The Business of Respondents and the Interstate Commerce

Respondent Atlantic Sponge and Chamois Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at 49 Walker Street, New York 13, New York. Respondents Benjamin E. Bloch and Ida Bloch are President and Secretary, respectively, of the corporate respondent. The individual respondent Benjamin E. Bloch owns all of the stock of the corporate respondent and formulates, directs and controls the business, acts, policies and practices of said corporate respondent, including its advertising claims, and has his office and principal place of business at the same address as the corporate respondent. There is no evidence that the individual respondent Ida Bloch takes any active part in the conduct of the business of the corporate respondent and this proceeding will be dismissed as to said respondent. All references to "respondents" hereinafter made will be to the corporate respondent and to the individual respondent Benjamin E. Bloch, unless otherwise indicated.

Respondents for more than two years last past have been engaged in the business of offering for sale, sale and distribution of leather products, including those designated and labeled by them as "Chamois." Respondents cause said products, when sold, to be transported from their place of business in New York, New York, to purchasers thereof located in various other States of the United States and in the District of Columbia. Said respondents maintain, and at

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all times mentioned herein have maintained, a course of trade in said products in commerce among and between the several States of the United States and in the District of Columbia. Their volume of trade in said products has been, and is substantial.

## II. The Alleged Illegal Practices

A. *The Representations Made and the Issues Arising Therefrom*

The primary issue in this case revolves about those of respondents' leather products which are designated and labeled by them as "Chamois." In the course and conduct of their business respondents have branded and labeled such leather products as:

Chamois

Supreme Oil Tanned Chamois

Atlantic Oil Tanned Chamois

W. E. Warner & Co., Inc. Genuine Oil Tanned Chamois<sup>1</sup>

In addition to such labeling and branding on the leather products themselves, respondents make use of certain statements with respect to said products on letterheads, postal cards, cartons, glassine envelopes, circulars and other advertising media. Such statements include, in addition to those abovementioned, the following:

Soft, Durable, Absorbent, Oil-Tanned. Nothing Cleans like a Chamois.

Best for Automobiles, Windows, Furniture, Silverware. There Is No Substitute For A Chamois.

100% Oil Tanned Guaranteed Washable Chamois.

This is a Genuine Chamois Skin and is Guaranteed washable.

In circulars distributed to the trade on a single occasion in 1952 respondents also made the following statement: "Buy direct from Tannery and Save."

There is no issue presented with respect to whether respondents did in fact brand, label or otherwise describe their product as above set forth, except that it is claimed that the use of the expression "oil tanned" in the above statements or branding was discontinued in 1953.<sup>2</sup> While apparently conceding that they have no right to

<sup>1</sup> The brand or trade names "Supreme" and "Atlantic" are used generally by respondents in the distribution of their leather products sold as chamois while the name "Warner" is a private label sold to a single distribution outlet.

<sup>2</sup> Although the respondent Bloch claimed that he discontinued using the words "oil tanned" sometime in 1953, evidence given by the firm which manufactures the transfers or decalcomanias used in branding respondents' skins indicates that it was not discontinued until sometime in 1954. Thus it appears that an order for 100,000 transfers for Supreme brand "oil tanned" skins was placed on April 20, 1953, and that the first order without the words "oil tanned" was not placed until January 15, 1954. In the case of Warner private brand, the first order without the disputed words was not placed until April 2, 1954.

describe their product as "oil tanned," respondents contend that it may truthfully be called a "chamois." On the other hand, it is the position of counsel supporting the complaint that irrespective of whether the phrase "oil tanned" is used, respondents' product cannot be called a chamois since that term can properly be applied only to the split underside of a sheepskin which has been oil tanned after splitting, whereas the bulk of the products sold as chamois by respondents are made from unsplit sheepskins which have been tanned by the application of chrome salts rather than oil. It is further claimed that while respondents' products have same general appearance as genuine chamois, they lack the essential qualities of the genuine product.

Except for some imported oil-tanned chamois skins which they sell under different brand names from those here at issue, it is conceded that the bulk of the skins sold by respondents as chamois have not been split before tanning and are tanned by the application of chrome salts rather than by oil. Respondents contend, however, that the method by which the skins sold by them are processed is one which has been recognized commercially as a method for making chamois leather, and that it results in a product possessing the essential characteristics of oil-tanned chamois.

The main issue for determination, therefore, is as to what constitutes genuine chamois leather and whether respondents' product falls within this category. To a consideration of this question the hearing examiner now turns.

Before doing so, it should be noted that the complaint also raises a subsidiary issue based on the representation that respondents operate a tannery. It is conceded that respondents do not own any tannery but it has been stipulated that the representation with respect to their operation of a tannery was made on only a single occasion in 1952, and that they have no intention of ever making it again unless they actually acquire and operate a tannery. This matter, therefore, does not present any particular problem and the disposition to be made of it will be considered after the main issue has been disposed of.

### *B. Background*

The word "chamois" has its origin in the name of the Alpine antelope known as the "chamois," whose skin was made into a soft, pliable leather used in the manufacture of gloves, and for the polishing of silver and other metals. The chamois antelope has become practically extinct and for a great number of years the name chamois has been used commercially to designate certain leather made from

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the sheepskin. Traditionally, chamois leather has been made from the underside of the sheepskin, known as the flesher, from which the top grain layer has been removed by splitting.<sup>3</sup> After splitting, the underside or flesher is tanned by a fish oil, usually cod oil.

The oil tannage process involves two main steps. After certain preparatory operations, the fish oil is pounded into the fleshers in special drums or kickers. Following the immersion in oil, the skins are hung in specially heated rooms where actual tannage takes place through the oxidation of the fish oils. The oxidation process causes certain chemical reactions to occur which result in the oil becoming combined with the hide substance. The immersion of the skin in oil usually takes four or five hours and the oxidation process in the heated rooms takes five days or longer. Sometimes the skins are permitted to oxidize for a period of several days and are again immersed in oil, after which they are returned for further oxidation in the heated rooms. The resultant product is a soft piece of leather with a loose fiber network and having a natural yellowish color. It is used for polishing or wiping metals, glass and other products, particularly after they have been washed, and also in the manufacture of fine gloves. Chamois leather made in this manner possesses a quick and high water absorptive capacity, a low water retention when wrung out, and when dried will retain its essential softness, pliability and absorptive qualities.

Except for a small proportion of skins which they import from England and France, the bulk of the skins sold by respondents are not oil tanned. These skins are purchased by respondents from Clifford Leather Company, hereinafter sometimes referred to as Clifford.<sup>4</sup> The bulk of the skins purchased from Clifford are made from unsplit sheepskins<sup>5</sup> by a process which the producer describes as "combination tannage." This involves, first, tanning of the skins by immersing them in a solution of chrome salts applied in a drum for a period of three or four hours. Then, after certain further preparatory operations, the skins are placed in another drum where

<sup>3</sup> Most of the sheepskin used in making chamois in the United States is imported from New Zealand due to the fact that the skins must be sufficiently thick for splitting and the domestic variety is generally not thick enough for that purpose.

<sup>4</sup> Clifford is the main source of supply for respondents and the latter are Clifford's primary distribution outlet. Clifford has been in business since about 1949 and, in addition to the leather sold to respondents for use as chamois, it also makes leather for use in the manufacture of gloves, garments, and shoes. Clifford, which describes itself as a "manufacturer-converter," does not actually operate a tannery. Its tanning activities are performed in the plant of another tanner with the use of the latter's employees, but subject to the supervision of Clifford's own tanner and with a few pieces of its own equipment.

<sup>5</sup> About 10 percent of the skins are made from imported English fleshers and the balance of Clifford's skins are made from domestic skins, most of which are not thick enough for splitting.

a combination of vegetable and sperm oils is applied for several hours. The skins are then permitted to dry off and the bulk of them are fed through an abrading machine where a certain portion of the top grain layer is removed by buffing.<sup>6</sup> Since the natural color of the skins made by this process is of a bluish or greenish cast, a small amount of dye is introduced into the oil drum during the oiling process to give the skins a color similar to that of oil-tanned chamois.

As far back as 1937, the Commission in the *Seld Leather Co.* case, 24 F.T.C. 1237, recognized that the accepted meaning of the term chamois was that it was an oil-tanned flesher or under-split of a sheepskin which had been tanned after splitting, such meaning having come to be accepted by the trade and the public after the skin of the original chamois of Alpine antelope had become exhausted for commercial purposes over forty years prior thereto.<sup>7</sup> While the order in that case prohibited the word chamois from being used to describe a leather product not made from the skin of the Alpine antelope or from oil-tanned sheepskin fleshers, it did permit sheep-skin fleshers tanned by a formaldehyde and alum process to be designated as "white chamois." This latter designation was apparently permitted on the basis of the definition of chamois leather contained in the dictionary of leather terminology published by the Tanners Council of America which, after defining "Chamois Leather" as meaning an oil-tanned sheepskin flesher, provided a special definition for "White Chamois." However, in another decision handed down later in the same year, *Pigro Chamois Company*, 25 F.T.C. 929, the Commission's order restricted the use of the term "chamois" to the skin of the Alpine antelope, or to sheepskin fleshers tanned in oil "without the use of alum, chrome, or formaldehyde," and dropped all reference to "White Chamois." In a subsequent decision in 1939, *Canadian Chamois and Leather Corporation*, 28 F.T.C. 1457, the Commission again restricted the use of the word chamois to the skin of the Alpine antelope and to oil-tanned sheepskin fleshers.

Respondents' contention that their skins may properly be called chamois is based mainly on developments which have taken place subsequent to the Commission's decisions in the above cases. Re-

<sup>6</sup> It was estimated by one of respondents' witnesses that about 25 percent of the skins are sufficiently thick to permit removal of the top grain by splitting after processing was otherwise completed.

<sup>7</sup> In the proposed findings filed by counsel for respondents, reference is made to the fact that the decision in the *Seld* case in several places uses the expression "oil-dressed," rather than "oil-tanned." Counsel apparently takes the position that the term "oil-dressed," as used in the decision, refers to something different from "oil-tanned." However, it is clear from a reading of the decision as a whole that both terms were used synonymously in the findings and order of the Commission and that the reference intended was to sheepskin fleshers tanned in oil.

spondents rely particularly on the fact that in December 1949, the specification governing the purchase of chamois leather by United States Government agencies was changed so as to recognize "combination-tanned" sheepskin fleshers as a type of chamois leather, and quantities of respondents' skins were purchased under this specification and a later one which superseded it in 1951. However, in December 1953 this specification was withdrawn and a new one was issued which limited Government purchases of chamois leather to oil-tanned sheepskin fleshers.

So far as appears from the record, the specification of December 1, 1949, referred to by respondents, is the first Government specification recognizing as chamois any leather produced other than by traditional oil tanning. The earliest Federal specification in the record governing the purchase of chamois, which is dated November 19, 1935, specifically provided as to tannage:

"The leather shall be prepared by the process known as 'straight oil' tannage. No alum or *chrome* shall be used in the tannage process."  
[Emphasis supplied]

Subsequent specifications similarly provided for "straight oil" tannage, as being the only skins which would be purchased as chamois by the Government until the specification of December 1, 1949.

The latter specification, which was issued as an interim specification, was based on the recommendation of the Federal Technical Committee on Leather and Leather Products, a Committee consisting of Everett L. Wallace, Chief of the Leather Section of the National Bureau of Standards, U. S. Department of Commerce, and representatives of other Government purchasing agencies. The specification recognized two types of chamois leather as suitable for purchase by Federal Government agencies, one of which is described as "Type I.—Oil-tanned" and the other as "Type II.—Combination-tanned." With respect to the Type II leather, the specification does not define the term "combination-tanned" but merely states that the leather "shall be tanned by a process known commercially as 'combination-tanned.'" The term is, however, specifically defined in the general Federal specification on leather and methods of testing leather, dated January 19, 1953, which defines combination tannage as follows:

"Formerly tanned with a blend of vegetable fats. Today, tanned with two or more types of tanning materials, such as chromium compounds and vegetable extracts, or chromium compounds and synthetic tannings."

The interim specification was superseded on June 1, 1951, by a so-called permanent type of specification which likewise provided for the same two types of chamois as the interim specification. This was

revised in November 1951 but continued to recognize two types of tannage. It should be noted, however, that all of the specifications recognizing two types of tannage for chamois leather, specifically required that the leather be made from "sheepskin fleshers" or "flesh splits of sheepskin."

The reason for the change in specifications giving recognition to "combination-tanned" leather as a type of chamois was, according to the testimony of Everett L. Wallace, Chairman of the Committee which approved the new specification, that the Government had experienced some difficulty in obtaining a sufficient supply of acceptable chamois skins made by the traditional oil-tanned method and that being aware there was on the market a so-called "chamois-type material" made of sheepskin fleshers but tanned by another method, it was felt the Federal Specifications should be modified to permit the purchase of such leather by Government agencies as a type of chamois.

Purchases of "Type II chamois" under the revised specification were made by various Government agencies from time to time, including some purchases from respondents. The 1951 specification continued in general use until December 9, 1953, when it was superseded by an interim specification which dropped all reference to "Type II" or "combination-tanned" chamois, and limited the purchase of chamois by Government agencies to the traditional oil-tanned flesh splits of sheepskin. So far as appears from the record, the interim specification of December 1953 is still in effect and purchases are being made under it.<sup>8</sup>

According to Everett L. Wallace of the leather technical committee, the reason for the change in the specification was that the Type II leather was not meeting the requirements of the agencies and they had requested the committee to revise the regulations. It may be noted, in this connection, that in a letter written in July 1953 by Wallace to the President of Clifford Leather Company in response to a letter of inquiry from the latter concerning a projected change

<sup>8</sup> Counsel for respondents place some reliance on the fact that the latest specification is designated an "interim" specification, and point out that as late as September 1954 a Navy Department invitation to bid requested bids on Type II as well as Type I chamois. It is argued that as an "interim" specification its use by Government agencies was optional. It may be noted, however, that the procurement of chamois for civilian agencies is all handled centrally through the General Services Administration, which is the agency that issued the December 1953 specification and upon which use of the specification is mandatory. While the military agencies also purchase chamois to meet their own requirements, they have, as a matter of practice, conformed to the December 1953 specification. Insofar as the Navy invitation of September 1954 is concerned, the examiner is satisfied that the reference to Type II leather was due to an administrative error which was later rectified. There is no evidence in the record of any purchases of Type II leather by Federal Government agencies since December 1953.

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with respect to Type II chamois, Wallace gave as the reason why a change in the specifications was being considered, the fact that some of the chamois purchased by Government agencies was used on orthopedic devices and for similar purposes where it came in close contact with the skin, and that chrome-tanned leather might cause dermatitis in some individuals. However, in his testimony Wallace indicated that, apart from such reasons, the Type II chamois had not proved to be satisfactory because of its lack of water absorption.

Although the change in the Government specification which limited Government purchases of chamois leather to oil-tanned sheepskin fleshers did not occur until December 1, 1953, the change was foreshadowed in the general specification covering leather products and the methods of testing same, which was issued January 19, 1953. This specification adopted a definition of chamois leather, based on that used by the Tanners Council of America, as follows:

"A soft pliable absorbent leather which is recognized in this country and abroad as being made from the innerside of a sheepskin, known technically as a flesher, from which the outer or grain side has been split prior to tanning. While chamois leather is now tanned by the classic straight fish oil tannage, it is not the intent of this definition to exclude other tannages which may be developed, that will commercially produce leather from sheepskin fleshers meeting all the recognized performance characteristics common to commercial oil tanned chamois leather."

It may be noted that while this definition recognizes that other tannages "may be developed" which "will" produce leather from sheepskin fleshers meeting the performance characteristics of oil-tanned chamois, it makes no mention of the combination-tanned or chrome-tanned leathers then in use as falling within this category.

*C. Contentions and Conclusions*

Respondents' position in this proceeding is, in essence, as follows: (1) That the skins sold by them are produced by the method known commercially as combination tannage; (2) that combination-tanned skins have come to be accepted by the trade and by Government purchasing agencies as chamois; and (3) that leather produced by combination tannage has all the essential performance characteristics of oil-tanned chamois. To this, counsel supporting the complaint makes the following counterargument: (1) the fact that the Federal specifications for a period of several years permitted the purchase by Government agencies of combination-tanned leather as a type of chamois, cannot have the effect of changing the accepted meaning of the term chamois; (2) that respondents' skins did not meet the

Government specifications even during the brief period when combination-tanned skins were purchased as chamois; and (3) that respondents' skins do not possess the performance characteristics of traditional oil-tanned chamois leather. The respective contentions of the parties are considered below in the light of the evidence and of the applicable legal principles.

1. The effect of the Federal specifications

There is no question in the mind of the hearing examiner that until the issuance of the Federal specification of December 1, 1949, recognizing combination-tanned fleshers as a type of chamois, for purposes of Government purchasing, the commonly accepted meaning of the term chamois was, as it had been for a period of fifty years since the chamois antelope had become extinct, that it referred to the oil-tanned flesher of a sheepskin. While there is some indication that skins made by the so-called combination-tannage method had been on the market for a period of time prior to the issuance of the 1949 specification, the record is lacking in substantial evidence that skins produced by this method had received any widespread acceptance as chamois leather up until that time. The question presented, therefore, is what effect the Federal specification, which was in effect for about four years, had in modifying the existing understanding of what constitutes chamois leather. Placing respondents' position in its proper legal perspective, the basic question is whether the action of the General Services Administration, which issued the specification, in permitting the purchase of combination-tanned leather as chamois had the effect of establishing a new, secondary meaning of the term "chamois."

This question must be resolved in the light of the governing legal criteria. The law is now well settled that in order to justify labeling a product in accordance with an alleged secondary meaning, it must appear that the secondary meaning has become "so thoroughly established that the description which the label carries has ceased to deceive the public \* \* \*." *FTC v. Winsted Hosiery Co.*, 258 U. S. 483, 493. It is not enough to show merely that a secondary meaning exists but it must appear that the secondary meaning has become "as firmly anchored as the first one." *FTC v. Algoma Lumber Co.*, 291 U. S. 67, 80. The high degree of proof necessary to establish the defense of secondary meaning has been emphasized in a recent decision of the Court of Appeals for the Third Circuit, based on the holding in the *Algoma Lumber* case, where the Court stated:

A high degree of proof was essential in establishing the defense of secondary meaning before the Commission. The very wording of petitioner's answer recog-

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nizes that, in the words of Mr. Justice Cardozo, it had to show that “\* \* \* by common acceptance the description, once misused, has acquired a secondary meaning as firmly anchored as the first one.” *Federal Trade Commission v. Algoma Co.*, 291 U. S. 67, 80. It could not prevail if its evidence was of a quality “\* \* \* short of establishing two meanings with equal titles to legitimacy by force of common acceptance.” *Ibid.* We think that petitioner failed to establish the fact of secondary meaning under those governing principles.” (*C. Howard Hunt Pen Company v. FTC*, 197 F. 2d 273, 280.)

Applying these principles to the facts in the instant case, it is the opinion of the hearing examiner that respondents have failed to sustain the defense of secondary meaning. While the fact that Government purchasing agencies did for a period of several years recognize so-called combination tanned chamois as a type of chamois, is a fact to be taken into consideration in determining whether respondents have fulfilled the burden of proof with respect to establishing the defense of secondary meaning, it is by no means conclusive, but is merely a piece of evidence to be weighed alongside the other evidence in the record. *FTC v. Algoma Lumber Co.*, *supra* at 75. The overwhelming weight of the evidence in the record is to the effect that the established meaning of the term chamois had been and continues to be that it is made from the fleshier of a sheepskin which has been tanned in fish oil after splitting. That this has been and continues to remain the accepted meaning of the term was established by counsel in support of the complaint through the testimony of a number of reliable witnesses, including several tanners of chamois leather, the Chief of the Leather Section of the National Bureau of Standards, a number of distributors of chamois leather, and an outstanding representative in the field of leather chemistry whose firm is engaged in the manufacture of various chemicals and oils used by tanners of various kinds of leather. The only witnesses to testify to the contrary were the individual respondent, Bloch, and two representatives of Clifford Leather Company, which produces the skins sold by Bloch. Considering the qualifications, knowledge and experience of the various witnesses, and the nature and quality of their testimony, it is the opinion of the examiner that the evidence adduced by respondents falls far short of counterbalancing the evidence offered in support of the complaint.<sup>9</sup>

<sup>9</sup> The respondent Bloch has been in the business for a great many years as a distributor of chamois leather, but has had no experience in chamois tanning. Under his definition a chamois would have to be yellow (otherwise it would meet consumer resistance) and be able to absorb water; otherwise, it would make no difference how it was tanned or what part of the skin it was made from—underside or grain side. The witness Clifford Bleeth of Clifford Leather Company has been in the business only since 1949 and has very limited experience in chamois tanning. The other witness, Eugene Spritzer, who is Clifford's tanner, has been in the leather business since about 1936 but a large part of his experience has been in dyeing operations and in the making of leathers for use in garments.

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In support of their position with respect to the meaning of the term chamois, respondents place reliance upon the fact that it has been stipulated that "the average consumer does not know how a chamois is made or of what material it is" and that when purchasing a chamois he "seeks a product which may be used for polishing silver and other metals and woods, for washing and cleaning windows, to remove water from his gasoline and for other purposes." It is apparently the position of respondents, based on these stipulated facts, that while there may be an understanding of the term chamois as being limited to an oil-tanned sheepskin fleshier which exists in the mind of certain tanners and distributors of the product, it is one which does not exist in the minds of the average consumer.

In the opinion of the examiner, this argument is lacking in merit. While it may be that the average consumer knows little or nothing of the technicalities with respect to the leather which he purchases as chamois, he relies upon the knowledge and understanding of those through whom the product is distributed to the public that he will be purchasing a product which is in essence the product that has traditionally been sold to the public under the name of chamois and has been accepted by it as such. Moreover, because of the physical similarity of respondents' product to the genuine article (due largely to the dyeing) even experts have difficulty in distinguishing the two without a chemical examination or analysis. The stipulated facts concerning the public's alleged lack of knowledge are no different here from those in the *Seld Leather Co.* case, *supra*, where it was found that "the general public does not know what a chamois skin as now known is made from." Such a situation will exist generally where a technical name is being used. Nevertheless, persons to whom such product is being distributed and competitors are entitled to protection against mislabeling, as well as the general public. *Hunt Pen Co. v. FTC*, *supra* at 280; *FTC v. Algoma Lumber Co.*, *supra* at 78; *Koch Laboratories, Inc.*, 48 F.T.C. 234, 251.

In view of the above findings as to the accepted meaning and understanding of the term "chamois," and the lack of substantial evidence of a commonly accepted secondary meaning, it is actually unnecessary to consider the other subsidiary questions raised above, *viz.*, (1) whether, even assuming the Government specifications created an additional type of chamois leather, respondents' skins met the requirements of the specifications; and (2) whether respondents' skins possess the essential characteristics of chamois leather. However, since the evidence on these issues is already in the record, and to the

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extent that the Commission may consider it material, the examiner will consider below the other contentions which have been raised.

2. Compliance with the Government specifications for  
"Type II chamois"

Counsel supporting the complaint has presented two main arguments why, even under the specifications which were in effect between 1949 and 1953, respondents' skins cannot qualify as chamois, *viz.*, (1) the bulk of the skins are not made from fleshers and (2) the skins are not combination tanned, as that term is used in the specifications and understood in the industry.

It is not disputed that the bulk of the skins which respondents purchase from Clifford Leather Company are not sheepskin fleshers but are made from unsplit sheepskin from which portions of the top grain have been removed by a buffing or abrading process. Since even during the period when "Type II chamois" was recognized for Government purchase, the specifications required that it be made from sheepskin fleshers, respondents' skins would clearly appear not to qualify.

However, respondents make the argument that the purpose of splitting is largely to obtain the top grain layer of the skin as a commercial by-product of the splitting. The evidence in the record does not sustain respondents' position in this respect since it appears that one of the important reasons for splitting the skin is to remove the imperious grain layer so as to make the underside more receptive to tanning. While it may be possible to remove the grain layer by other methods than splitting, respondents' methods of abrading or buffing does not remove all or even substantially all of the grain layer.<sup>10</sup> Since the grain and flesh layers do not stretch at the same rate, if any appreciable amount of the grain is not removed, the skin will not stretch uniformly and will eventually rip and crumble. In any event, irrespective of the relative merits of the splitting method versus the buffing method for removal of the grain layer, the fact remains that the specifications called for sheepskin fleshers, and even though another type of tannage may have been temporarily given an aura of legitimacy, it was nevertheless limited to skins made from sheepskin fleshers. This requirement, respondents' skins did not fulfill.

<sup>10</sup> A test made in October 1952 by Everett L. Wallace of the National Bureau of Standards, on some of respondents' skins, which had been purchased by a Government agency, showed that significant portions of the grain had not been removed. The respondent Bloch admitted in his testimony that the buffing removes only "[p]art of the grain." In a letter addressed to Wallace by Clifford L. Bleeth, President of Clifford Leather Company, under date of August 30, 1949, the following statement indicative of the possible amounts of unremoved grain layer, appears: "We have perfected a process of removing 50-75% of the grain \* \* \*."

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Counsel supporting the complaint also makes the additional argument that respondents' skins were not even "combination tanned," aside from the fact that they were not fleshers. It may be noted in this connection that the specifications for the purchase of chamois leather did not specifically define combination tannage but merely required that the skins should be "tanned by a process known commercially as 'combination-tanned.'" However, the general leather specification of January 19, 1953, defines combination tannage as the tanning of leather with "two or more types of tanning materials, such as chromium compounds or vegetable extracts, or chromium compounds and synthetic tannings." In addition, Wallace's testimony indicates that at the time the December 1949 specification was issued, the Committee had in mind a sheepskin flesher then on the market which was tanned with a combination of chromium and a sulphyanyl chloride synthetic tanning agent.

According to the answer filed by respondents in this processing, the combination tannage used in the processing of their skins is one in which "both oils and chrome and other chemical agents are used." The President of Clifford Leather Company, Clifford Bleeth, described combination tannage, in his testimony, as a process by which "either a vegetable or a mineral tanning agent is combined with another product, usually oil, in such a way as to prevent putrefaction of the skin \* \* \*." It would thus appear that the combination tannage purportedly used by respondents' supplier is primarily one in which chromium is combined with certain oils. However, it is clear from the record as a whole that respondents' skins are completely tanned in the chromium compounds in which they are first immersed, and that while a combination of sperm and vegetable oils is thereafter applied, this is in the nature of a dressing or lubricating operation and is not a part of the tanning process.<sup>11</sup> While the witness Spritzer, Clifford's tanner, did refer to a synthetic tanning agent being used before the oils are applied, it seems evident that this is applied primarily to make the skins receptive to absorption of the oils rather than to tan them. It may be noted, in this connection, that the witness Bleeth referred to this process of making the skins receptive to the oils as "mordanting." However, the term mordant generally refers to a substance which couples with a dyestuff so as to produce a fixed color in fiber or leather, and is not a tanning agent. Since a dye is

<sup>11</sup> Clifford's tanner, Spritzer, conceded that the skins were completely converted into leather by the chromium tanning and that neither the vegetable nor the sperm oils used thereafter is a tanning agent. Bleeth also conceded that the tanning took place by the use of the mineral (chromium) tanning agent and that the oils were supplied as part of a "dressing" operation.

actually introduced into the lubricating oils, it may be that this is the purpose of the so-called synthetic tanning.

From the evidence as a whole, the examiner is of the opinion that respondents' skins are essentially tanned by the application of chromium rather than by combination tannage. In any event, the evidence offered on behalf of respondents is so confusing that no affirmative finding can be made that their skins are combination tanned.

3. The performance qualities of respondents' skins

In addition to their argument based on the new, additional or secondary meaning acquired by the term chamois, respondents have also sought to justify the designation of their product as chamois on the ground that it possesses all the essential performance characteristics of chamois leather. In the opinion of the hearing examiner, the fact that respondents' product is as good or almost as good as chamois produced from oil-tanned fleshers is of no legal significance. If, as has already been found, a genuine chamois is the oil-tanned flesher of a sheepskin tanned after splitting, the fact that respondents' product will serve the same or a substantially similar purpose is wholly immaterial. A similar argument was made by respondents in the *Hunt Pen Company* case, *supra*, based on the fact that the tipping materials used in their pens is as good as "iridium," that being the name respondents were charged with improperly using on their pen points. The Court disposed of this argument, citing a similar holding by the Supreme Court in the *Algoma* case *supra*, as follows: (p. 280)

It is of no moment, in this proceeding in the public interest, that what the purchaser gets in the tipping material used on petitioner's pen points may be as serviceable as or almost as serviceable as iridium. "The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. \* \* \* In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance." *Federal Trade Commission v. Algoma Co.*, *Supra*, page 78. There is prejudice also to other manufacturers of pen points who, as this record shows, purchase the same tipping material as does petitioner but who do not mark their points with the word "iridium."

To the same effect see *Benton Announcements, Inc. v. FTC*, 130 F. 2d 254.

In the light of the above authorities there would appear to be no reason to determine whether respondents' product possesses all or most of the attributes of genuine chamois leather. However, since the complaint alleges that respondents' skins do not possess the same characteristics as chamois and since considerable evidence was offered

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on this issue by both sides, and to the extent that the Commission may possibly regard these facts as material, the hearing examiner has undertaken to discuss this issue below.

There is no substantial dispute with respect to what are the recognized performance characteristics of chamois leather. The more important of these characteristics are set forth in the definition of chamois leather by the Tanners Council of America, which was adopted by the General Services Administration in its general specification on leather testing dated January 19, 1953, as follows:

"\* \* \* High water absorption, low water retention after wringing, rapid rate of wetting, speed and efficiency of filtering water from gasoline, ease with which the leather may be cleaned without materially changing the above characteristics, and nonirritating effect when in contact with the skin."

The above definition also provides that these performance characteristics will not be "changed appreciably by repeated washing of the leather."

While there are certain recognized performance characteristics of chamois leather, the record does not disclose that there are any precise standards in the industry for determining whether particular skins claimed to be chamois fulfill these requirements. Thus, for example, while one of the paramount requirements of chamois leather is that it shall possess "high water absorption," it does not appear that there is any recognized standard in the industry with respect to the amount of water a skin must absorb before it can be said to possess "high water absorption." However, the Federal specifications on chamois leather have laid down certain definite norms for determining whether leather meets the required performance characteristics, and it was on the basis of these standards that much of the evidence in support of and in opposition to the complaint was based.

During the period from December 1949 to December 1953 when the specifications recognized the so-called "Type II—combination-tanned chamois" the specifications provided the following definitive standards for determining some of the more important performance characteristics of chamois leather:

1. Water absorption—the ability to absorb water to the extent of not less than 200% of the original weight of the leather.
2. Rate of wetting—the ability to absorb water rapidly enough to sink to the bottom of a container in not less than 60 seconds.
3. Removal of water from gasoline—the ability to remove 100% of the water added to gasoline.

These specifications also contained a test for determining flexibility after wetting, but established no quantitative standard of measure-

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ments, the specifications merely providing that the leather should be "soft and pliable when tactually examined" after treatment in water.

The current specification of December 9, 1953, which restricts Government purchases of chamois to oil-tanned fleshers, contains similar tests for determining compliance with the specification, except that higher performance requirements have been established in the following respects: (1) The water absorption capacity requirement has been increased from 200% to 450%; (2) a new test called "water removal after wringing" has been established, with a requirement that the amount of water wrung out should be 250% of the original weight of the leather; (3) the rate of wetting test has been made stricter by requiring the specimen to sink in not less than 30 seconds instead of 60 seconds; and (4) the requirement for removal of water from gasoline provides that all of the water has to be removed within 60 seconds, unlike the old specification which set no time limit on the requirement for removal of all water from gasoline.

A considerable amount of evidence was offered by both counsel supporting the complaint and respondents with regard to the conduct of certain scientific tests to determine the ability of respondents' skins to meet the performance requirements of chamois leather. Except for several tests conducted by the National Bureau of Standards, the other tests were conducted by private testing companies. For the most part the tests were conducted in accordance with the testing procedures provided for in the Federal specifications and were for the purpose of determining whether the skins tested met the requirements of the specifications.

Despite certain differences with respect to items where the element of subjective analysis was involved, the tests are strikingly similar in their results insofar as they involve matters which are subject to measurement in quantitative terms. This is particularly true in the case of the water absorption and rate of wetting tests. Thus, a test conducted by the United States Testing Company, which was offered by counsel supporting the complaint, shows a water absorption for three of respondents' skins tested of 235%, 321% and 288%, respectively, while two tests made for respondents by Foster D. Snell, Inc., disclose results of 284%, 272% and 318% on one occasion, and 265% and 315% on a second testing. With respect to the rate of wetting test, the United States Testing Company tests disclosed that respondents' skins would sink in 17.5, 27, and 19 seconds, respectively, while the Snell tests showed a rate of wetting of 18, 13 and 24 seconds on one occasion, and 20 and 18 seconds on a second occasion.

The argument of counsel supporting the complaint based on these tests, that respondents' skins do not meet the performance standards

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of oil-tanned chamois, rests largely on the ground that respondents' skins do not meet most of the requirements of the latest Federal specification issued in December 1953, while most of the oil-tanned skins tested do meet these requirements. Thus, the tests disclose that all of respondents' skins failed to meet the latest requirement for water absorption of 450% and the requirement for filtering gasoline within 60 seconds, and that all but one of the skins failed to meet the requirement for water expulsion of 250%.<sup>12</sup> It further appears that of nine oil-tanned skins tested in one of the tests, all but two met the requirements of the latest specification.<sup>13</sup>

It should be noted, however, in fairness to respondents, that the specification against which counsel supporting the complaint has sought to measure respondents' skins is one which went into effect subsequent to the time when respondents sold to the Government and reflects a stricter set of requirements than were previously applicable. It may be noted, in this connection, that the tests disclose that respondents' skins did meet most of the quantitative requirements of the specifications which were applicable at the time they were selling to the Government, with two exceptions,<sup>14</sup> in that they had a water absorption rate in excess of 200%, a rate of wetting of less than 60 seconds and they filtered all of the water out of gasoline within an unspecified time, as provided in the specifications.

However, it is not necessary to determine the merits of the controversy with respect to the performance characteristics of respondents' skins on the basis of whether they meet the requirements of the Federal specifications which were in effect between 1949 and 1953, or the stricter requirements of the specification which went into effect in December 1953. There is other evidence in the record which is dispositive of this issue without having to determine the precise metes and bounds of the criteria for testing the performance characteristics of chamois leather. This evidence relates to the question of whether the oils with which respondents' skins are treated after tanning will or will not wash out as a result of the normal use of the skins, thereby materially affecting their ability to act in a manner characteristic of chamois leather.

<sup>12</sup> One of the samples tested by the Bureau of Standards showed a water expulsion capacity of 265%.

<sup>13</sup> These two skins show a water absorption of 352% and 371%, and a water expulsion of 156% and 195%.

<sup>14</sup> In one of the tests conducted by the United States Testing Company, the skins were subjected to repeated washing and drying to determine their water absorptive capacity and were found after such test to have a water absorption of only 156%. In one of the tests conducted by the National Bureau of Standards, the samples showed a rate of wetting of 118 seconds as against a requirement of 60 seconds. However, it should be noted that a later test conducted by the Bureau showed a rate of wetting of 38 seconds and 31 seconds on two skins tested.

There is no dispute in the record that it is the oil with which chamois leather is tanned or dressed which gives it the ability to act like a chamois. It is the oil which gives it its soft, suede-like quality and its capacity to absorb, expel and filter water rapidly. In the case of traditional oil-tanned chamois, the oil is the instrumentality by which the skin is tanned and which imparts to it the qualities which make it a chamois. By the process of oxidation certain chemical changes take place in the oil which cause it to combine with the hide substance. Through this medium the skin is not only tanned but it receives the soft, absorbent qualities of chamois leather. In the case of respondents' skins, the tanning of the skins in chrome merely prevents putrefaction of the skin and changes it into leather but does not give it any of the characteristics of chamois. It is not until the skin has been treated or dressed in the combination of sperm and vegetable oils that it takes on any of the characteristics of chamois leather.<sup>15</sup>

It is the position of counsel in support of the complaint that the method used by respondents' supplier in dressing or treating the skin in oils after it has been tanned does not cause the oil to effectively combine with the skin, as in the case of oil-tanned chamois, and that after a relatively brief period of normal use the oil will wash out, thereby causing the skin to lose whatever chamois characteristics it may have had. On the other hand, it was the testimony of the tanner employed by respondents' supplier that the method used by his company in treating the skins with oils causes the oils to "penetrate fully into the skin, and it locks itself right in with the skin." According to this witness, while a certain amount of the oil will wash out with use, enough of it will be retained to give the skin suppleness and the ability to perform like a chamois. The basic question, therefore, is whether the oils will or will not wash out of respondents' skins.

From his evaluation of the testimony and other evidence in the record, the hearing examiner is convinced that the position taken by counsel supporting the complaint on this issue is the more tenable one. In reaching this conclusion the examiner relies particularly on the testimony of Clarence M. Morrison, which was corroborated to a considerable extent by the testimony of Everett L. Wallace of the Bureau of Standards, and by other reliable testimony and evidence in the

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<sup>15</sup> Clifford Bleeth, President of Clifford Leather Company, testified in this respect as follows:

"It [the skin] is not complete at the point of tannage \* \* \*. It is nothing at that state other than just being a skin that will not rot or putrefy \* \* \*. The purpose of the last process [putting the oils into the skin] is to accomplish, or to make the chamois skin. Without that process, quite frankly, without the finishing process, the skin is really nothing at that state." (R. 536-537.)

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record. Morrison is President of the company which manufactures all kinds of chemically-treated oils for industrial processing, including oils used in the manufacture of leather. He has been in business for 34 years, holds a B.S. degree in chemistry, has served as Director of the American Leather Chemists Association, and has lectured on leather chemistry. His company was the first to manufacture so-called non-ionic oils, such as those used in the treatment of respondents' skins. It was Morrison's view that the dressing of leather with oils, as performed by respondents' supplier, is essentially a fat-liquoring operation similar to that used in the making of garment leather, the principal function of which operation is to coat the fiber of the skin on top of another tannage so as to give it a certain softness and stretch. However, it was his opinion that the oils would not become fixed to the hide substance to any great extent and would wash out after a relatively short period of use, unlike oil-tanned chamois where the oil combines chemically with the skin and will not wash out.<sup>16</sup> Morrison's views in this respect were supported by certain tests which he made on respondents' skins and on oil-tanned skins, and which showed that the oils in respondents' skins are soluble in water while those in oil-tanned skins are not.

While it is true that a number of the tests in the record show that respondents' skins have the ability to absorb a considerable amount of water, it must be noted that these tests were conducted mainly on new pieces of leather which had not been subjected to continuous soiling and washing. There is, however, one test in the record which gives support to Morrison's testimony. This is a "comparative washing test" conducted by the United States Testing Company on several of respondents' skins and on several oil-tanned skins. The specimens tested were subjected to a process of soiling and washing which was repeated nine times. At the end of the test the oil-tanned skins showed a water absorption of 500%, while respondents' skins were only 156%. Likewise, the oil-tanned skins were found to be "relatively soft and supple" while respondents' skins were "stiff and boardy." The samples tested, which were received in evidence, bear out the qualitative descriptions given to them by the tester.<sup>17</sup>

<sup>16</sup> The witness Wallace corroborated Morrison's testimony that it is not possible for the oils applied to respondents' skins to become locked into the skins, as claimed by respondents' supplier.

<sup>17</sup> Counsel for respondents suggests that the tests conducted by this laboratory should not be accepted because they were performed for Drueding Brothers, Inc., a competitor of respondents. However, the undersigned does not regard this as a reason for rejecting tests which otherwise appear to be valid. Significantly, the results of the other tests conducted by this laboratory comport substantially with similar tests which were conducted by the laboratory which made respondents' own tests.

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According to the witness Morrison, there is nothing new or unusual about the process used by respondents' supplier. It is essentially the same as that used in the making of leather for gloves, garments, slippers and ladies' handbags in which the skins are tanned in chrome and then go through a fat-liquoring process to make the leather soft and supple. The only difference in the operations is that respondents' skins receive a greater application of oil.<sup>18</sup> Eugene Spritzer, the tanner for respondents' supplier, also conceded that the oiling operation used by them had basically the same purpose as fat liquoring, namely, to put back the oils which had been removed by tanning, but denied that it could be called fat liquoring "because we use an excess amount of oil in there." However, according to Morrison, the excess amount used would have no lasting effect since the oil is water soluble and will wash out. As pointed out by Morrison, many of the soft leathers used in the making of gloves, garments and slippers will also absorb water, filter gasoline and otherwise act like a chamois for a time, but after a period of cleaning and washing the oils will wash out and they will cease to perform effectively.

Counsel for respondents urges that Morrison's testimony should not be accepted because his firm sells oils to respondents' competitor, Drueding Brothers, and that presumably he is not an unbiased witness. The examiner cannot accept this as a reason for rejecting Morrison's testimony. In the first place, Drueding Brothers is only one of many customers of Morrison's firm and is not even among its larger customers. Aside from this, however, he demonstrated both in his demeanor and in his testimony a high degree of integrity and familiarity with the field about which he spoke.

The only witness called by respondents with any degree of technical knowledge was the witness Spritzer, who is in charge of tanning for respondents' principal supplier, and who is also an interested witness. While holding a certificate from Pratt Institute, School of Leather Technology, his technical training and experience, particularly in the field of leather chemistry, do not compare with that of Morrison. Spritzer appeared to be a highly nervous witness and impressed the undersigned as being somewhat uncertain of himself. To a considerable extent his testimony concerning the nature and properties of the oils used by him in the processing of the skins was based on information which he received from third persons from whom he purchased such oils. Morrison, on the other hand, as the manufacturer of such oils, was certainly in a position to know what such oils will do.

<sup>18</sup> Morrison's testimony was corroborated to a large extent by Andrew Van Derslice, a tanner of leather for shoes and hatbands.

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Morrison's testimony was corroborated in important respects by that of other witnesses, by one of the tests conducted by United States Testing Company mentioned above, and, as will hereafter appear, by some of the practical tests which were conducted by various users of respondents' skins.

Counsel for respondents place considerable emphasis on the fact that large numbers of respondents' skins have been sold to various users with a minimum of complaint. While this fact may be entitled to some weight,<sup>19</sup> it cannot counterbalance the more direct and persuasive testimony in the record. Significantly, aside from the testimony regarding a lack of complaints, respondents offered no testimony by actual users of their skins.<sup>20</sup>

On the other hand, considerable testimony was offered by counsel supporting the complaint from persons who had actually used respondents' skins and found them wanting. These included window cleaners who use chamois skins in washing windows, and employees of garages and auto laundries who use chamois in the washing of automobiles. These witnesses had received some of respondents' skins for the purpose of testing them and actually used them in their work for a period of days or weeks. Although some of these witnesses found respondents' skins to be satisfactory to a greater or lesser degree, most of them testified that respondents' skins did not work satisfactorily because they wouldn't absorb water or couldn't be wrung out sufficiently to get the window or automobile dry. Several of the witnesses corroborated Morrison's testimony to the effect that while respondents' skins did appear to absorb water for a while, after several days they began to lose their effectiveness.<sup>21</sup>

Counsel for respondents apparently accept as valid what they refer to in their reply to proposed findings as "the unrehearsed testimony" of certain of these witnesses who were called to testify in Wash-

<sup>19</sup> See however, *Independent Directory Corp. v. FTC*, 181 F. 2d 468, 471 holding that: "The fact that petitioners had satisfied customers was entirely irrelevant."

<sup>20</sup> Aside from the testimony of respondent Bloch that he received only a small number of complaints, the only testimony along these lines was that of two retailers in Philadelphia who handled respondents' product and who testified that they received very few complaints from their customers. One of these retailers sells between \$1,000 and \$1,500 worth of respondents' skins a year out of a total business of \$1,000,000 and the other sells a similar amount of respondents' skins.

<sup>21</sup> One of these witnesses, a car washer, testified in this respect as follows:

"This particular chamois [respondents'], for the first day, maybe first two days was fine, but after a period of being immersed in water quite a bit the chamois seems to harden, I mean, it was not as soft as that particular skin there [an oil-tanned skin] and it also pushed the water around, it did not absorb water as rapidly or as fully as that particular chamois" (R. 878).

Another witness who used the skin for washing windows and found that it was unsatisfactory because you couldn't wring the water out of it, testified:

"Up to the third day, I thought I could do something with it, but I have not" (R. 1120).

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ington, D. C. and who had received skins for testing from counsel supporting the complaint, but question the testimony of a number of such witnesses who testified in Philadelphia and received skins for testing through an employee of Drueding Brothers. The undersigned cannot discern any material difference in the tenor of the testimony of these two groups, and both groups impressed the examiner as equally unbiased and sincere.<sup>22</sup> Counsel for respondents also argue that the testimony of these witnesses indicates a preference for imported chamois as against domestic chamois and not any criticism of respondents' skins. However, while in a few instances witnesses did indicate a preference for imported chamois, the evidence does not establish any general preference in the trade such as that indicated by counsel.<sup>23</sup> Moreover, the examiner is satisfied that in most instances the criticism of respondents' skins was not based on any preference for imported chamois over the domestic variety but on the ground that respondents' skins just did not act like a chamois.

In the opinion of the examiner, the evidence above discussed sufficiently establishes that respondents' skins do not, after normal use, possess the essential characteristics of genuine chamois leather.

*D. Summary and Concluding Findings*

On the record as a whole, including the evidence discussed above, it is concluded and found as follows:

1. By branding, labeling, or otherwise describing certain of the leather products sold by them as "chamois" or "oil tanned chamois," respondents have represented, directly or by implication, that said product is genuine chamois leather.

2. Genuine chamois, as the term is now understood and used, and as understood and used for a great many years since the Alpine

<sup>22</sup> It is significant that one of the Philadelphia witnesses was one of the few who seemed to think respondents' skins were satisfactory, although he indicated that he preferred the oil-tanned Drueding skin which he customarily used (R. 861). Another Philadelphia witness also testified that respondents' skins appeared to work fine for a day or two, except that thereafter it began to harden and wouldn't absorb water (R. 878). On the other hand, most of the Washington witnesses complained that you couldn't wring the water out of respondents' skins. One of them testified that respondents' skins were "more like leather" and that it left "more water [on the window] than there was in the first place" (R. 1153).

<sup>23</sup> One of the witnesses who indicated a preference for imported chamois, conceded that he had had very little experience with the domestic variety and that his preference was based on the durability of the imported chamois rather than on the inability of domestic chamois to absorb water and clean (R. 824). On the other hand, another witness indicated his preference for domestic chamois precisely because of its greater durability (R. 1059). The preference of one witness for imported chamois was based on an unsatisfactory experience during the war (R. 1027). However, others indicated there was no general preference for imported skins (R. 1070) or that domestic skins compare favorably with imported ones (R. 1058, 1109).

antelope from which the name "chamois" derives became practically extinct, is a product made from the underside, commonly called "flesher," of a split sheepskin, which has been tanned in oil after splitting. Said product is soft and pliable, has a natural yellowish color, and is used in the manufacture of fine gloves and certain articles of clothing, for polishing silver and other metals and woods, for washing and cleaning windows and automobiles, to remove water from gasoline and for other purposes. It has a quick, high water absorption and low water retention when wrung out, and will return to its original soft and pliable state when dried.

3. The aforesaid branding, labeling or otherwise describing of their said leather products by respondents as chamois is false, misleading and deceptive. In truth and in fact, respondents' said product is not genuine chamois but is made from sheepskin from which portions of the grain side have been removed by buffing or abrading rather than by splitting and which has been chrome tanned rather than oil tanned. Said product has the same general appearance as genuine chamois by virtue of being treated, after tanning, with certain vegetable and sperm oils and by the addition of a yellowish dye to said oils. However, while respondents' said product will for a period of time absorb and release moisture and perform in other respects similar to genuine oil-tanned chamois, although not to the same degree, said product will, after a relatively short period of use, particularly when used or washed in water, lose a substantial part of the oils with which it has been treated and will lose much of its capacity to absorb and release water and to otherwise perform in a manner similar to genuine chamois, and will lose much of its soft and pliable qualities.

4. Through the use of the statement, "Buy direct from Tannery and Save," respondents have represented, directly or by implication, that they operate their own tannery in which the products sold by them are tanned. Said statement was, however, only made on a single occasion in 1952, and respondents have indicated that they do not intend to make such statement again unless they actually acquire and operate a tannery.

5. The aforesaid statement is false, misleading and deceptive in that respondents do not own, control or operate a tannery, but buy and have bought their said leather products from others.

6. Some dealers and others prefer to buy direct from the tannery, believing that in doing so they may be afforded better prices, services, and other advantages.

## III. Effect of the Unfair Practices

Respondents are now, and at all times mentioned herein have been, in substantial competition in commerce with other corporations and individuals and others engaged in the sale and distribution of leather products, including chamois skins. It is found that the use by respondents of the false, misleading and deceptive statements hereinabove has had, and, except for the use of the above statement concerning the operation of a tannery, now has, the tendency and capacity to mislead and deceive dealers and the purchasing public into the erroneous and mistaken belief that such statements were and are true and into the purchase of substantial quantities of respondents' products. As a result thereof, substantial trade in commerce has been, and except for the above statement concerning the operation of a tannery, is now being, diverted to respondents from their competitors and substantial injury has thereby been done and is being done by respondents to competition in commerce. It is further found that by branding, labeling or otherwise describing certain of their leather products as chamois or as oil-tanned chamois, respondents have placed in the hands of dealers a means and instrumentality by and through which such dealers may mislead and deceive members of the purchasing public into purchasing respondents' said products in the mistaken belief that they were purchasing genuine chamois skins.

## CONCLUSION OF LAW

It is concluded that the acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

## THE REMEDY

Respondents have urged that no order should issue which would restrict the use of the word "chamois" to oil-tanned sheepskin fleshers since this will tend to increase the price of chamois leather and foster a monopoly in a small number of firms who produce chamois leather in accordance with the traditional method. The undersigned cannot accept this argument. In the first place, while there is some evidence in the record concerning the operations of other chamois tanners, the record does not establish that these are the only chamois tanners in the United States or that they have a monopoly in the industry. Secondly, and more important, respondents' argument is wholly

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## Conclusion

irrelevant. The public is entitled to get the article it pays for even though a substitute article may be cheaper.<sup>24</sup> If there is any monopoly or tendency to monopoly among the suppliers of the bona fide article, there are remedies provided by law for reaching such practices, other than by allowing the public to be duped.

Respondents also urge that no order be entered with respect to the representation made concerning their operation of a tannery. In determining whether the order to issue herein should include a provision with respect to this practice, the undersigned has taken into consideration the fact that the practice was discontinued long prior to the issuance of the complaint, that it was used on only a single occasion, and that respondents have indicated they have no intention of resuming it. In addition to the above, the examiner has taken into consideration the apparent lack of intent to deceive or wilfulness with respect to the main violation charged, and the part played by agencies of the Federal Government in recognizing for several years, as a type of chamois, skins produced by a method other than classic fish-oil tanning. While the examiner is aware that intent to deceive and wilfulness are not necessary elements of the offense,<sup>25</sup> the absence of such evidence with respect to the main violation charged may appropriately be taken into consideration in determining whether the order to be issued herein should include a provision with respect to the discontinued practice. Under all the circumstances, the examiner is of the opinion that the public interest does not require such a provision in the order.

However, in view of the findings above made with respect to the improper branding, labeling and describing of certain of respondents' skins as chamois, and respondents' continued insistence that such skins may properly be so branded, labeled or described, it is the opinion of the hearing examiner that this proceeding is in the public interest and that an order to cease and desist from such practices should issue.

It has been urged that no order should issue against the respondent Benjamin E. Bloch. However, in view of the fact that this individual wholly owns and dominates the corporate respondent, it is the opinion of the examiner that effective enforcement of the order to be issued

<sup>24</sup> As stated by the Supreme Court in the *Algoma Lumber* case, *supra*, at page 78:

"But saving to the consumer, though it be made out, does not obliterate the prejudice. Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else."

See also *Benton Announcements, Inc. v. FTC*, 130 F. 2d 254.

<sup>25</sup> *Koch v. FTC*, 206 F. 2d 311; *Gimbel Bros. v. FTC*, 116 F. 2d 579.

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herein requires that it shall run against the individual respondent as well.<sup>26</sup>

Accordingly, it will be ordered that the corporate respondent and the individual respondent Benjamin E. Bloch cease and desist from engaging in the practice of misbranding or otherwise describing certain of the leather products sold by them under the name chamois, as hereinabove found. However, the complaint will be dismissed as to the individual respondent Ida Bloch, concerning whom the record fails to establish any connection with the illegal practices found.

## ORDER

*It is ordered,* That respondent Atlantic Sponge and Chamois Corporation, a corporation, and its officers, and respondent Benjamin E. Bloch, individually, and said respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of leather products, do forthwith cease and desist from branding or labeling such products as "Chamois," or in any other manner representing that such products are "Chamois" or are made from "Chamois" unless such products are made (1) from the skin of the Alpine Antelope, commonly known and referred to as Chamois, or (2) from the fleshers or undersplits of sheepskin which have been tanned in oil after splitting.

*It is further ordered,* That the allegations of the complaint alleging that respondents have violated the Federal Trade Commission Act by representing that they own or operate a tannery be, and the same hereby are, dismissed without prejudice.

*It is further ordered,* That the complaint be, and the same hereby is, dismissed as to respondent Ida Bloch, individually.

## OPINION OF THE COMMISSION

By GWYNNE, Chairman:

Complaint under Section 5 of the Federal Trade Commission Act was issued February 5, 1954 charging respondents with unfair methods of competition and unfair and deceptive acts and practices in the following particulars: (1) in representing that certain products sold by respondents were "chamois" leather; and (2) representing that respondents operated a tannery in which said products were tanned.

After hearing, the second charge was dismissed as to all respondents, and both charges were dismissed as to Ida Bloch. An order was

<sup>26</sup> See *Standard Distributors, Inc. v. FTC*, 211 F. 2d 7; *Consumer Sales Corp. v. FTC*, 198 F. 2d 404; *Steelco Stainless Steel, Inc. v. FTC*, 187 F. 2d 693.

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entered prohibiting any representation that the products in question are "chamois" or made from "chamois" unless such products are made (1) from the skins of the Alpine antelope, commonly known and referred to as chamois, or (2) from the fleshers or under-splits of sheepskins which have been tanned in oil after splitting.

Respondents' products are both domestic and imported. The inquiry here has to do with domestic products, purchased from Clifford Leather Company. It is not disputed that respondents did represent such products as "chamois" and as "oil tanned chamois." Respondents claim that the use of the phrase oil tanned was discontinued in 1953, although the initial decision points out that the evidence indicates that the date of discontinuance was in the early part of 1954. The principal question in the case is may the respondents lawfully represent the product in question to be "chamois" as that term is presently understood.

Chamois was originally produced from the skin of the Alpine antelope which animal was also known as chamois. When this animal became practically extinct, a product known commercially for many years as chamois was produced from sheepskins. To establish the meaning of the word "chamois," counsel supporting the complaint presented the testimony of tanners and distributors of leather and others qualified by training and experience to speak upon the subject. Respondents also presented testimony, some of which differed materially from that of the evidence presented in behalf of the complaint.

It was also stipulated that the average customer does not know how a chamois is made or of what material it is and that when purchasing a chamois, he seeks a product which may be used for polishing silver and other metals and woods, for washing and cleaning windows, to remove water from gasoline and for other purposes.

It is true that the ordinary customer often does not know the composition and method of manufacture of many things he buys. Nevertheless, he does know that over the years many products have acquired a well-known name and, in buying under that name, he usually assumes that it is the traditional and accepted product he is buying and not something else.

On the question of the meaning of "chamois," the hearing examiner made the following finding:

Genuine chamois, as the term is now understood and used, and as understood and used for a great many years since the Alpine antelope from which the name "chamois" derives became practically extinct, is a product made from the underside, commonly called "flesher" of a split sheepskin, which has been tanned in oil after splitting. Said product is soft and pliable, has a natural yellowish color, and is used in the manufacture of fine gloves and certain

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articles of clothing, for polishing silver and other metals and woods, for washing and cleaning windows and automobiles, to remove water from gasoline and for other purposes. It has a quick, high water absorption and low water retention when wrung out, and will return to its original soft and pliable state when dried.

This finding has abundant support in the evidence and is in accord with the previous holdings of the Commission, the latest one being in the matter of *Canadian Chamois and Leather Corporation*, 28 F.T.C. 1457. In an earlier decision, in the matter of *Seld Leather Company*, 24 F.T.C. 1237, the Commission, while recognizing the standard definition, did permit sheepskin fleshers tanned by a formaldehyde and alum process to be designated as "white chamois." Nevertheless, in the matter of *Pigro Chamois Company*, 25 F.T.C. 929, the term "chamois" was restricted to the skin of the Alpine antelope or to sheepskin fleshers tanned in oil without the use of alum, chrome or formaldehyde.

It appears from the evidence that the respondents' products which are in question here are not made by the traditional process above described. They are made from unsplit sheepskins by a process sometimes known as combination-tannage. The skins are first immersed in a solution of chromium salts for three or four hours. Thereafter, there is an application for several hours of a combination of vegetable and sperm oils. After the skins are dry, a portion at least of the top grain layer is removed by buffing. This process produces a product of a bluish or greenish cast and a small amount of dye is added to the oil to give the yellow color of the oil tanned chamois.

The traditional method of producing chamois differs from the process above described in several respects. Instead of removing the top grain layer by buffing after tanning, the outer part is removed by splitting prior to tanning. This process requires a thicker skin to begin with and most of such skins are imported from New Zealand.

After the splitting process, the fleshers are treated with fish oil and hung in heated rooms for five or more days where the tanning process takes place through the oxidation of the fish oil.

It will thus be seen that respondents' process is substantially different from the traditional method and does not bring the product in question under the definition of chamois as found by the hearing examiner.

Respondents, however, claim that "chamois" has acquired a secondary meaning under which their product can qualify. This claim is based on specifications that had been adopted in recent years by the U. S. General Services Administration to govern certain government purchases. About December 1, 1949, the previous specifications gov-

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erning the subject of chamois leather by certain U. S. government agencies were changed. These specifications, for example one dated November 19, 1935, provided "the leather shall be prepared by the process known as 'straight oil' tannage, no alum or chrome shall be used in the tannage process."

None of the various specifications departed from the requirement that the leather be made from "sheepskin fleshers" or "flesh splits of sheepskin." The December 1, 1949 specification recognized two types of chamois leather; "Type I, Oil-Tanned," and "Type II, Combination-Tanned." In Type II, the leather "shall be tanned by a process known commercially as combination-tanned." In the specification of January 19, 1953, combination-tannage was defined as follows:

"Formerly tanned with a blend of vegetable fats. Today, tanned with two or more types of tanning materials, such as chromium compounds and vegetable extracts, or chromium compounds and synthetic tannings."

On December 9, 1953, another specification was adopted which did not refer to "Type II" or "combination-tanned" chamois and limited purchases to oil-tanned flesh splits of sheepskin. According to the chairman of the committee which promulgated these various specifications, the original change of December 1, 1949 was made because the government was having difficulty in obtaining sufficient chamois skins made by the oil-tanned method. According to a letter written by the chairman, one reason for the change back to the original specification was that some of the chamois purchased by government agencies was used on orthopedic devices and for similar purposes where it came in close contact with the skin, and that chrome-tanned leather might cause dermatitis in some individuals. He also testified that Type II chamois had not proved to be satisfactory because of its lack of water absorption.

The law is well settled that under some circumstances a term used to label a product may acquire a secondary meaning. However, it must appear that the secondary meaning has become so thoroughly established that the description which the label carries has ceased to deceive the public. Furthermore, a high degree of proof is required to establish a secondary meaning. This is well expressed by an excerpt from the case of *C. Howard Hunt Pen Company v. FTC*, 197 F. 2d 273, quoted in the initial decision:

A high degree of proof was essential in establishing the defense of secondary meaning before the Commission. The very wording of petitioner's answer recognizes that, in the words of Mr. Justice Cardozo, it had to show that "\* \* \* by common acceptation the description, once misused, has acquired a secondary meaning as firmly anchored as the first one." *Federal Trade Commission v.*

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*Algoma Co.*, 291 U. S. 67, 80. It could not prevail if its evidence was of a quality "\* \* \* short of establishing two meanings with equal titles to legitimacy by force of common acceptance." Ibid. We think that petitioner failed to establish the fact of secondary meaning under those governing principles.

We agree with the findings of the hearing examiner that the evidence is not sufficient to establish a secondary meaning.

Even though it might be assumed that the government specifications would establish a secondary meaning, it appears that the products in question do not qualify thereunder. The findings of the hearing examiner on that point are that: (1) respondents' products were not made from "fleshers," or "flesh splits of sheepskins," and (2) said products are essentially tanned by the application of chromium rather than combination-tannage.

The complaint alleges that respondents' products in question here do not possess the same characteristics as chamois qualifying under the definition found by the hearing examiner to be the correct one. Evidence was introduced pro and con on this subject and the initial decision contains conclusions of law and findings of fact based thereon.

As to the conclusions of law, reference is again made to the opinion in *C. Howard Hunt Pen Company v. FTC*, where the court said:

It is of no moment, in this proceeding in the public interest, that what the purchaser gets in the tipping material used on petitioner's pen points may be as serviceable as or almost as serviceable as iridium. "The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. \* \* \* In such matters, the public is entitled to get what it chooses, though the choice may be dictated, by caprice or by fashion or perhaps by ignorance." *Federal Trade Commission v. Algoma Co.*, supra, page 78. There is prejudice also to other manufacturers of pen points who, as this record shows, purchase the same tipping material as does petitioner but who do not mark their points with the word "iridium."

As to the ultimate fact on this subject, the hearing examiner found that the evidence sufficiently establishes that respondents' skins do not after normal use possess the essential characteristics of genuine chamois.

Respondents also point out that the production of oil tanned chamois in the United States is confined to four tanners. Therefore they claim that "rejection of respondents' products will create a monopoly in the production and marketing of chamois in the United States."

There is not sufficient evidence in the record from which it can be concluded that a monopoly in oil tanned chamois either exists or is reasonably probable. The order does not reject respondents' products. They may still sell their products so long as they do not sell under the name "chamois."

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Finally, respondents argue that the order goes further than is necessary to protect the public interest. They suggest that respondents should be allowed to sell their product under the name "combination-tanned chamois," with the additional words, "split before tanning" or "split after tanning," or "buffed not split" where appropriate.

It is true that corporate names or trade names upon whose promotion time and money has been spent should not be destroyed if qualifying language can be found which will adequately prevent deception. For example, in the matter of *Manhattan Brewing Company*, 42 F.T.C. 226, cited by respondents, the words "Canadian Ace" had been used for seven years to describe a certain brand of beer which was, in fact, made in the United States. Final decision was that the words "Canadian Ace" could be retained if accompanied by words in immediate conjunction therewith which adequately informed the public that the product was in fact brewed in the United States. There are other similar decisions.

In the *Manhattan Brewing Company* case, it was concluded that the words "Canadian Ace" did have a tendency and capacity to mislead the public into believing that the beer was made in Canada. If so, that result was adequately offset by the direct and easily understood statement that the product was in fact made in the United States. The truth could be ascertained by a reading of the label and the qualifying words without the aid of specialized knowledge or expert opinion.

In the case at bar, such would not be the situation. The use of the word "chamois" is a representation that the product is that which has traditionally been sold under the name "chamois" and which has been so accepted by the public after years of buying experience. Although the ordinary buyer does not know how chamois is made, he is entitled to believe that the particular product sold under that name is in fact "chamois" as that term is understood by manufacturers and distributors. If such be the implication of the label "chamois," it is not offset by the qualifying words suggested. After reading both, the ordinary consumer would still not know the truth about the product without resort to specialized information which he does not possess. In other words, the capacity and tendency to deceive which the hearing examiner has found to exist in the wrongful use of the word "chamois" would still be there.

Respondents object to the failure of the hearing examiner to accept and adopt certain proposed findings set out in their brief. They also except to the adoption of proposed findings submitted by counsel supporting the complaint.

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We conclude that the action of the hearing examiner in these respects is not error. The findings, conclusions and order of the hearing examiner are adopted as the findings, conclusions and order of the Commission.

Respondents' appeal is denied and it is directed that an order issue accordingly.

Commissioner Kern did not participate herein.

## FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents, Atlantic Sponge and Chamois Corporation and Benjamin E. Bloch, from the hearing examiner's initial decision, and briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having rendered its decision denying the appeal and adopting the findings, conclusions, and order contained in the initial decision:

*It is ordered*, That respondents, Atlantic Sponge and Chamois Corporation and Benjamin E. Bloch, shall, within sixty (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 the order contained in said initial decision.

Commissioner Kern not participating.

## Opinion

IN THE MATTER OF  
VULCANIZED RUBBER AND PLASTICS COMPANY*Docket 6222. Order and opinion, Nov. 29, 1955*

Interlocutory order denying respondent's appeal from hearing examiner's denial of its motion to dismiss complaint, etc., since the record contains evidence which, if not overcome by rebuttal, would support a desist order.

Before *Mr. Loren H. Laughlin*, hearing examiner.

*Mr. Charles S. Cox* for the Commission.

*Chapman, Walsh & O'Connell*, of Washington, D. C., and *Mr. Joseph Sawyer*, of New York City, for respondent.

*Mr. I. Louis Wolk*, of Los Angeles, Calif., for Dayton Rubber Co., *amicus curiae*.

*Arthur, Dry & Dole*, of New York City, for United States Rubber Co., *amicus curiae*.

## ORDER DENYING RESPONDENT'S INTERLOCUTORY APPEAL

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's ruling denying respondent's motion to dismiss the complaint and respondent's request that the Commission order that further hearings herein be suspended until the Commission has acted on the appeal; and

The Commission, for the reasons stated in the accompanying opinion, having concluded that the appeal and request for oral argument thereon, as well as the request that further hearings herein be suspended until the Commission has acted on the appeal, should be denied:

*It is ordered*, That respondent's appeal, and request for oral argument thereon, from the hearing examiner's ruling denying respondent's motion to dismiss the complaint, and respondent's request that further hearings herein be suspended until the Commission has acted on the appeal, be, and they hereby are, denied.

## OPINION OF THE COMMISSION

Per Curiam:

This is an interlocutory appeal by the respondent from the hearing examiner's denial of the respondent's motion to dismiss the complaint.

The complaint charges that the respondent has falsely, deceptively, and misleadingly represented its combs as "rubber" and "hard rubber" products. Extensive hearings have been held and considerable testimony and other evidence in support of the allegations of the com-