
IN THE MATTER OF
BROWNING KING & COMPANY, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket 7060. Complaint, Feb. 7, 1958—Decision, Aug. 2, 1961

Order requiring Philadelphia men's and boys' clothing manufacturers, operating a chain of retail stores in various States, to cease violating the Wool Products Labeling Act by labeling as "All Wool", men's sport coats which contained a substantial percentage of non-woolen fibers; by tagging sport coats with a high and a low price, thereby representing falsely that the low price was a reduction from the usual retail price which was, in fact, wholly fictitious; and by failing in other respects to comply with labeling requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the

authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Browning King & Company, Inc., a corporation, and A. Benjamin Wilkes and Jack Hirsh, individually and as officers of said corporation, and Joseph Wilkes and same said A. Benjamin Wilkes, individually and as co-partners, trading as Ben Wilks Co., hereinafter referred to as respondents, have violated the provisions of said Acts, and the Rules and Regulations promulgated under said Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Browning King & Company, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, with its principal place of business located at 227 North Broad Street, Philadelphia, Pennsylvania.

The individual respondents, A. Benjamin Wilkes and Jack Hirsh are president and secretary-treasurer, respectively, of the corporate respondent, and have business offices at the same address as the corporate respondent. These individual respondents, formulate, direct and control the acts, policies and practices of the corporate respondent, Browning King & Company, Inc.

The individual respondents, Joseph Wilkes, and the same said A. Benjamin Wilkes, are co-partners doing business as Ben Wilks Co. with their address at the same address as the corporate respondent.

PAR. 2. Respondents are now, and for several years last past have been, engaged in the manufacture and sale, at retail, of men's and boy's clothing. Said clothing is retailed to the public through a chain of stores owned and operated by corporate respondent, Browning King & Company, Inc., who maintain retail stores in various states throughout the United States.

In the regular and usual course of their business respondents cause, and for the past several years have caused, their products, when sold, to be transported from their place of business in the State of Pennsylvania to purchasers thereof located in various other states, and the District of Columbia.

Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of business in said products in commerce has been and is substantial.

PAR. 3. In the course and conduct of their business respondents have been and are now engaged in substantial competition in com-

merce, with corporations, firms, partnerships and individuals likewise engaged in the manufacture, distribution and sale, of mens' and boys' clothing.

PAR. 4. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since January of 1955, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products, as "wool products" are defined therein.

PAR. 5. Certain of said wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of said Wool Products Labeling Act and the Rules and Regulations promulgated under said Act, in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products were men's sport coats labeled or tagged by respondents as consisting of "All Wool", whereas, in truth and in fact, said men's sport coats did not consist of all wool, but contained a substantial percentage of non-woolen fibers.

PAR. 6. Respondent further misbranded certain of said wool products within the intent and meaning of Section 4(a)(1) of said Wool Products Labeling Act by placing on tags attached to said wool products two prices, a high price and a low price, thereby representing that the high price was their usual and regular retail price and that the low price was a reduction from their usual and regular retail price. In truth and in fact, the higher prices listed by respondents were wholly fictitious as respondents had not sold said goods at the higher prices appearing on said tags.

Among such misbranded wool products were sport coats to which tags were attached stating the following:

- | | |
|--------------|-------|
| 1. Conqueror | \$60 |
| | 19.85 |
| 2. Conqueror | \$60 |
| | 19.70 |

PAR. 7. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged or labeled as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939, and in the manner and form prescribed therein.

PAR. 8. The acts and practices of respondents as set out in Paragraphs Five through Seven were in violation of Wool Products

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Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their business and for the purpose of inducing the purchase and aiding and promoting the sale of their products in commerce, respondents have caused certain advertisements to be placed in newspapers of general circulation. By the use of these advertisements respondents have represented, directly or by implication, that they were offering products for sale at prices which were less than the prices at which said products were usually or regularly sold by them in the normal course of their business.

In addition, and likewise for the purpose of inducing the purchase of their products in commerce, respondents have placed two prices on tags attached to certain of their products, a high price and a low price. Respondents thus represented, by the prices set out on the tags, that they were offering products for sale at prices which were less than the prices at which said products were usually and regularly sold by them in the normal course of their business.

In both instances, in newspaper advertising and on the tags attached to their products, the higher prices represented by the respondents to be their regular or usual retail prices are fictitious prices, as respondents had not sold said certain goods in the regular or usual course of their business at said higher prices. Typical and among, but nowise limited thereto, of the statements made in the advertising and on the tags are the following:

A. Newspaper advertisements:

CONQUEROR imported fabric
All Wool Sport Coats

our
regular \$60
Price

Reduced to
only \$30

SCOT-TEX
Ivy Classic suits

our
regular \$105
Price
Reduced to
only \$52.50

B. Tickets

CONQUEROR \$60
19.85
CONQUEROR \$60
19.70

PAR. 10. The use by the respondents of the aforementioned false, misleading and deceptive statements and representations as alleged in Paragraph Nine has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the public into the erroneous and mistaken belief that such statements and representations were, and are true, and into the purchase of a substantial amount of respondents' products because of said erroneous and mistaken belief. As a result thereof trade has been unfairly diverted to respondents from their said competitors and injury has thereby been done to competition in commerce.

PAR. 11. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents competitors and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondents on February 7, 1958, charging them with misbranding wool products in violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder and with engaging in unfair and deceptive acts and practices in violation of the Federal Trade Commission Act. The respondents' answer to the complaint was filed on April 17, 1958. Hearings were thereafter held before duly designated hearing examiners of the Commission and testimony and other evidence in support of and in opposition to certain allegations of the complaint were received into the record. In an initial decision filed January 27, 1961, the hearing examiner ordered that the complaint be dismissed.

The Commission having considered the appeal of counsel supporting the complaint from the initial decision and the entire record in this proceeding and having determined that the appeal should be granted in part and denied in part and that the initial decision should be vacated and set aside, now makes its findings as to the facts, conclusions drawn therefrom and order which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent Browning King & Company, Inc., is a corporation organized and existing under and by virtue of the laws of

the State of Pennsylvania, with its office and principal place of business located at 227 North Broad Street, Philadelphia, Pennsylvania.

Said corporation operates men's retail clothing stores in Philadelphia, Florida and the District of Columbia. Respondent A. Benjamin Wilkes is president of the corporation and actively participated in the formulation, direction and control of its acts, policies and practices. Respondent Jack Hirsh was an officer and director of the corporation until March 4, 1960, but did not, as an individual, formulate, direct or control its practices or policies. The proceeding will be dismissed as to Jack Hirsh individually and as an officer of the corporation and as hereinafter used the term "respondents" will refer to the remaining respondents.

Respondent Joseph Wilkes and the same A. Benjamin Wilkes are co-partners doing business as Ben Wilks Co. with their address at the same address as the corporate respondent. Ben Wilks Co. is a manufacturer and jobber of men's clothing.

2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale wool products in commerce, as "commerce" and "wool products" are defined in the Wool Products Labeling Act.

3. Certain of said wool products were misbranded in violation of Section 4(a)(1) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder in that they were falsely or deceptively identified on labels or tags as consisting of "All Wool" when in fact said wool products did not consist of all wool, but contained a substantial percentage of non-woolen fibers.

4. Certain of said wool products were misbranded in that they were not stamped, tagged or labeled as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder.

5. In the course and conduct of their business, respondents are in competition, in commerce, with firms and individuals likewise engaged in the sale of wool products.

6. The charges in the complaint that respondents misbranded wool products in violation of Section 4(a)(1) of the Wool Products Labeling Act by placing fictitious prices on tags attached to said wool products and that respondents used fictitious prices in the advertising and tagging of their products in violation of the Federal Trade Commission Act are not sustained by the record and provision for the dismissal of said charges accordingly is included in the order appearing hereafter.

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CONCLUSIONS

The aforesaid acts and practices of respondents, herein found, constitute misbranding of wool products and were in violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents, Browning King & Company, Inc., a corporation, and its officers, and A. Benjamin Wilkes, individually and as an officer of said corporation, and Joseph Wilkes and A. Benjamin Wilkes, individually and as co-partners trading as Ben Wilks Co., or under any other name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the offering for sale, or the sale, transportation, distribution or delivery for shipment in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of "wool products", as such products are defined in and subject to said Wool Products Labeling Act, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included therein.

2. Failing to affix labels to such products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That the charges of Paragraph Six, Paragraph Nine and Paragraph Ten of the complaint be, and they hereby are, dismissed.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent Jack Hirsh as an individual and as an officer of the respondent corporation.

It is further ordered, That the respondents named in the preamble of the order to cease and desist, 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 to cease and desist.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

The complaint in this matter charges respondents with misbranding wool products as to fiber content and price in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder and with fictitious pricing in the advertising and labeling of their products in violation of the Federal Trade Commission Act. Counsel supporting the complaint has appealed from the hearing examiner's order dismissing the complaint and from the findings and conclusions on which the order is based.

The hearing examiner whose order is challenged did not hear the testimony of the witnesses in support of the complaint, having been designated to take the place of the original hearing examiner, who had retired, after counsel supporting the complaint had rested his case but prior to the reception of any evidence in defense of the charges. As a result of this substitution of hearing examiners, respondents filed a motion requesting a hearing *de novo* in this proceeding. In a somewhat unusual maneuver, the substitute examiner informed counsel by letter that he was of the opinion that the motion should not be granted subject to certain considerations. As stated in the letter, which is in evidence as Commission Exhibit 124 A and B, the substitute examiner was of the belief, after reviewing the record, that a question of credibility was raised with respect to the testimony of one of the Commission witnesses. He informed counsel that he proposed to resolve this problem by disregarding entirely the testimony of this witness and the exhibits which had been presented through him.

About five months after the date of the letter, one hearing was held before the substitute examiner to permit respondents to put in their defense. None of the witnesses who had previously testified were called as witnesses for any purpose at this last hearing. The substitute examiner formally ruled on the respondents' motion for a trial *de novo*, denying the same, in his initial decision.

It is clear from the substitute examiner's letter that he found it necessary to make a credibility evaluation with respect to one of the witnesses testifying in support of the complaint. It is equally obvious from the initial decision that the substitute examiner also made a credibility evaluation with respect to two other Commission witnesses who had conducted the investigation of the Browning King & Company, Inc., retail stores in Florida. In view of the conflict in the testimony of these two witnesses with that of the

individual respondent A. Benjamin Wilkes concerning pricing practices in the Florida stores, it was indeed incumbent upon the examiner to make such an evaluation. Moreover, it is clear that this evaluation constituted a material factor in the recommended decision of the substitute examiner. On the basis of the court's ruling in the *Gamble-Skogmo* case,¹ the substitute examiner, at some stage in this proceeding, should have seen and heard these three witnesses testify and his failure to do so was error. Accordingly, we can give no weight to the evidence adduced through these three witnesses in arriving at our decision.

The first issue presented by the appeal of counsel supporting the complaint is whether the hearing examiner erred in dismissing the misbranding charges. In substance, the complaint alleges that respondents deceptively labeled their wool products with respect to the character and amount of the constituent fibers therein in violation of Section 4(a)(1) of the Wool Products Labeling Act, and that said products were not labeled as required under Section 4(a)(2) which provides in part that the label must show the percentage of the total fiber weight of the wool products of wool and other fibers contained therein.

Both charges are fully sustained on this record. Three labels taken from a sport coat in the Browning King store in Washington, D.C., are in evidence as Commission Exhibits 67 a, b and c. One label with the Browning King name printed thereon bears the wording "All Wool." Another label, described as a fiber label, contains the wording "This garment contains ORLON 'The Miracle Fiber' Dupont-Virgin Yarn." The third label on the same garment, bearing the identification WPL 8576, gives the content of the garment as "65% Wool 35% Orlon." The Commission investigator, through whom these labels were introduced and whose credibility is not in question, testified that he noted approximately 166 coats so labeled. We agree with the hearing examiner that the fact that on said garments there was one label which correctly stated the wool and fiber content does not absolve the seller from responsibility for the other incorrect or incomplete labels. The Browning King label clearly violates both Sections 4(a)(1) and 4(a)(2).

The record also contains another label, Commission Exhibit 68, obtained by the same investigator from a coat in the Washington, D.C., store. This was the only label on the garment and the fiber content is stated thereon as "All Wool & Dacron." This label is

¹ *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F. 2d 106 (8th Cir. 1954).

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deficient as it does not show the percentage of wool and Dacron in said garment as required by Section 4(a)(2). The investigator testified that he observed about 133 coats so labeled.

Although the hearing examiner concluded that respondent Browning King & Company, Inc., had misbranded wool products, he found in effect that the company had discontinued the practice. This is evidenced by his ruling in January, 1961, that since all of the evidence as to misbranding related to October, 1956, it would be an act of futility to require respondents to stop doing that which is not shown on the record to have been done since that time. Obviously, this is not a proper basis for a finding of abandonment which, as a defense, must be established by respondents.

The record is devoid of any evidence upon which to base a conclusion that the practices have been surely stopped with no likelihood of resumption. We have no express assurance from respondents that they will not resume such practices and there is no indication of any unusual circumstances which would support that conclusion. On the contrary, respondents' principal business remains that of selling those products the labeling of which was the occasion for the violations shown to exist. In view thereof and considering the nature of the violations, we cannot assume, as did the hearing examiner, that respondents have not engaged in the illegal practices since the date they were initially observed. In our opinion, an order to cease and desist is necessary to regulate respondents' present and future labeling practices.

Throughout this proceeding, respondents have contended that Joseph Wilkes and A. Benjamin Wilkes cannot be held responsible for any misbranding violations in their capacities as co-partners trading as Ben Wilks Co. The evidence discloses that the corporate respondent, Browning King & Company, Inc., which operates men's retail clothing stores in Pennsylvania, Florida and Washington, D.C., has its principal office at 227 N. Broad Street in Philadelphia, Pennsylvania. Ben Wilks Co. is engaged in manufacturing and jobbing men's clothing and is located at the same address. Joseph Wilkes is the sole stockholder and A. Benjamin Wilkes is the president of the corporate respondent. These two formulate, direct and control the acts, policies and practices of the corporation.

The clothing sold by Browning King retail stores is procured on consignment from Ben Wilks Co. As disclosed by the testimony of A. Benjamin Wilkes, the Browning King store in Washington, D.C., orders garments directly from Ben Wilks Co. After the garments are selected, the Browning King labels are placed thereon by

a Browning King employee while the garments are in the Ben Wilks warehouse. The garments are then shipped to the Washington store by Ben Wilks Co. Moreover, garments bearing the labels in question are interchanged between the Browning King stores in Philadelphia, Florida and Washington, D.C., with all shipments being handled by Ben Wilks Co. It is obvious, therefore, that Ben Wilks Co. has transported and distributed misbranded wool products in commerce within the intent and meaning of Section 3 of the Wool Products Labeling Act. Accordingly, the co-partners will be included in our order to cease and desist.

Counsel supporting the complaint has also appealed from the hearing examiner's ruling that the evidence fails to sustain the charge that respondents have used fictitious prices in the labeling and advertising of their products. As shown on the record, Browning King engaged in comparative two-price advertising in Florida and Philadelphia. Since we cannot consider the testimony of the three witnesses whose credibility was put in issue by the hearing examiner, the only evidence in support of the advertising charge consists of copies of the advertisements themselves, which are largely seasonal, together with copies of eleven invoices showing sales at the lower prices. We cannot base a finding of fictitious pricing on such evidence.

Browning King did not use comparative pricing in the advertising for its Washington, D.C., store. However, it did stamp in green ink on the Browning King label on all garments in the Washington store, a price which was considerably lower than the original price printed on said label. These garments had been brought into the Washington, D.C., store from its other stores by Browning King expressly for the purpose of selling said garments at a reduced price. Respondents admitted that they did not sell any garment at the higher of the two labeled prices in Washington, D.C.

Although the evidence does not support a finding that the advertising used by the Washington store is deceptive, it does not follow that the two price-labels used in that store do not have a capacity to induce customers to purchase garments so labeled in the mistaken belief that the higher prices are the Browning King usual and regular retail prices of the garments in the Washington area. However, in view of the state of the record, we are constrained not to make the latter finding here. There may be a question as to whether the complaint was drawn with sufficient particularity to justify consideration of the fictitious labeling charge within so narrow a compass. At all events, we do not deem it appropriate at this stage of the proceedings, everything here considered, to ap-

proach the case from that standpoint. Accordingly, we find that the charge of fictitious price labeling, as pleaded, has not been sustained.

The only issue remaining for our consideration is whether our order to cease and desist should include Jack Hirsh individually and as an officer of the corporate respondent. The record discloses that Hirsh was secretary-treasurer and one of the directors of the corporation at the time of the investigation and hearing in this matter, but was not a stockholder. His job was principally that of supervising the alteration department and inspecting the physical plant of the various retail stores. There is no evidence that Hirsh was responsible for or participated in the formulation, direction or control of the acts or practices of the corporation. Moreover, at the final hearing in this matter in November 1960, respondents' counsel introduced evidence showing that Hirsh had resigned as an officer and director of the corporation in March 1960, and it appears that he is no longer in the clothing business. Under the circumstances, the complaint will be dismissed as to respondent Jack Hirsh in his individual capacity and as an officer of the corporation.

To the extent set forth herein, the appeal of counsel supporting the complaint is granted but in all other respects it is denied. The initial decision is set aside and we are entering our own findings as to the facts, conclusions and order in conformity with this opinion.
