



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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Dear Mses. and Messrs.:

This letter responds to your Petition requesting that the Commission amend its Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 C.F.R. Part 23 (Jewelry Guides or Guides). Specifically, the Petition seeks an amendment stating that it is deceptive or unfair to use the term “cultured” to describe laboratory-created gemstones.¹ Although the Petition alleges that

¹ Laboratory-created gemstones are defined in the Jewelry Guides as stones that possess essentially the same optical, physical, and chemical properties as mined stones. 16 C.F.R. § 23.23(c).

it is deceptive and unfair to describe any laboratory-created gemstone as “cultured,” Petitioners focus on the use of the term to describe laboratory-created diamonds. In so doing, the Petition relies upon three surveys testing consumer perception of the term “cultured diamonds.”

Having reviewed all the arguments and evidence Petitioners submitted, the Commission concludes that the Petition does not demonstrate that the use of the term “cultured” to describe laboratory-created diamonds, when qualified by one of the terms provided in the Guides,² is deceptive or unfair. The Commission, therefore, declines to amend the Guides at this time for the reasons discussed below.

Analysis of the Petition

In reaching its conclusion, the Commission analyzes whether use of the term “cultured” to describe laboratory-created diamonds is deceptive or unfair and examines Petitioners’ argument that the Commission should amend the Guides to harmonize with international standards.

A. Deception

In support of its position that use of the term “cultured diamonds” is deceptive, Petitioners rely on a 1964 Commission opinion, Carroll F. Chatham Trading as Chatham Research Laboratories, et al., 64 F.T.C. 1065, and three consumer perception surveys dated 2002, 2005, and 2006. In Chatham, the Commission found that it was deceptive to use the term “cultured” to describe laboratory-created emeralds that had the same optical, chemical, and physical properties as natural emeralds.³ As discussed in more detail below, the 40-years-old Chatham case, however, is no longer legally or factually relevant.

First, in order to decide whether to grant the Petition’s request, the Commission must determine whether the representation “cultured diamonds” is deceptive under Section 5 of the FTC Act.⁴ Under the current legal standard, a representation or omission is deceptive if it is likely

² Section 23.23 of the Guides provides that it is unfair or deceptive to use a gemstone name (e.g., diamond) to describe man-made gemstones that possess essentially the same physical, optical, and chemical properties as natural, mined stones, unless the name is qualified by the word “laboratory-created,” “laboratory-grown,” “[manufacturer-name]-created,” or “synthetic.”

³ The Administrative Law Judge (ALJ) entered an order that prohibited the use of the term “cultured,” but allowed Chatham to use the term “Chatham-Created Emerald.” On appeal, the Commission adopted the ALJ’s opinion as the decision of the Commission and affirmed the order. The order is no longer in force pursuant to the Commission’s sun-setting policy. Chatham, 64 F.T.C. at 1077-78.

⁴ “The purpose of the Guides is not to maintain uniformly high product standards but rather to prevent unfairness and deception.” 61 Fed. Reg. 27178, 27224-25 (May 30, 1996). Because the Commission promulgates Guides to help industry comply with Section 5 of the FTC

to materially mislead consumers acting reasonably under the circumstances.⁵ The Chatham opinion, however, did not apply this deception standard. Rather, it cites a test that the Commission abandoned long ago – the “least sophisticated consumer” test, which provides that “the Commission may require an advertisement to be so carefully worded that the most ignorant and unsuspecting purchaser will be protected.”⁶ The Commission cannot rely on this outdated standard to evaluate this Petition.

Second, in evaluating whether a representation is misleading, the Commission examines not only the claim itself, but the net impression of the entire advertisement.⁷ This net impression analysis is particularly important here because Petitioners request that the FTC amend the Guides to state that it is unfair or deceptive to use the term “cultured” to describe laboratory-created diamonds under any circumstances. Thus, to grant the Petitioners’ request, the Commission would have to conclude that no reasonable qualification is sufficient to render the term “cultured diamond” non-deceptive to consumers. How consumers actually perceive the meaning of the term “cultured,” therefore, is central to the determination of whether the term is deceptive. The Commission in Chatham based its decision on its sense of consumer perception at that time. This perception, however, may have changed significantly in the intervening years. Indeed, in 1996, the Commission declined to amend the Guides to address the use of “cultured” to describe laboratory-created gemstones because there was insufficient evidence of consumer perception at the time.⁸

Act, its Guide provisions attempt to delineate the boundary between claims that do or do not comply.

⁵ Deception Policy Statement, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 176 (1984).

⁶ Chatham, 64 F.T.C. at 1074.

⁷ Deception Policy Statement, 103 F.T.C. at 179 n.32 (when evaluating representations under a deception analysis, one looks at the complete advertisement and formulates opinions “on the basis of the net general impression conveyed by them and not on isolated excerpts”). Depending on the specific circumstances, qualifying disclosures may or may not cure otherwise deceptive messages or practices. Id. at 180-81.

⁸ 61 Fed. Reg. at 27208. The Commission solicited public comment on the Jewelry Guides in 1992 in response to a Jewelers Vigilance Committee (JVC) petition that requested, among other things, that the Guides state that it was deceptive to describe laboratory-created gemstones as “cultured.” Some public comments supported JVC’s position; others requested that the Commission expressly allow the use of the term. Although the Commission stated that some companies had used the term “cultured” to describe their laboratory-created gemstones for some time, it declined to either advise against or expressly allow the use of the term given the lack of consumer perception evidence. Id.

Therefore, the Commission looks to Petitioners' consumer perception surveys to decide whether marketers' use of the term "cultured" to describe laboratory-created diamonds is likely to deceive consumers. Petitioners contend that the three surveys they submitted demonstrate that the use of the term "cultured" to describe laboratory-created diamonds misleads consumers to their economic detriment.⁹ These surveys, however, only address the unqualified use of the term "cultured" to market laboratory-created diamonds. As discussed above (see note 2), the Guides provide that it is unfair or deceptive to use the term diamond to describe a man-made stone that possesses essentially the same physical, optical, and chemical properties as natural, mined stones, unless it is qualified by the word "laboratory-created," "laboratory-grown," "[manufacturer-name]-created," or "synthetic." Therefore, any advertisement using the term "cultured" to describe a laboratory-created gemstone would not be consistent with the Guides if it failed to also include one of these four qualifying terms. The Petition does not allege, and the Commission has no evidence demonstrating, that these terms inadequately inform consumers that a gemstone is man-made. Accordingly, the Commission must determine whether a marketer's use of the term "cultured" in conjunction with the qualifications currently provided in the Guides is deceptive.

The surveys, however, did not evaluate consumer perception of the terms "laboratory-created," "laboratory-grown," or "synthetic" in conjunction with the term "cultured."¹⁰ Based upon this record, the Commission cannot conclude that a clear and conspicuous disclosure that the stones are laboratory-created or laboratory-grown, as the Guides currently suggest, is insufficient to qualify a "cultured diamonds" representation and thereby avoid deception.¹¹

B. Unfairness

Petitioners also allege that use of the term "cultured diamonds" is unfair. An act or practice is unfair, under Section 5 of the FTC Act, if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable and not outweighed by countervailing

⁹ Petition at 1-2, 13.

¹⁰ The 2002 survey includes one question that probes consumer perception of the term "laboratory-created" alone, and the responses indicate that consumers understand the term. Petition, Attachment A, Question 4 (finding that only 0.7% of consumers believe that laboratory-created diamonds refer to "real diamonds," defined as those "mined from the earth and untreated by man other than for cutting and polishing").

¹¹ At the same time, the Commission does not conclude that the use of the term "cultured" by itself is sufficient to qualify the term "diamond" when describing stones created in a laboratory. The Commission was not asked to evaluate whether "cultured" may be used alone to qualify the term "diamonds." The Guides provide that certain qualifying language is necessary to describe diamonds that are not mined from the earth, and marketers should continue to follow this guidance. See 16 C.F.R. § 23.23.

benefits to consumers or competition.¹² Petitioners' unfairness analysis is essentially a restatement of their deception argument. Petitioners state that use of the term "cultured" is misleading to consumers and, therefore, causes injury to consumers that is unavoidable.¹³ Because the evidence does not show that use of the term "cultured," with the qualifications provided in the Guides, is misleading, the Commission cannot conclude that use of the term is likely to cause substantial consumer injury. Accordingly, the Commission cannot find that the use of the term "cultured diamonds" is unfair.

C. International Harmonization

Although it is not appropriate to amend the Guides based on the current record, the Commission nevertheless considers Petitioners' argument that the proposed amendment would harmonize the Guides with international standards.¹⁴ In support of this argument, Petitioners state that a number of foreign governments and international jewelry organizations advise against, or restrict, the use of the term "cultured" to describe laboratory-created gemstones.¹⁵ These foreign decisions, however, take a different approach than the Guides and, in some instances, may not be based on a deception or unfairness standard.

A number of the foreign standards cited in the Petition take a more restrictive approach to describing laboratory-created diamonds than the current Jewelry Guides. For example, a French decree, the CIBJO international nomenclature standards, a World Diamond Congress resolution,

¹² 15 U.S.C. § 45(n); see Unfairness Policy Statement, appended to Int'l Harvester Co., 104 F.T.C. 949, 1070 (1985).

¹³ Petition at 23-24.

¹⁴ The Trade Agreements Act of 1979 states that no federal agency "may engage in standards-related activity that creates unnecessary obstacles to the foreign commerce of the United States" and that federal agencies must, in developing standards "take into consideration international standards and shall, if appropriate, base the standards on international standards." 19 U.S.C. §§ 2532, 2532(2)(A). The term "standard" in the Act includes guidelines that are not mandatory, such as the Jewelry Guides. 19 U.S.C. § 2571(13). The Act provides, however, that "the prevention of deceptive practices" is an area where basing a standard on an international standard "may not be appropriate." Id. at § 2532(2)(B)(i)(II).

¹⁵ Petition at 25. The Petition cites decisions from Australia, France, and Germany, as well as the World Jewelry Confederation (also known as CIBJO), the World Diamond Congress, and the Gemological Institute of America (GIA). Id. at 25-26. Contrary to the Petition's assertions, Australia's Jewelry Guide does not prohibit use of the term "cultured" to describe laboratory-created gemstones, but advises that it "*risks* being misleading and deceptive," and suggests that marketers seek independent legal advice before using the descriptor. A Guide to the Trade Practices Act: Advertising and Promotion in the Jewelry Industry, Australian Competition & Consumer Commission (Aug. 2005) at ii. Therefore, it is not clear that there is any current conflict between the two Guides. The other cited decisions are discussed below.

and GIA practices each state that marketers should use the term “synthetic” to describe diamonds with essentially identical properties as natural stones.¹⁶ The term “synthetic,” however, is problematic. When the Commission added the terms “laboratory-grown,” “laboratory-created,” and “[manufacturer-name]-created” to the Guides in 1996, the record indicated that “synthetic” is a potentially confusing term, *i.e.*, consumers associate synthetic gemstones with imitation stones. The Commission determined that these other terms (“laboratory-grown,” etc.) would more clearly communicate the nature of the stone.¹⁷

The Jewelry Guides, therefore, state that these gemstones may be described as synthetic, laboratory-grown, laboratory-created, and [manufacturer-name]-created. The Commission has no evidence that these latter three terms are deceptive and Petitioners do not request we eliminate them from the Guides’s list of permissible qualifiers. Thus, even if the Commission were to amend the Guides to address the use of the term “cultured,” it would not achieve harmony with these foreign standards that only allow use of the term “synthetic.”

In addition, the international jewelry associations discussed in the Petition may base their standards on factors other than deception or unfairness. For example, the World Diamond Congress consists of members of the natural diamond industry who meet regularly to develop ethical business programs.¹⁸ Therefore, these associations’ standards may serve a different purpose than the Commission’s Guides.

Accordingly, although harmonization with international standards is generally preferred, where, as here, the Commission’s analysis of consumer perception data reveals that there is insufficient evidence to determine that a particular representation is deceptive or unfair, the Commission will not prohibit the representation solely to harmonize with international standards.

¹⁶ Petition at 25-26. The German court decision cited in the Petition takes a slightly different approach, advising that these gemstones must be described as synthetic, artificial, or man-made. See Landgericht Muenchen I (Regional Court for Munich I), 1. Handelskammer (First Chamber of Commerce), Case Number 1HK 0 9640/04 at 1573-1574.

¹⁷ See 61 Fed. Reg. at 27209; see also Letter from Apollo Diamond to James Kohm and Robin Spector, at 2 n.3 (June 18, 2007) (explaining that “synthetic” is synonymous with descriptors such as “fake,” “ersatz,” “phony,” and “counterfeit”).

¹⁸ See 31st Congress, New York 2004 Resolution; see also News Update, Edition 10 June 2007, World Federation of Diamond Bourses, *text of a speech by Ernest Blom*, at 6-7. Similarly, although one of CIBJO’s goals is to protect consumer confidence, the standards are not necessarily based solely on preventing deception and may include ethical business practices. http://www.cibjo.org/index.php?option=com_content&task=view&id=95&Itemid=198.

Conclusion

After reviewing the Petition and the consumer perception surveys upon which Petitioners rely, the Commission declines to amend the Guides to state that it would be unfair or deceptive to use the term “cultured” to describe gemstones created in a laboratory. Even if the surveys demonstrate that the unqualified term is misleading, a question the Commission does not reach, there is no evidence to suggest that the use of qualifying language in the Guides fails to render the term non-deceptive. In addition, the Commission concludes that there is insufficient evidence to establish that the qualified use of the term “cultured diamonds” is unfair. The Commission staff will continue to evaluate advertising for “cultured diamonds” on a case-by-case basis and recommend enforcement action when appropriate.

Thank you for your interest in this issue.

By direction of the Commission.

A handwritten signature in black ink that reads "Donald S. Clark". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Donald S. Clark
Secretary