

Certification of Record

IN THE MATTER OF

SHIP 'n SHORE, INC., ET AL

MODIFIED ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 8161. Complaint. Nov. 4, 1960—Decision, Sept. 19, 1966*

Order modifying an earlier order dated May 16, 1961, 58 F.T.C. 757, which prohibited an Upland, Pa., manufacturer of women's and children's clothing from falsely advertising and labeling certain of its textiles as "madras," by providing that if the fabric does resemble the India madras cloth the term "madras" may be used in any nondeceptive phrase or statement. The order also dismisses the complaint as to individual respondent William Netzky.

CERTIFICATION OF RECORD WITH FINDINGS OF FACT, CONCLUSIONS,
AND RECOMMENDATIONS THEREON, IN CONFORMITY WITH COM-
MISSION'S ORDER DIRECTING HEARINGS ISSUED MARCH 11, 1966
AUGUST 9, 1966

By petition filed on January 7, 1966, respondents requested that this proceeding be reopened and the order to cease and desist, heretofore issued by the Commission on May 16, 1961, be set aside. In the alternative, respondents requested that they be granted a hearing on their request pursuant to § 3.28(b) (3) of the Rules of Practice. Additionally, the individual respondent requested that the order be set aside as to him in his individual capacity. The Director, Bureau of Deceptive Practices, filed an answer in opposition to the petition.

Upon consideration of the petition to reopen the proceeding and set aside the cease and desist order now in effect therein, the Commission concluded that the pleadings raised substantial factual issues and granted respondents' alternative request for a hearing on the issues presented.

The Commission's decision of May 16, 1961, was based on an agreement containing a consent order. By the terms thereof, respondents agreed to cease and desist from:

Using the word "madras" or any simulations thereof, either alone or in connection with other words to designate, describe, or refer to any fabric or other textile product which is not in fact made of fine cotton, handloomed and imported from India, and if the cloth is other than natural in color, has not been dyed with bleeding vegetable dyes.

In the petition for reopening, respondents contend that factual conditions have changed to the extent that the public no longer understands the term "madras" to have the meaning ascribed in the order, and that among the purchasing public it is now commonly accepted that the word "madras" is applied to the plaid design scheme of fabric, regardless of whether the fabric is domestic or imported, colorfast or bleeding.

Under the terms of the Commission's order issued March 11, 1966, granting respondents' alternative request for a hearing, the matter was assigned to the undersigned hearing examiner to receive evidence in support of, and in opposition to, respondents' allegation that a change of law or fact, or the public interest, requires: (1) that the order to cease and desist be altered, modified or set aside, and (2) that the order be set aside as to the individual respondent. Said order further provided that the hearing be conducted in accordance with Part 3, subparts C, D, E, and F of the Rules of Practice.

A hearing was held on respondents' petition on June 7, 1966, in Washington, D.C., which had the effect of denying a request for postponement filed on May 31, 1966, on behalf of the Government of India. At the outset of the hearing counsel supporting the complaint and counsel for respondents announced that they had agreed upon a proposed modification of the cease and desist order presently in effect in this proceeding with respect to respondents' use of the word "madras." The modification, as proposed, was formalized in a written "Stipulation and Agreement Containing Proposed Order," dated June 7, 1966, signed by counsel and submitted as Commission Exhibit No. 1.

Under this Stipulation, the following form of order would be entered by the Commission in lieu of Paragraphs 1 and 2 of the order issued by the Commission on May 16, 1961, now in effect, to wit:

1—Using the word "madras" or any simulations thereof, either alone or in connection with other words, to designate, describe or refer to any fabric or other textile product which is not in fact made of fine cotton, handloomed and imported from India, and if the cloth is other than natural in color, has not been dyed with bleeding vegetable dyes; provided, however, that the word "madras" may be used to designate, describe or refer to any fabric or other textile product other than madras if the manner in which the fabric or other textile product actually resembles madras is clearly and nondeceptively stated.

2—Placing in the hands of retailers the means and instrumentalities by and through which they may deceive the purchasing public concerning merchandise in the respects set out in "1," above.

It is seen that the modification of the presently effective order as proposed in the Stipulation does not change or modify the definition or meaning of "madras" as set out in recent decisions of the Commission, but merely adds to the present order a proviso "that the word 'madras' may be used to designate, describe or refer to any fabric or other textile product other than madras if the manner in which the fabric or other textile product actually resembles madras is clearly and nondeceptively stated." This provision only incorporates the salient points of the "Statement on Use of the Term Madras" contained in the Commission's News Release on June 26, 1965. The addition of this provision to "1" of the present order would be proper and comport with the public interest.

After the submission of such "Stipulation and Agreement Containing Proposed Order," designated Commission Exhibit No. 1, the hearing proceeded and oral testimony was received from the individual respondent William Netzky with respect to his request that the order to cease and desist be set aside as to him, individually. Proposed findings of fact, conclusions of law, and briefs thereon have been filed by respective counsel. All proposed findings and conclusions not specifically found or concluded herein are rejected. Upon the basis of the entire record, the hearing examiner makes the following findings of fact, conclusions of law based thereon, and recommendations:

FINDINGS OF FACT

1. Respondent Ship 'n Shore is a corporation existing and doing business under the laws of the State of Pennsylvania, with its office and place of business located in the city of Upland, Pennsylvania. The corporation has been in business for approximately 50 years and formerly had the name Susquehanna Waist Company. Later, the corporate name was changed to Ship 'n Shore (Tr. 45).

2. Ship 'n Shore is a manufacturer of women's blouses, shirts, knitted shirts, shifts and various types of sportswear. Ship 'n Shore sales range between \$25 million and \$30 million per year. The company's net worth is in excess of \$5 million (Tr. 46).

3. Ship 'n Shore is a closed company whose capital stock is

owned by a relatively small number of individuals. The individual respondent William Netzky is president and a member of the board of directors of the corporate respondent Ship 'n Shore, and is the owner of less than 25 per cent of its capital stock (Tr. 45, 58). The respondent William Netzky has been associated with the company approximately 34 years and it has been his only employer over that period of time (Tr. 53, 56). No member of Netzky's immediate family owns any stock in the company nor is employed by it (Tr. 45, 53, 59).

4. As president of Ship 'n Shore, Inc., Netzky's principal duties are the general administrative supervision of all departments of the company, and he devotes special attention to the financial and marketing aspects of the business (Tr. 47).

5. Ship 'n Shore, Inc., does not maintain an advertising department. All of its advertising is handled by the Mervin and Jesse Levine Agency, an advertising agency located at 1270 Avenue of the Americas, New York, New York. This agency has been handling Ship 'n Shore advertising for 35 years (Tr. 46, 48).

6. Ship 'n Shore's annual budget for advertising and publicity is approximately \$1¼ million (Tr. 54). Decisions with respect to advertising the company's products are not made by the individual respondent Netzky, but are made by committees, composed of the officers and their assistants in the various departments of the company, in consultation with representatives of Ship 'n Shore's advertising agency (Tr. 49).

7. The individual respondent William Netzky does not prepare or select the wording contained in company advertising, nor does he direct that any particular words or phrases be used in company advertising (Tr. 59).

8. The individual respondent William Netzky does not control Ship 'n Shore, Inc.'s, advertising, and any participation therein by him is solely in his capacity as a corporate officer. His participation in the supervision of the general business affairs of the corporate respondent is not as an individual but in his official capacity as president of the corporate respondent (Tr. 53-54).

CONCLUSIONS

1. Upon the basis of the entire record it is concluded that modification of Paragraph 1 of the cease and desist order in the form proposed by counsel in the Stipulation (CX No. 1) would be an appropriate disposition of respondent's petition to reopen and set aside the consent order herein, and would satisfy any objections

by the Government of India as to the use of the word "madras." Such a modification merely carries out the recent expression by the Commission in its Statement of June 26, 1965, as to the permissible use of the word "madras" in describing or referring to a fabric or other textile product which is not genuine India madras.

2. It is further concluded that all acts and duties performed by the individual respondent William Netzky were performed in his capacity as president of Ship 'n Shore, Inc. There is nothing in the record to warrant a finding that he did anything in connection with advertising or anything else except in his capacity as an officer of Ship 'n Shore. In a recent Commission decision on the question of joining an officer of a corporation as an individual in a complaint against the corporation on the ground that "he formulates, directs and controls the acts and practices of corporate respondent," including those complained about, the Commission, in *The Lovable Company et al.*, Docket No. 8620 (1965) [67 F.T.C. 1326, 1336], stated:

To justify naming an officer as an individual there must be something in the record suggesting that he would be likely to engage in these practices in the future *as an individual*. To argue otherwise would be to hold that in every order running against a corporation the officers who control its policies, acts and practices should be named. If acts are done as an officer they are done for the corporate respondent, and the order against the corporation will run against the officer as officer. That is all that is required in this case on this record.

3. There is nothing in this record to suggest that Mr. Netzky would be likely to engage in these practices in the future as an individual. A cease and desist order directed against the corporate respondent Ship 'n Shore, Inc., and its officers, agents, representatives and employees is sufficient to protect the public interest.

RECOMMENDATIONS

Upon the basis of the entire record in this proceeding, which is hereby certified to the Commission, including the "Stipulation and Agreement Containing Proposed Order," together with the findings of fact and conclusions herein, it is recommended that the following form of order be substituted for the cease and desist order originally issued in this proceeding:

RECOMMENDED ORDER

It is ordered, That respondent Ship 'n Shore, Inc., a corporation, and its officers, agents, representatives and employees, di-

Order

70 F.T.C.

rectly or through any corporate or other device, in connection with the offering for sale, sale or distribution of blouses, sportswear, or other textile products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "madras" or any simulations thereof, either alone or in connection with other words, to designate, describe or refer to any fabric or other textile product which is not in fact made of fine cotton, handloomed and imported from India, and if the cloth is other than natural in color, has not been dyed with bleeding vegetable dyes: *Provided, however,* That the word "madras" may be used to designate, describe or refer to any fabric or other textile product other than madras if the manner in which the fabric or other textile product actually resembles madras is clearly and nondeceptively stated.

2. Placing in the hands of retailers the means and instrumentalities by and through which they may deceive the purchasing public concerning merchandise in the respects set out in Paragraph 1, above.

It is further ordered, That the complaint against the individual respondent William Netzky be, and the same hereby is, dismissed.

ORDER REOPENING PROCEEDINGS AND MODIFYING ORDER TO CEASE
AND DESIST

The respondents, by petition filed January 7, 1966, requested that this proceeding be reopened and that the order to cease and desist, which issued on May 16, 1961 [58 F.T.C. 757], be set aside. In the alternative, respondents requested that they be granted a hearing on their petition pursuant to § 3.28(b)(3) of the Rules of Practice. Additionally, the individual respondent requested that the order be set aside as to him in his individual capacity.

The Commission, by order issued March 11, 1966 [69 F.T.C. 1110] granted respondents' alternative request and directed hearings before a hearing examiner. The order directed that hearings be conducted for the purpose of receiving evidence to determine whether a change of law or fact, or the public interest requires (1) that the order to cease and desist be altered, modified or set aside or (2) that the order be set aside as to the individual respondent. The order further directed the hearing examiner, upon conclusion of the hearings, to certify the record to-

631

Order

gether with his recommendations, to the Commission, and that the hearing examiner's recommended disposition be treated in the same manner as if it were an initial decision under § 3.21 of the Rules of Practice.

Pursuant to the order of March 11, 1966, the hearing examiner, on August 9, 1966 [p. 631 herein], certified the record together with findings of fact, conclusions and recommendations thereon, to the Commission. The examiner states that the parties have entered into a written "Stipulation and Agreement Containing Proposed Order" and he recommends that the order proposed by the parties be adopted by the Commission in modification of the present order to cease and desist. As to the individual respondent, the examiner concludes on the basis of oral testimony that a cease-and-desist order directed against the corporate respondent, its officers, agents, representatives and employees is sufficient to protect the public interest. Accordingly, he recommends that the complaint be dismissed as to the individual respondent.

The Commission, after due consideration, has determined that the examiner's recommended dismissal of the complaint as to the individual respondent is appropriate.

In considering the examiner's recommended modification of the order to cease and desist, the Commission notes that the proposed modified order, as does the outstanding order, prohibits the use of the term "madras" in such a manner as to lead purchasers to believe, contrary to fact, that any fabric or textile product is true India madras. In addition, the order, if modified as recommended, purports to permit the nondeceptive use of the term "madras" to describe any resemblance or similarity actually existing between the fabric or textile product and true India madras. While the Commission has concluded that modification of the order to accomplish the desired result is justified in the public interest, it is of the opinion that the proposed order is somewhat confusing and should be revised for the purpose of clarity.

On the basis of the foregoing:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist issued in this matter on May 16, 1961 [58 F.T.C. 757], be, and it hereby is, modified to read as follows:

It is ordered, That respondent Ship 'n Shore, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connec-

Syllabus

70 F.T.C.

tion with the offering for sale, sale or distribution of blouses, sportswear, or other textile products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "madras" or any simulations thereof, either alone or in connection with other words, to designate, describe or refer to any fabric or other textile product which is not in fact made of fine cotton, handloomed and imported from India, and if the cloth is other than natural in color, has not been dyed with bleeding vegetable dyes: *Provided, however,* That if the fabric or textile product does in fact resemble or is similar to madras fabric, the term "madras" may be used in any phrase or statement to clearly and nondeceptively set forth the actual resemblance or similarity.

2. Placing in the hands of retailers the means and instrumentalities by and through which they may deceive the purchasing public concerning merchandise in the respects set out in Paragraph 1, above.

It is further ordered, That the complaint against the individual respondent William Netzky be, and the same hereby is, dismissed.

It is further ordered, That respondent Ship 'n Shore, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist set forth herein.