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Initial Decision

FINAL ORDER

Respondent and counsel in support of complaint having filed cross appeals from the initial decision of the hearing examiner, and the matter having been heard on briefs and oral argument; and the Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part respondent's appeal and having denied the appeal of counsel in support of complaint, and having modified the initial decision to conform with the views expressed in said opinion:

It is ordered, That the hearing examiner's initial decision as modified be, and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

KORBER HATS, INC., ET AL.

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

Docket 8190. Complaint, Nov. 28, 1960—Decision, June 12, 1964

Order modifying original desist order of March 28, 1962, 60 F.T.C. 642, in accordance with the direction of the First Circuit dated Dec. 31, 1962, 311 F. 2d 358 (7 S.&D. 611), to recognize that the word "Milan" has acquired a secondary meaning indicative of a type of weave or braid, in addition to its original use as descriptive of men's hats manufactured in Italy of wheat straw.

Mr. Terral A. Jordan for the Commission.

Mr. Isador S. Levin of *Levin and Levin*, Fall River, Mass; and *Weil, Gotshal & Manges*, New York, N.Y., by *Mr. Ira M. Millstein*, *Mr. Marshall C. Berger*, and *Mr. Irving Scher* for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

NOVEMBER 22, 1963

In the complaint, which was issued on November 28, 1960, the respondents are charged with mislabeling of hats manufactured and

sold by them in violation of the Federal Trade Commission Act. The complaint reads in part:

PARAGRAPH FOUR: In the course and conduct of their business, and for the purpose of inducing the sale of their said hats, respondents have imprinted certain representations on the tags, labels and sweatbands of men's straw hats respecting the origin, method of construction and material from which the said hats are made. Typical and illustrative of such representations are the following from separate hats:

1. On the label, "Genuine MILAN imported handblocked"; on the sweatband, "Genuine Milan".
2. On the sweatband, "Genuine Imported Milan".
3. On the label, "Genuine MILAN imported braid"; on the sweatband, "Genuine MILAN".

PARAGRAPH FIVE: Through the use of the aforesaid statements respondents have represented, directly and indirectly:

That said hats are manufactured in Italy and are of the same material, construction, design and workmanship as men's straw hats manufactured in Italy and designated by the term "Milan".

PARAGRAPH SIX: Said statements and representations are false, misleading and deceptive. In truth and in fact:

Said hats are not manufactured in Italy. Said hats are manufactured by respondents in the United States. Said hats are not of the same material, construction, design and workmanship as men's straw hats manufactured in Italy and designated by the term "Milan". Men's straw hats designated as "Milan" are made in Italy of wheat straw braid which is of a narrow width with a distinctive style of weave. Respondents' hats are made of a braid manufactured in Japan of Philippine hemp. The said braid is not of the same style and characteristic as the braid used in the manufacture of the "Milan" hats.

In the answer filed by the respondents with reference to the quoted portion of the complaint, it is said:

4. Respondent, Korber Hats, Inc., admits that in the course and conduct of its business, and for the purpose of inducing the sale of its said hats, it has imprinted certain representations on the tags, labels and sweatbands of men's straw hats, but denies that said representations have to do with the origin, method of construction and material of which the said hats are made.

Further answering, respondent, Korber Hats, Inc., admits that typical and illustrative of such representations are those numbered 1, 2, and 3 of paragraph four of the Complaint, excepting that the respondent has not used the word "handblocked" for sometime last past.

* * * * *

5. Respondents deny the allegations contained in paragraph five of the complaint.

6. Respondent, Korber Hats, Inc., admits that hats manufactured by it are manufactured in the United States, and that said hats are made of a braid manufactured in Japan and designated as Milan hemp braid.

Respondent, Korber Hats, Inc., denies all the other allegations contained in paragraph six of the Complaint.

It is further stated in the answer :

And further answering, respondents say that for the past 6 to 8 years it has become a widespread industry practice to attach the words "Milan" and/or "Imported Milan" and/or "Genuine Imported Milan" on the labels and sweatbands of straw hats made of braid imported from Japan and represented and designated as Milan Hemp Braid.

February 7, 1961, at Washington, D.C., was fixed as the time and place of hearings in the complaint. Respondents moved that the hearings be held in New York, N.Y., stating that the center of the hat trade and the respondents' witnesses are located in such city. They also requested additional time to prepare for the hearings. Agreeable to all concerned, hearings were scheduled and held at New York, N.Y., on April 18, 19 and 20, 1961, at which time the complaint counsel put in his case-in-chief and the respondents presented their defense. However, the record was not closed for the receipt of evidence until November 3, 1961, at which time there was presented and received a stipulation as to certain facts which had been entered into by counsel for the parties. On the same date, an order was entered fixing December 4, 1961 for the filing of proposed findings, and December 15, 1961 for the filing of replies thereto. Proposed findings were submitted by complaint counsel, but the respondents failed and neglected to file proposed findings.

On January 23, 1962, the Hearing Examiner filed an initial decision which, in effect, found that the respondents had violated the provisions of the Federal Trade Commission Act as alleged in the complaint and ordered the respondents to cease and desist from :

(1) Using the terms "Milan", "Genuine Milan", "Imported Milan", "Genuine Imported Milan" or any other substantially similar representation as descriptive of men's straw hats not manufactured in Italy of wheat straw.

(2) Using the terms "Milan", "Genuine Milan", "Imported Milan", "Genuine Imported Milan" or any other substantially similar representation as descriptive of men's straw hats not of the same construction, design and workmanship as that traditionally characteristic of men's straw hats manufactured in Italy and designated as "Milan".

(3) Using any words or phrases which, directly or indirectly, represent that said products are manufactured in a given country or out of certain materials or in a particular manner or style unless such is a fact.

(4) Furnishing or otherwise placing in the hands of retailers or dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove inhibited.

On February 9, 1962, the respondents filed a petition for a review by the Commission of the initial decision, pursuant to the rules¹ of the Commission which were in effect at that time. In support of their petition, the respondents stated:

1. The issue involved in this case is whether the Respondent, Korber Hats, Inc. by using the words "Genuine Milan" or "Genuine Imported Milan" or other similar words on sweat bands or labels attached to hats manufactured by it misled or tended to mislead the public into believing such hats were imported from Italy.
2. The Respondents submit that the Hearing Officer erred in finding that the words "Genuine Milan" or "Genuine Imported Milan" or other similar words on sweat bands or labels attached to hats manufactured by the Respondent, Korber Hats, Inc., misled or tended to mislead the public into believing that such hats were imported from Italy, inasmuch as the findings of the Hearing Officer are based only on the testimony of witnesses engaged in the manufacture and sale of hats, and not upon the testimony of any of the buying public, so-called, and there was no evidence at the hearing that the labels misled or tended to mislead the buying public.
3. It is in the public interest for the Commission to review this decision because most of the manufacturers in the hat industry use labels or sweat bands with the words "Genuine Milan" or "Genuine Imported Milan", or similar words on hats which are not imported from Italy and sold to the general public.

The Commission, on March 28, 1962, after examining the petition and the entire record, and being of the opinion that a determination of the questions presented for review was neither necessary nor appropriate under the law to insure a just and proper disposition of the proceeding and to protect the rights of the respondents, denied the petition and ordered that the initial decision and the order of the Hearing Examiner be adopted as the decision and order of the Commission.

Thereafter, respondents filed their petition for review in the United States Court of Appeals for the First Circuit where the principal issues raised related to the substantiality of the evidence to support the findings of fact as to the falsity or deceptiveness of the labels and, secondly, to the scope of the order.

The Court of Appeals, on December 31, 1962 (311 F. 2d 358), held that substantial evidence supported the Commission's finding that use on hemp hats of terms "Milan", "Genuine Milan", or "Genuine Imported Milan" might tend to mislead a consumer into believing that he was obtaining a hat made of wheat straw and justified restriction of terms to hats manufactured of wheat straw. However, the case was returned to the Commission for determination of whether absolute

¹ § 4.20(b) reads: "Content. The petition for review shall concisely and plainly state (1) the questions presented for review, (2) the facts in abbreviated form, and (3) the reasons why review by the Commission is deemed to be in the public interest. Such petition shall not exceed ten pages in length."

proscription against use of any variation of term "Milan" on hats was required to protect public interest and insure against consumer deception, where evidence strongly indicated that term, apart from its primary market-place significance of "wheat straw", may have acquired secondary meaning in the hat industry denoting the type or class of hats embracing the hemp variety. The Court in its opinion also discussed paragraph (3) of the Commission's order and indicated the belief that the language of such paragraph may be entirely too broad.

The Commission, on March 29, 1963, remanded this matter to the Hearing Examiner for further proceedings in accordance with the opinion of the Circuit Court of Appeals for the First Circuit. On April 17, 1963, counsel for the parties met with the Hearing Examiner in an informal conference, at which time they agreed to a prehearing conference to be held on May 20, 1963. On May 6, 1963, respondents filed an application with the Commission for the initiation of proceedings for the establishment of Trade Practice Rules defining the application standards under which hat manufacturers may label hats with the term "Milan", either alone or in conjunction with qualifying language, and for suspension of further proceedings in this matter until the issuance by the Commission of such final Trade Practice Rules. Counsel supporting the complaint, in reply to respondents' aforesaid application, stated:

* * * that in view of the posture of the instant proceeding: the wide-spread, false and deceptive use by numerous hat manufacturers of "MILAN", "Genuine MILAN", "Genuine Imported MILAN", "Genuine MILAN Imported Hand-blocked" and similar terms to describe hats made in the United States of braid manufactured in Japan of Philippine hemp; and the need to treat the instant practices in a manner uniform and consistent with such corrective action as may be taken by the Commission with respect to other and related practices in the hat industry, the public interest may well be best served by suspending further proceedings in the instant matter and referring the industry-wide problem to the Bureau of Industry Guidance for appropriate treatment under the procedures available in that Bureau.

At the request of counsel for the parties, the prehearing conference scheduled for May 20, 1963, was cancelled to be reset on ten days' notice. The Commission, on June 21, 1963, entered an order placing the respondents' application for initiation of Trade Practice Rules on suspense and denied suspension of further proceedings in this matter. On July 12, 1963, the counsel for the parties met with the Hearing Examiner in a stenographically reported prehearing conference, at which time counsel in support of the complaint and respondents' counsel announced that they would rely on the record already made and had no desire to submit any additional evidence in this proceeding.

Thereupon the record was closed for the receipt of evidence and the time for filing proposed findings and replies thereto was fixed at September 4, 1963, and September 25, 1963, respectively. The Hearing Examiner has given consideration to the proposed findings filed by the parties hereto, and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

Respondent Korber Hats, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its principal office and place of business located at 420 Quequechon Street, in the city of Fall River, State of Massachusetts (Complaint, Para. 1; Answer, Para. 1).

Respondent Sidney Korber is an individual and is an officer of the corporate respondent. He formulates, directs and controls the acts, practices and policies of the corporate respondent, including the acts, and practices hereinafter set forth. His address is the same as that of the corporate respondent (Complaint, Para. 1; Answer, Para. 1).

Respondents are now and for some time past have been, engaged in the manufacturing, offering for sale, sale and distribution of men's straw hats to distributors and jobbers (Record 6. Record hereinafter referred to as "R"). The gross sales for the year 1960 were slightly in excess of \$500,000 (R. 8).

In the course and conduct of their business, respondents now cause, and for some time past have caused, their said products, when sold, to be shipped from their place of business in the State of Massachusetts to purchasers thereof located in various other States of the United States and in the District of Columbia, and 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 (R. 7).

In the course and conduct of their business, and for the purpose of inducing the sale of their said hats, respondents have imprinted certain representations on the tags, labels, and sweatbands of men's straw hats respecting the origin, method of construction and material from which the said hats are made. Typical and illustrative of such representations are the following from separate hats:

- (1) On the label, "Genuine MILAN Imported Hand Blocked"; on the sweatband "Genuine Milan".
- (2) On the sweatband, "Genuine Imported Milan".
- (3) On the label, "Genuine MILAN Imported Braid", on the sweatband "Genuine MILAN". (R. 9-16.)

