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ORIGINAL

Decision No. 88029 OCT 25 1977

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

HUGUETTE VAN CAYZEELE also known  
as CATERINE DE SAINT ANDRE doing  
business as FRANCE MASSAGE &  
ABACA FRANCE,

Complainant,

vs.

THE PACIFIC TELEPHONE AND  
TELEGRAPH COMPANY, a  
corporation,

Defendant.

Case No. 10360  
(Filed June 24, 1977)

Huguette Van Cayzeele, for herself,  
complainant.

V. Henderson, for The Pacific Telephone  
and Telegraph Company, defendant.

O P I N I O N

Complainant alleges that defendant breached its written advertising contract by refusing to publish an ad in its 1977 San Francisco directory yellow pages under complainant's fictitious business name of Abaca France. On August 16, 1977 we denied complainant's motion for a temporary restraining order.<sup>1/</sup>

Defendant's answer filed July 29, 1977 admits signing an advertising contract with complainant on June 1, 1977 and denies all other allegations. Defendant's affirmative defense is that to allow complainant to list the name Abaca France in the classified section of the directory would violate its filed tariff, Schedule Cal.P.U.C. No. 17-T, Original Sheet 6-B which provides in part:

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1/ D.87712 dated August 16, 1977 in C.10360.

"Listings to secure preferential publicity or position by the use of a brand name or by other means are not accepted unless the customer...actually conducts business under the name to be listed."

and Schedule Cal.P.U.C. No. 17-T, 9th Revised Sheet 5 which provides in pertinent part as follows:

"The Company may require the subscriber to furnish evidence satisfactory to the Company that the business of the subscriber...is being conducted under the names to be listed. If, upon request of the Company, the subscriber for any reason does not furnish such evidence, the Company may refuse to list the name or refuse to continue a listing of the name. Such acceptance or refusal of the Company of the listing of a name is subject to review by the California Public Utilities Commission."

Defendant believes that complainant desires to use the name Abaca France for the purpose of obtaining preferential publicity and positioning within the directory, that complainant is not actually conducting business under that name, and that the tariff provisions are part of the contract entered into.

A public hearing, under the Commission's expedited complaint procedure, was held on September 14, 1977 in San Francisco before Administrative Law Judge Bernard A. Peeters and submitted on that date.

The evidence shows that defendant required complainant to first obtain listings from its business office for the business names of France Massage and Abaca France. Such listings were obtained on May 31, 1977.<sup>2/</sup> On June 1, 1977 defendant entered into an advertising contract with complainant for two double half-column display ads under the names of France Massage and Abaca France and canceled a double half-column ad under the name Babette; on July 8, 1977 a corrective sales memo was issued removing the order for the ad under the name Abaca France.<sup>3/</sup>

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<sup>2/</sup> Exhibit 2.

<sup>3/</sup> Exhibit 1.

Complainant contends that defendant told her if the business office would accept her listings, then the advertising would be accepted; that defendant's representative checked with the business office for the listings and after that worked up Exhibit 1. Subsequently, complainant was asked for proof of doing business under the name Abaca France. By letter of June 23, 1977 defendant advised complainant that a decision had been reached on acceptability of complainant's ad for Abaca France.<sup>4/</sup> It was pointed out that the ad appeared to be designed for preferential positioning in violation of the tariffs, and that the listing was unacceptable; therefore, the ad was unacceptable. Complainant attempted to show that business was being done under the name Abaca France by registering the name with the city and county of San Francisco and providing a copy of an ad under that name in the San Francisco Advertiser.<sup>2/</sup> Ultimately a 2 1/2-inch custom trademark ad was published in addition to a double half-column display ad under the name of France Massage. The custom trademark ad is listed under France Massage and on the bottom line, opposite the telephone number appears the name Abaca France.<sup>6/</sup> Complainant contends this is also evidence of doing business under the disputed name. It is contended by complainant that the use of the word abaca is not intended to obtain preferential positioning, but that it is the name of a tree found in Panama and the Philippines, which she believes is beautiful, that her fiancé is a Panamanian, and that the name is well known among Spanish and French speaking peoples, ethnic groups into which she is trying to expand her business; and, therefore, it is not designed to secure a preferential position in the directory listing. The relief sought by complainant is the free use of the name Abaca France in her advertising in the yellow pages. If it is determined that the name cannot be used, then reparations in an amount equivalent to 50 percent of the cost of the custom trademark ad is sought on the grounds that an erroneous name was published.

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<sup>4/</sup> Exhibit 3.

<sup>5/</sup> Exhibits 4 and 5.

<sup>6/</sup> Exhibits 6 and 7.

Defendant's case was put in through its administration manager. He pointed out that defendant followed its customary procedures in determining whether to accept the ad under the name Abaca France; that the salesman referred it to management for decision; that the evidence submitted by complainant is not sufficient to conclude that she is doing business under the name Abaca France; that one of the items relied upon in making its determination was a statement of the salesman who initially worked with complainant on the advertising order; that when he was at her premises he saw a dictionary open to the first page of the "A's";<sup>2/</sup> that the name Abaca France published in the custom trademark ad was printed in error since the copy sheet (Exhibit 6) shows France Massage; and that for this mistake, defendant is willing to make an adjustment of \$4 per month for the bold-type listing of Abaca France.

In rebuttal, complainant pointed out that the reason the dictionary was open at the time the salesman was there was because he wanted to know the meaning of the word, and complainant provided him with the dictionary.

We are of the opinion that defendant was justified in believing that complainant was not doing business under the name Abaca France since complainant had just changed from using the name Babette, and that it was an attempt to secure a preferential listing. However, in view of the ad placed in the San Francisco Advertiser and the fact defendant placed the name Abaca France in complainant's ad, albeit in error, it appears that for the future complainant can be considered as doing business under the name Abaca France and should be permitted to advertise under the name.

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<sup>2/</sup> Contained in a Memo to File dated August 5, 1977 prepared by this salesman for defendant.

O R D E R

IT IS ORDERED that:

1. For future directories, The Pacific Telephone and Telegraph Company shall consider complainant as doing business under the name Abaca France.

2. In all other respects the complaint is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 21<sup>st</sup> day of OCTOBER, 1977.

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President  
*William Symons, Jr.*  
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*Vernon L. Sturgeon*  
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*Robert D. Howell*  
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*Clare J. DeBrih*  
Commissioners

Commissioner Robert Batinevich, being necessarily absent, did not participate in the disposition of this proceeding.