

IN THE MATTER OF
PERFORMANCE SAILCRAFT INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2922. Complaint, May 2, 1978 —Decision, May 2, 1978

Consent order requiring a Pointe-Claire, Quebec, Canada, manufacturer and distributor of fiberglass sailboats and accessories, among other things, to cease entering into or enforcing any form of agreement with its dealers concerning the retail price of its products; restricting territories in which its dealers may advertise or sell its products; and terminating or threatening to terminate dealers who do not follow its pricing and territorial instructions. Further, any future price lists distributed by the firm must note that the prices are suggested or approximate.

Appearances

For the Commission: *Allen R. Caskie.*

For the respondent: *R. Warden McKimm, Ottawa, Canada.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Performance Sailcraft Inc., a corporation, more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. 45), 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 with respect thereto as follows:

PARAGRAPH 1. Respondent Performance Sailcraft Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the province of Quebec, Canada, with its principal office and place of business at 91 Hymus Boulevard, Pointe-Claire, Quebec, Canada.

PAR. 2. Respondent is a manufacturer and distributor of small recreational sailboats of fiberglass construction and accessories to be used therewith.

In 1975, respondent's gross income from sales of said products was \$3.6 million, over \$2 million of which was derived from sales in the United States.

PAR. 3. In the course of conduct of its business of manufacturing

and distributing sailboats and accessories, respondent is engaged in transacting business within the United States through the following activities, among others: the placement of advertising in United States magazines and newspapers of interstate circulation; the presence within the United States and participation of respondent's salesmen at numerous trade shows; and the C.O.D. shipment of respondent's products from its principal place of business to independent dealers located in various States throughout the United States who sell the products to consumers.

There is now and has been for several years past, a constant, substantial and increasing flow of such products in or affecting "commerce" as that term is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business in or affecting commerce, except to the extent that competition has been hampered or restrained by reason of the practices hereinafter alleged, respondent has been and is now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of said products.

PAR. 5. Respondent, in combination, agreement, or understanding with certain of its authorized dealers, or with the cooperation or acquiescence of other of its dealers, has for the last several years been engaged in a planned course of action to fix, establish and maintain certain resale or retail prices at which said products are resold. In furtherance of said planned course of action, respondent has for the past several years engaged in the following acts or practices, among others:

(a) Regularly furnishing its dealers with price lists and necessary supplements thereto containing certain resale or retail prices;

(b) Establishing agreements, understandings, or arrangements with its dealers, as a condition precedent to the granting of a dealership, that such dealers will maintain certain resale or retail prices;

(c) Informing its dealers, by direct or indirect means, that respondents expect and require such dealers to maintain and enforce certain resale or retail prices or such dealerships will be terminated;

(d) Soliciting and obtaining from its dealers cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices.

PAR. 6. Respondent, in combination, agreement, or understanding with certain of its authorized dealers, or with the cooperation or

engaged in a planned course of action whose effect has been to foster, promote, maintain and support its policies of restricting dealer competition in the United States in the marketing, sale, and distribution of fiberglass sailboats by directing, encouraging, threatening, warning, and/or otherwise prohibiting its dealers from selling or advertising the sale of said products outside of their allocated territories.

PAR. 7. These aforesaid acts and practices as alleged, are prejudicial and injurious to the public; have a tendency to hinder, restrict, restrain and prevent competition and have actually hindered, restricted, restrained and prevented competition; and constitute unfair acts or practices and unfair methods of competition in or affecting commerce within the meaning and intent of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent and its counsel and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Performance Sailcraft Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the province of Quebec, Canada, with its principal office and

place of business at 91 Hymus Boulevard, Pointe-Clare, Quebec, Canada.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and the respondent, and the proceeding is in the public interest.

ORDER

I. *It is ordered*, That respondent Performance Sailcraft Inc., and its subsidiaries, divisions, licensees, successors, assigns, officers, directors, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the distribution, advertising, offering for sale, or sale of fiberglass sailboats and accessories, or any other products (hereinafter referred to in this order as "said products"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from:

A. Establishing, maintaining or enforcing any contract, agreement, understanding or arrangement fixing, establishing, maintaining, controlling, influencing or enforcing in any way or to any extent, directly or indirectly, the price at which any of said products is advertised, sold or offered for sale at retail.

B. Requiring any dealer or prospective dealer to enter into any oral or written agreement or understanding that such dealer or prospective dealer will maintain any resale or retail price for any of said products as a condition of buying any of said products.

C. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any resale or retail price for any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

D. Threatening to terminate or terminating, either directly or indirectly, any dealer for failure to observe, maintain or advertise respondent's suggested resale prices for said products.

E. Requiring, from any dealer charged with price cutting or failure to adhere to any resale or retail price, a promise or assurance to adhere to any resale or retail price for any of said products as a condition precedent to any future sales to said dealer.

F. Publishing, disseminating or circulating any price list, price book, price tag, advertising or promotional material, or other document indicating any resale or retail price without stating on each page (of such list, book, tag, advertising or promotional material or other document), on which a price appears, that the price is suggested or approximate.

G. Imposing or attempting to impose any limitations or restrictions respecting the territories in which said products may be advertised or sold by its dealers.

H. Attempting to enter into, entering into, continuing, maintaining, or enforcing any contract, combination, understanding or agreement to limit, allocate, or restrict the territory in which said products may be advertised or sold by its dealers.

I. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any territorial restriction in the advertising and sale of any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

J. Threatening to terminate or terminating, either directly or indirectly, any dealer for failure to limit or restrict the advertising and sale of said products to a specified territory.

Provided, that none of the provisions herein shall prohibit respondent from designating geographical areas within which a dealer may agree to devote his best efforts to the sale of said products (hereinafter "area of primary responsibility") as a condition of becoming a dealer or maintaining a dealership, provided that such dealers are told that said area is not exclusive and does not place a territorial restriction upon the sale of said products.

Provided further, that none of the provisions herein shall prohibit respondent from terminating dealers for lawful business reasons.

II. *It is further ordered*, That the respondent shall within sixty (60) days after the service upon it of this order, mail a copy of this order to each of its dealers of said products in the United States and, during the five (5) year period of time following the date of service of this order, to all of its future dealers in the United States at the time said dealers are opened as accounts, under cover of the letter annexed hereto as Exhibit A, and furnish the Commission proof of the mailing thereof in the file required to be maintained under Paragraph V herein.

III. *It is further ordered*, That respondent shall forthwith distribute a copy of this order to each of its operating divisions engaged in the manufacture, sale, marketing and distribution of said products and to all of its sales personnel connected with the sale, marketing, and distribution of said products and shall instruct each sales person employed by it now or in the future to read this order and to be familiar with its provisions.

IV. *It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the

corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

V. *It is further ordered.* That the respondent herein, for a period of five (5) years from the date of this signing, establish and maintain a file of all records referring or relating to respondent's refusal to sell said products to any of respondent's dealers, which file shall contain the names and addresses of all dealers with whom respondent has refused to deal since the effective date of the order, a description of the reason for the refusal, the date of the refusal, and a record of a communication to each such dealer explaining respondent's refusal to sell said products, and which file will be made available on reasonable notice for inspection at the Commission's offices in Washington, D.C.

VI. *It is further ordered.* That the respondent herein 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 this order.

EXHIBIT A

(Letterhead of Performance Sailcraft Inc.)

Dear Dealer:

PSI has entered into an agreement with the Federal Trade Commission relating to our territorial allocation and pricing policies. A copy of the consent order entered into pursuant to that agreement is enclosed herewith.

We have entered into this agreement solely for the purpose of settling a dispute with the Commission, and the agreement and consent order are not to be construed as an admission that we have violated any of the laws administered by the Commission, or that any of the allegations in the complaint are true and correct. Instead, the order merely relates to our activities in the future.

In order that you may readily understand the terms of the consent order, we have set forth the essentials of the agreement with the Commission, although you must realize that the consent order itself is controlling rather than the following explanation of its provisions:

(1) Our dealers are free to set their own retail or resale prices for the products covered by the consent order.

(2) We will not solicit, invite or encourage any dealer or any other person to report any dealer not following any retail or resale price for any of said products, and, furthermore, will not act on any such report sent to us.

(3) We will not require or induce our dealers to refrain from advertising said

869

Decision and Order

(4) As you know, it is a condition of becoming a dealer or maintaining a dealership that you agree to devote your best sales efforts in your designated geographical territory. However, you are free to advertise and sell any of the products covered by the consent order outside of these designated territories.

Sincerely,
(Officer)

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

CHRYSLER CORPORATION, ET AL.

Docket 9072. Interlocutory Order, May 8, 1978

Denial of complaint counsel's motion to enforce subpoena *duces tecum* against present owner of records sought, a purchaser of the assets of the corporation named in the subpoena.

ORDER DENYING MOTION TO ENFORCE SUBPOENA DUCES
TECUM

On February 13, 1978, Administrative Law Judge Lewis F. Parker certified to the Commission the motion of complaint counsel herein for enforcement of a subpoena *duces tecum* issued in November, 1976,¹ directing Northline Dodge, Inc., a California corporation, to produce certain documents relating, *inter alia*, to motor vehicle repossessions in which it had been involved during a specified time period. A partial return was made, and complaint counsel were pursuing further compliance when, on July 29, 1977, complaint counsel were advised that the assets of the California corporation had been sold to a Texas corporation having different principals but the same name, and the California corporation dissolved. The assets transferred evidently include the records sought, to the extent they exist, but complaint counsel assert that the Texas corporation has declined to take the effort necessary to make any further return on the subpoena. Matters were in this posture when complaint counsel moved for enforcement of the subpoena.

Complaint counsel's motion does not attempt to propound a theory for enforcing a subpoena *duces tecum* against a corporation which simply purchased assets from the corporation against which it was issued. It is patent, however, that mere identity of name between the two corporations has no bearing on the matter. The subpoena was issued against and served upon a particular legal entity. While that legal entity retains the capacity to be sued for some period of time after formal dissolution, it evidently no longer possesses the documents sought. The legal entity which does possess the documents, on the other hand, has never been subpoenaed to produce them. Moreover, there is nothing in the record to indicate that the new entity stands in the position of a legal successor to the dissolved corporation so as to enable the outstanding subpoena to be enforced

¹ The exact date does not appear from the materials before us. Indeed, as complaint counsel note, the copy of the subpoena attached to the motion herein does not show on its face that it was authorized by the ALJ. Because of

876

Interlocutory Order

against the Texas corporation. In these circumstances, an order that the November 1976 subpoena be enforced would appear to be an exercise in futility. Accordingly,

It is ordered, That complaint counsel's Motion to Enforce Subpoena *Duces Tecum* be, and it hereby is, denied.²

² This ruling, of course, in no way precludes complaint counsel from seeking to subpoena the documents directly from the new corporation.

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

AMERICAN DENTAL ASSOCIATION, ET AL.

Docket 9093. Interlocutory Order, May 8, 1978

Denial of supplemental motions of subpoenaed third parties to quash and/or limit subpoenas *duces tecum*.

ORDER DENYING MOTION TO QUASH AND/OR LIMIT SUBPOENAS
DUCES TECUM

This matter comes to the Commission upon supplemental motions to quash and/or limit subpoenas *duces tecum* filed on behalf of Henry L. Ernstthal and the California Dental Association ("CDA") and Kathie Boise and the Orange County Dental Society, Inc. ("OCDS"). Because of the unusual posture of this motion, it is necessary to chronicle the prior developments in some detail.

The Commission issued an administrative complaint in this proceeding on January 4, 1977. In the course of the administrative proceedings, the administrative law judge ("ALJ"), at the request of Commission complaint counsel, on November 16, 1977, issued subpoenas *duces tecum* to CDA and OCDS pursuant to Section 3.34(b) of the Commission's Rules of Practice and Procedures. CDA and OCDS filed a joint motion to quash the subpoenas on December 1, 1977, which motion was denied by the ALJ on December 15, 1977. CDA and OCDS then filed a joint motion on January 3, 1978, seeking extraordinary leave to appeal to the Commission the denial of their motion to quash. On January 6, 1978, this motion was denied by the ALJ, who established January 23, 1978, as the final date for compliance with the subpoenas. CDA and OCDS moved before the ALJ on January 18, 1978, for reconsideration of his denial of their motion to quash and their motion for appeal to the Commission, arguing for the first time that the Commission lacked jurisdiction over the parties. The ALJ denied this motion on January 23, 1978. Upon the parties' subsequent refusal to comply with the subpoenas, on February 17, 1978, the Commission granted complaint counsel's motion requesting court enforcement of the subpoenas and enforcement papers were filed on March 14, 1978.

In an order issued April 19, 1978, the District Court for the District of Columbia concluded that it was inappropriate to consider the parties' jurisdictional challenge to the Commission's pending adjudicative proceeding. However, the court found that the ALJ had not had an opportunity to consider some of the parties' non-jurisdictional challenges. Accordingly, the court's order permitted

present to the ALJ by April 21, 1978, any of the non-jurisdictional challenges which they raised in the enforcement proceedings but which were not initially presented to the ALJ. The court's order further provides that the ALJ shall rule on any such challenges no later than April 28, 1978, and that after the ALJ has so ruled (and the Commission, if requested, has reviewed the matter), CDA and OCDS may assert in the enforcement proceeding any non-jurisdictional challenges to the instant subpoenas *duces tecum*. The order specifically indicates that the court will retain jurisdiction over the Commission's present enforcement petition pending the ALJ's consideration (and the Commission's, if so requested) of non-jurisdictional challenges not previously presented by the parties to the ALJ.

Pursuant to this order, CDA and OCDS filed the instant supplemental motion to quash and/or limit the subpoenas *duces tecum* on April 21, 1978, arguing that the specifications of the subpoenas are overly broad, seek irrelevant information, and are too indefinite. Additionally, the parties contend that compliance with the subpoenas would be unduly burdensome and that they are entitled to a protective order for confidential documents. By orders of April 28, May 1, and May 2, 1978, the ALJ issued a protective order but otherwise denied the supplemental motion and certified the matter to the Commission for its consideration in view of the order of the district court.¹

Ordinarily, under the Commission's Rules of Practice and Procedure the supplemental motion would have been untimely since no good cause for a belated, piecemeal submission has been shown to justify an extension under Section 3.34(b). Moreover, even had it been timely, the ALJ's denial of that motion, like other pre-trial discovery rulings, would not be reviewed by the Commission absent a showing (not made here) of a clear abuse of discretion. *See, e.g., Exxon Corp.*, 85 F.T.C. 91 (1975). The opposition of CDA and OCDS to court enforcement of the subpoena did not focus on a supplemental motion to quash as a form of relief, and the status of such motion under the Commission's Rules was not addressed in the litigation papers. Accordingly, the court had no reason to know that the review apparently contemplated by the court's order would ordinarily be unavailable, and it is open to question whether the court intended to require the Commission to engage in extraordinary review in this matter.

¹ We understand that the May 31, 1978 compliance date established by the ALJ is contingent upon the district court's enforcement of the subpoenas.

Nevertheless, in a spirit of compliance with the court's order and to forestall further delay in enforcement of the subpoenas,² the Commission has reviewed the ALJ's denial of the supplemental motion. Our review convinces us that there is no showing sufficient to warrant reversal of the ALJ's well-considered ruling. Accordingly, *It is ordered*, That the Supplemental Motion to Quash and/or Limit the Subpoenas *Duces Tecum* is denied.

² We assume that the court did not intend to endorse any generally-applicable departure from the usual principle requiring exhaustion of administrative remedies, under which legal or factual arguments not tendered in a timely motion to quash a subpoena would be deemed waived.

Modifying Order

IN THE MATTER OF

GEORGIA-PACIFIC CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATIONS OF THE
FEDERAL TRADE COMMISSION AND SEC. 7 OF THE CLAYTON
ACTS

Docket 8843. Final Order, Dec. 26, 1972—Modifying Order, May 12, 1978

This order modifies a final order to cease and desist issued December 26, 1972, 38 FR 1581, 81 F.T.C. 984, by changing Paragraphs 6 and 7 to permit acquisitions of \$1,000,000 or less without prior Commission approval, and by substituting for Paragraph 10, one that limits reporting obligations to those corporate alterations that may have a significant affect on compliance.

ORDER MODIFYING ORDER TO CEASE AND DESIST

By a petition filed March 31, 1978, and revised by a petition filed April 26, 1978, respondent Georgia-Pacific Corporation asked the Commission to reopen this proceeding to modify Paragraphs 6, 7, and 10 of the consent order issued by the Commission on December 26, 1972.

Paragraph 7 of the consent order requires, *inter alia*, that Georgia-Pacific obtain Commission approval before purchasing non-softwood plywood assets when the seller is engaged in softwood plywood manufacturing. Georgia-Pacific contends that this reporting requirement is overbroad because the consent order was aimed at preventing Georgia-Pacific from increasing its market power in the softwood plywood industry, and it is unlikely that its ability to control price or entry in the relevant market would be affected when the acquisition is of non-softwood plywood assets.

Respondent also requests modification of Paragraphs 6 and 7 of the order so that it need not obtain approval of acquisitions of softwood plywood assets where the purchase price is less than 1 million dollars. Respondent believes that purchases of this size are *de minimis* and "would not undercut the effectiveness of the consent order, but it would reduce needless administrative burdens arising from compliance with the consent order. . . ." More precisely, respondent contends that it is unable to bid at auctions for softwood plywood equipment owned by softwood plywood firms, as these auctions often take place upon relatively short notice which precludes the soliciting and receiving of prior approval from the Commission. Because of their *de minimis* nature, these asset acquisitions, respondent believes, would likely be approved by the Commission.

The final modification sought by Georgia-Pacific relates to Paragraph 10 of the consent order. This paragraph requires respondent to notify the Commission of the creation or dissolution of subsidiaries even if the corporate change does not affect compliance obligations arising from the order. Respondent is a large, multinational corporation which periodically must, it represents, "make various adjustments in its corporate structure which do not or would not affect its compliance obligations." The modification proposed by respondent will limit its reporting obligations under Paragraph 10 to those corporate alterations that may have significance from a compliance standpoint.

The Bureau of Competition filed on May 1, 1978, an answer to respondent's petition. The Bureau does not oppose the modifications.

We agree that the petition should be granted. The modifications proposed by respondent should not affect adversely the purpose of the order, which, is to say, the aspects of the order complained of by respondent are either unnecessary or overbroad, and they are, therefore, unwarranted.

Accordingly,

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

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting for Paragraphs 6, 7 and 10 of the order, the following:

PARAGRAPH 6

It is further ordered, That for ten (10) years from the effective date, respondent shall cease and desist from acquiring, directly or indirectly through subsidiaries, or otherwise, for its use in the manufacture of softwood plywood, from any person, firm or corporation other than the manufacturer thereof or a regular dealer or distributor of such equipment in the ordinary course of such dealer's or distributor's business:

(A) Any equipment specifically designed for the manufacture of softwood plywood;

(B) Any equipment specifically designed and theretofore used in the manufacture of softwood plywood; and

(C) Any equipment thereafter converted by respondent, directly or indirectly, into equipment specifically designed for the manufacture of softwood plywood; unless such acquisitions amount to \$1,000,000 or less from any one person, firm or corporation in any twelve month period in the absence of prior Federal Trade Commission approval of

PARAGRAPH 7

It is further ordered, That for a period of ten (10) years from the effective date, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries, or otherwise, the whole or any part of the share capital or assets of, or any other interest in, any other person, firm or corporation engaged in the manufacture of softwood plywood in the United States immediately prior to such acquisition, unless such asset acquisitions amount to \$1,000,000 or less from any one person, firm or corporation in any twelve-month period, in the absence of prior Federal Trade Commission approval of such acquisition; *Provided, however,* That nothing contained in this paragraph shall preclude or be deemed to preclude respondent from acquiring timberlands or any interest therein or timber in any form (including but not limited to stumpage, logs, veneers, chips, sawdust and cores); and, *Further provided,* That nothing contained in this paragraph shall apply to purchases of lumber, plywood, machinery, or any other product, by respondent in the regular conduct of its business from suppliers in the regular conduct of their businesses, or to sales made by respondent in the regular conduct of its business.

PARAGRAPH 10

It is further ordered, That for a period of ten (10) years from the effective date of the order entered by the Commission on December 26, 1972, respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or joint ventures.

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

BELTONE ELECTRONICS CORPORATION, ET AL.

Docket 8928. Interlocutory Order, May 12, 1978

Remand for additional hearings ordered for consideration of customer and territorial restriction on interbrand and intrabrand competition.

ORDER REMANDING FOR ADDITIONAL HEARINGS

By order of July 5, 1977, the Commission directed the parties in this proceeding to submit supplemental briefs concerning the impact of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). After careful review of the briefs submitted by the parties and the record developed before the administrative law judge ("ALJ"), the Commission has determined that a limited remand of the case is necessary for consideration of the impact of respondents' customer and territorial restrictions upon both interbrand and intrabrand competition.

The complaint in this proceeding was issued on May 8, 1973, charging respondents with various violations of Section 5, including, *inter alia*, imposition of exclusive dealing, maintenance of territorial and customer restrictions, use of certain post-termination restraints, and misappropriation of the names and addresses of dealers' customers. After extensive pretrial discovery and 115 days of hearings in Washington, D.C., Chicago, San Francisco, and New Orleans, the ALJ filed his initial decision on September 7, 1976, finding that the respondents had engaged in the following unfair acts and practices and unfair methods of competition in violation of Section 5:

(A) Requiring their selected dealers to sell Beltone products within assigned geographic territories;

(B) Requiring their selected dealers to deal exclusively in Beltone hearing aids;

(C) Prohibiting their dealers from dealing with certain potential customers;

(D) Preventing others, not their dealers, from dealing in or repairing Beltone products; and

(E) Appropriating and using for their own purposes the names and addresses of their dealers' customers.

The ALJ's legal analysis of respondents' territorial and customer restrictions (ID 79-82)¹ leaves no doubt that he examined these

¹ We recognize, of course, that respondents deny the existence of any territorial or customer restrictions and

Interlocutory Order

particular restraints in light of the then-prevailing *per se* standard of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), under the rationale that conduct violating the Sherman Act would necessarily violate Section 5 of the FTC Act. Moreover, complaint counsel's trial and answering briefs indicate that they contemplated application of a *per se* theory throughout the proceeding. Although the record contains some discussion of the competition effects of respondents' territorial and customer restrictions, it is clear that the evidence introduced provides, on balance, an incomplete picture of the interbrand and intrabrand effects of these practices. Hence, the need to premise our disposition of this case upon a thorough examination of the competitive impact of these specific restraints leads us to conclude that we should remand the proceeding.² Accordingly,

It is ordered, That this matter is remanded to the administrative law judge for an expedited proceeding solely to receive additional evidence regarding the effects of respondents' territorial and customer restrictions upon interbrand and intrabrand competition.

It is further ordered, That, after the receipt of such additional evidence, the administrative law judge certify the record to the Commission together with any findings of fact or conclusions of law which he may make in light of the additional evidence.

² In view of the unusual amount of cumulative dealer testimony evident in the present record, we wish to emphasize that an expeditious resolution of the issues on remand is in the best interest of all parties. To this end, stipulations should be freely utilized to avoid the introduction of duplicative testimony. In any event, we assume that the ALJ will exercise appropriate control over the receipt of additional evidence.

Interlocutory Order

91 F.T.C.

IN THE MATTER OF
SUNKIST GROWERS, INC.

Docket 9100. Interlocutory Order, May 15, 1978

Application for review of ALJ order denied for failure to raise an issue having substantial ground for difference of opinion.

ORDER DENYING APPLICATION FOR REVIEW

Respondent, Sunkist Growers Inc. ("Sunkist"), has filed an Application for Review of Order Denying Respondent's Motion to Dismiss for Lack of Jurisdiction pursuant to Rule 3.23(b). Because Sunkist has failed to raise an issue as to which there is substantial ground for difference of opinion, the Application for Review is denied. While further elaboration is unnecessary, a brief explanation of the reasons for our decision seems warranted.

Sunkist argues that the Commission lacks jurisdiction over the subject matter of this proceeding by reason of the Capper-Volstead Act, 7 U.S.C. 291, 292. Alternatively, Sunkist argues that primary jurisdiction of this matter rests with the Secretary of Agriculture.

It is well settled that the Capper-Volstead Act does not vest exclusive jurisdiction of antitrust claims against agricultural cooperatives in the Secretary of Agriculture. *Maryland & Virginia Milk Producers Ass'n, Inc. v. United States*, 362 U.S. 458, 462-64 (1960); *United States v. Borden Co.*, 308 U.S. 188, 205-06 (1939); *Central California Lettuce Producers Cooperative*, Dkt. 8970, slip opinion at 4-5 (July 25, 1977) [90 F.T.C. at 53,54], Cf. *Washington Crab Ass'n*, 66 F.T.C. 45 (1964). While conceding that federal courts have jurisdiction over monopolization suits initiated by the Department of Justice, Sunkist argues that the Commission lacks similar jurisdiction with respect to complaints issued under the Federal Trade Commission Act. Respondent, however, cites no authority in support of this anomalous position. The complaint alleges that Sunkist is a corporation within the meaning of Section 4 of the Federal Trade Commission Act which has engaged in unfair methods of competition. It thus appears that the complaint states a cause of action under Section 5 against a respondent which is subject to the Commission's jurisdiction.

Respondent's alternative argument is that "primary jurisdiction rests with the Secretary of Agriculture." As we explained in *Perpetual Federal Savings & Loan Ass'n*, Dkt. 9083 (December 6, 1977) [90 F.T.C. 608], it is not wholly clear that the doctrine of

its jurisdiction until an administrative agency has determined a particular question, applies as between agencies. *Id.*, slip opinion at 24 n. 28 [90 F.T.C. at 662]. Assuming, *arguendo*, the applicability of the doctrine, it appears that the tests of *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), are not met. The cases cited above indicate that the provisions of the Capper-Volstead Act are not incompatible with the maintenance of this action. Moreover, the Capper-Volstead Act gives the Secretary of Agriculture authority to adjudicate whether a cooperative association "monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced thereby." On the other hand, a monopolization complaint¹ under Section 2 of the Sherman Act or Section 5 of the Federal Trade Commission Act involves only an inquiry into whether monopoly power exists, and whether that monopoly power has been willfully acquired or maintained, *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), without any necessary showing of price enhancement. For this reason, it does not appear that facets of this dispute are necessarily within the jurisdiction of the Secretary of Agriculture, nor that adjudication by the Secretary would be of material aid in resolving the issues posed by the complaint. With respect to the latter point, it is clear that an adjudication by the Secretary that respondent had not unduly enhanced prices would in no way dispose of, or shed much significant light on, the issues in this case. Thus, it does not appear that the doctrine of primary jurisdiction requires us to defer to the Secretary of Agriculture. Accordingly,

It is ordered, That Respondent's Application for Review be, and the same hereby is, denied.

¹ We note that while the gravamen of the complaint is monopolization, other charges, including violations of Section 7 of the Clayton Act, are encompassed within the complaint.

Complaint

91 F.T.C.

IN THE MATTER OF

VERRAZZANO TRADING CORPORATION, ET AL.

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

Docket 9038. Complaint, June 24, 1975 — Final Order, May 15, 1978

This order, among other things, requires a New York City importer and distributor of wool and textile fiber products, and four affiliated companies, to cease misrepresenting or failing to properly disclose the fiber content of wool and textile fiber products, and the residual shrinkage of such products. Additionally, the firms must file bond with the Secretary of the Treasury before participating in the importation of wool and textile fiber fabrics; and provide purchasers of mislabeled merchandise with a copy of the order.

Appearances

For the Commission: *Ellen Zweibel* and *Judith K. Braun*.

For the respondents: *David A. Botwinik*, *Pavia & Harcourt*, New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Verrazzano Trading Corporation, a corporation, Francisco Datini Inc., a corporation, Lanificio Tuscania Inc., a corporation, Lima Textiles Inc., a corporation, and Walter Banci, individually and as an agent for said corporations and as an officer of Lanificio Tuscania Inc. and Lima Textiles Inc. and as a partner trading and doing business as Lanificio Walter Banci s.a.s., hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated [2] under the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act, and it now appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Verrazzano Trading Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its main office and principal place of business at 2 Penn Plaza New York New York

existing and doing business under and by virtue of the laws of the State of New York, with its main office and principal place of business at 2 Penn Plaza, New York, New York.

Respondent Lanificio Tuscania Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its main office and principal place of business at 2 Penn Plaza, New York, New York.

Respondent Lima Textiles Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its main office and principal place of business at 2 Penn Plaza, New York, New York.

Individual respondent Walter Banci is an agent of said corporations and an officer of Lanificio Tuscania Inc. and Lima Textiles Inc. and a partner trading and doing business as Lanificio Walter Banci s.a.s. Lola Conti Banci is a co-partner but is inactive with respect to the business operations of said company. Walter Banci formulates, directs and [3] controls the acts and practices of said partnership and of said corporate respondents, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondents.

The corporate respondents and Walter Banci constitute a unified family business operation designed to import and sell in the United States fabrics produced and exported from Italy by Lanificio Walter Banci, s.a.s. and distribute such fabrics in commerce.

PAR. 2. Respondents are now and for some time past have been engaged in the introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products which have been advertised or offered for sale in commerce, and have sold, offered for sale, advertised, delivered, transported, and caused to be transported after shipment in commerce, textile fiber products as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited

thereto, were certain textile fabrics stamped, tagged, labeled or otherwise identified by respondents as "50% cotton, 35% polyester, 15% nylon" whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented. [4]

PAR. 4. Certain of such textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels which failed:

- (1) To disclose the true generic names of fibers present; and
- (2) To disclose the true percentages of such fibers.

PAR. 5. Respondents' textile fiber products described in Paragraph Four above were imported by the respondents into the United States and, as particularized in said paragraph, were not stamped, tagged, labeled, or otherwise identified in accordance with the provisions of the Textile Fiber Products Identification Act. The invoices of said imported textile fiber products required by the Tariff Act of 1930 failed to set forth the information with respect to said textile fiber products required under Section 4(b) of the Textile Fiber Products Identification Act. The respondents did falsify the consignee's declaration provided for in said Tariff Act of 1930 insofar as it related to said information, in violation of Section 9 of the Textile Fiber Products Identification Act and Section 5 of the Federal Trade Commission Act.

PAR. 6. The acts and practices of respondents as set forth in Paragraphs Three, Four and Five above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition [5] and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

PAR. 7. Respondents now and for some time past have imported for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products, as "wool product" is defined therein.

PAR. 8. Certain of said wool products were misbranded by

Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain wool fabrics stamped, tagged, labeled, or otherwise identified by respondents as "45% acrylic, 30% wool, 25% cotton" whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 9. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely wool fabrics, with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation [6] not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 10. Respondents' wool products described in Paragraph Nine above were imported by the respondents into the United States and, as particularized in said paragraph, were not stamped, tagged, labeled, or otherwise identified in accordance with the provisions of the Wool Products Labeling Act of 1939. The respondents in their invoices of said imported wool products required by the Tariff Act of 1930 failed to set forth the information with respect to said wool products required under the provisions of the Wool Products Labeling Act of 1939, to wit, the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers. The respondents did falsify the consignee's declaration provided for in said Tariff Act of 1930 insofar as it related to the above items of information enumerated in this paragraph, in violation of Section 8 of the Wool Products Labeling Act of 1939 and Section 5 of the Federal Trade Commission Act.

PAR. 11. The acts and practices of the respondents as herein alleged in Paragraphs Eight, Nine and Ten were, and are, in

violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, within the meaning of the Federal Trade Commission Act. [7]

PAR. 12. Respondents, now and for some time past, have been engaged in the importation, offering for sale, sale, and distribution of certain products, namely fabrics. In the course and conduct of their business as aforesaid, respondents now cause and for some time past have caused their said products, when sold, to be shipped from the State of New York to purchasers located in various other States of the United States, 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.

PAR. 13. In the course and conduct of their business, respondents have misrepresented to their customers the character and amount of the constituent fibers contained in their products through falsely and deceptively stamping, tagging, labeling and otherwise identifying said products.

Among such products, but not limited thereto, were fabrics labeled as "65% acrylic, 25% cotton, 10% nylon" whereas, in truth and in fact, such products contained substantially different fibers and amounts of fibers than represented including wool.

PAR. 14. In the course and conduct of their business, respondents have misrepresented to their customers the shrinkage factor of their textile products through falsely and deceptively invoicing said products.

Among such products, but not limited thereto were fabrics represented as having 1-1 1/2% residual shrinkage whereas, in truth and in fact, such products shrink substantially more than represented.

PAR. 15. Respondents in the course and conduct of their business have made statements on [8] invoices to their customers, misrepresenting the fiber content of certain of their products.

Among such misrepresentations, but not limited thereto, were statements setting forth the fiber content thereof as "55% acrylic, 20% wool, 20% cotton, 5% other fibers" whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 16. The aforesaid acts and practices of respondents as herein alleged in Paragraphs Thirteen, Fourteen and Fifteen were and are,

888

Initial Decision

constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY PAUL R. TEETOR, ADMINISTRATIVE LAW
JUDGE

NOVEMBER 25, 1977

I

SUMMARY OF COMPLAINT

Identification of Respondents

Alleging violations of the Wool Products Labeling Act of 1939 (hereafter "the Wool Act"), the Textile Fiber Products Identification Act (hereafter "the Textile Act") and Section 5 of the Federal Trade Commission Act (hereafter "the FTC Act") and the rules and regulations promulgated thereunder, on 6/24/75 this Commission issued its complaint against what *Paragraph 1* thereof alleges to be "a unified family business operation." It is said to be made up of Verrazzano Trading Corporation, Francesco Datini Inc., Lanificio Tuscania Inc., Lima Textiles Inc. (all New York corporations with an office in New York City) and one Walter Banci, personally, as an officer and agent for said corporations and as a partner in an Italian company, Lanificio Walter Banci s.a.s. His wife, Lola Conti Banci, is alleged to be an inactive partner. [An amendment to the complaint allowed by the administrative law judge without objection on 2/10/76 added Hudson Textile, Inc. (also a New York corporation) as an additional respondent and alleged participant in the same enterprise.] This "unified family business" is alleged in *Paragraph 1* to be designed to import and sell in the United States and distribute in "commerce" their fabrics produced and exported from Italy by Lanificio Walter Banci s.a.s.

"Commerce" Allegations

Complaint Paragraph 2 alleges that respondents engage in importing, transporting, advertising, offering and selling *textile fiber products* and introducing them in "commerce," both phrases being defined as in the Textile Fiber Products Identification Act (hereafter the "Textile Act"). [2]

Paragraph 7 alleges that respondents engage in importing, transporting, distributing, offering, selling, shipping and delivering *wool products* and introducing them in "commerce" (both phrases

being defined as in the Wool Products Labeling Act (hereafter the "Wool Act").

Paragraph 12 alleges that respondent engage in importing, distributing, offering and selling *fabrics generally*, shipping such fabrics, when sold, from the State of New York to purchasers located in various states, the same amounting to a "substantial course of trade" in "commerce," as defined in the Federal Trade Commission Act (hereafter the "FTC Act").

Alleged Violations of the Textile Act

Complaint Paragraph 3 pleads a violation of Section 4(a) of the Textile Act, which prohibits "misbranding," *i.e., false and deceptive identification of the name or amount of constituents in textile fabrics*. An example of such misbranding is said to be the identification of a textile fabric as "50% cotton, 35% polyester, 15% nylon" when the constituent fibers and amounts thereof are, in fact, "substantially different."

Complaint Paragraph 6 adds that such violation of Section 4(a) of the Textile Act, by virtue of Section 7 thereof, automatically constitutes, in addition, an unfair practice under the FTC Act.

Complaint Paragraph 4 pleads a violation of Section 4(b) of the Textile Act, which prohibits "misbranding" *i.e., non-attachment or non-affixation of specified identifying data of textile fiber products*. An example of such misbranding is said to be the non-disclosure on textile fiber product labels of the true generic names of fibers present or the true percentages of such fibers therein contained.

Complaint Paragraph 6 adds that such violation of the Textile Act, by virtue of Section 7 thereof, automatically constitutes, in addition, an unfair practice under the FTC Act. [3]

Complaint Paragraph 5 pleads a violation of Section 9 of the Textile Act, which prohibits *importation into the United States of textile fiber products "misbranded" under Section 4 of the act* (above). In elaboration, Paragraph 5 explains that the required identifying information was omitted from so-called *Tariff Act invoices* and falsified on so-called *Tariff Act consignee-declarations*.

Complaint Paragraph 6 adds that such violation of Section 9 of the Textile Act, by virtue of Section 7 thereof, automatically constitutes, in addition, an unfair practice under the FTC Act.

Alleged Violations of the Wool Act

Complaint Paragraph 8 pleads a violation of Section 4(a)(1) of the

randing") of wool products. An example of such misbranding is said to be the identification of certain wool fabrics as "45% acrylic, 30% wool, 25% cotton," whereas said fabrics in fact contained "substantially different" fibers or amounts of fibers. *Complaint Paragraph 11* adds that such violation of the Wool Act, by virtue of Section 6 thereof, automatically constitutes, in addition, an unfair practice under the FTC Act.

Complaint Paragraph 9 pleads a violation of Section 4(a)(2) of the Wool Act, which prohibits *non-attachment or non-affixation of specified identifying data ("misbranding") of wool products*. An example of such misbranding is said to be failure to disclose by a label on or affixed to a wool product the percentage of total fiber weight¹ which is: [4]

- (1) wool
- (2) reprocessed wool
- (3) re-used wool
- (4) each non-wool fiber representing 5% or more of total weight
- (5) the aggregate of all other fibers.

Complaint Paragraph 11 adds that such violation of the Wool Act, by virtue of Section 6 thereof, automatically constitutes, in addition, an unfair practice under the FTC Act.

Complaint Paragraph 10 pleads a violation of Section 8 of the Wool Act, which prohibits *importation into the United States of wool products "misbranded" under Section 4 of the act* (above). In elaboration, Paragraph 10 explains that required identifying information was omitted from so-called *Tariff Act invoices* and falsified on so-called *Tariff Act consignee-declarations*. *Complaint Paragraph 11* adds that such violation of the Wool Act, by virtue of Section 6 thereof, automatically constitutes, in addition, an unfair practice under the FTC Act.

Alleged Violations of Federal Trade Commission Act²

Complaint Paragraph 13 pleads a violation of Section 5 of the FTC Act, which prohibits unfair and deceptive trade practices, alleging *misrepresentation of the character and amount of constituent fibers in respondents' fabrics*. An example pleaded is the [5] labeling of fabrics "65% acrylic, 75% cotton, 10% nylon," whereas, in fact, such

¹ Exclusive of ornamentation not exceeding 5% of total fiber weight.

² *Complaint Paragraphs 13, 14 and 15* plead unfair trade practices under Section 5 of the FTC Act which do not (unlike earlier allegations of unfair practices) derive automatically from a Textile Act or Wool Act violation and which, in fact, for one reason or another, could not have been made the basis for a Textile Act or Wool Act charge. The "public interest" finding requisite to all three FTC Act charges is pleaded in *complaint Paragraph 16*.

fabrics contained "substantially different" kinds and amounts of fibers, including wool.³

Complaint Paragraph 14 pleads a violation of Section 5 of the FTC Act, which prohibits unfair and deceptive trade practices, alleging *misrepresentation of the shrinkage factor*⁴ in respondents' textile products. An example pleaded is a representation that fabrics have 1-1 1/2% residual shrinkage whereas, in truth, such fabrics shrink "substantially more" than represented.

Complaint Paragraph 15 pleads a violation of Section 5 of the FTC Act, which prohibits unfair and deceptive trade practices, alleging *misrepresentation by means of commercial (i.e., non-Tariff Act) invoices*⁵ concerning certain products' fiber content. An example pleaded is a representation that fiber content is [6] "55% acrylic, 20% wool, 20% cotton, 5% other fibers," whereas, in fact, such products contain "substantially different" kinds and amounts of fibers than represented.

Complaint Paragraph 16 pleads the public interest in prosecution which must exist to justify bringing charges (as in Paragraphs 13, 14 and 15) under Section 5 of the FTC Act (as distinguished from either the Wool Act or Textile Act).

Proposed Order

A proposed order, served with the complaint, contemplates cease and desist orders against all respondents, which orders would prohibit: (1) misbranding textile fiber products by false or deceptive identification of the name or amount of constituent fibers or by failing to affix each element of information required by Section 4(b) of the Textile Fiber Products Identification Act; (2) importing textile fiber products into the United States except upon filing a bond in double import value to comply with the Textile Fiber Products Identification Act; (3) misbranding wool products by false or deceptive identification of the character or amount of constituent fibers or by failing to affix each element of information required by Section 4(a)(2) of the Wool Products Labeling Act; (4) importing wool products into the United States except upon filing a bond in double

³ The significance of wool traces lies in making such a fabric a "wool product" and thus exempt from application of the Textile Act, at least according to complaint counsel's reasoning, as will be discussed at page 32 below.

⁴ A misrepresentation concerning a fabric's shrinkage potential must be pleaded under the FTC Act because both the Textile Act and the Wool Act are concerned only with the kinds and quantities of fibers contained in a fabric.

⁵ Misrepresentation of the fiber content of a wool product must be charged under the FTC Act if the instrumentality of the misrepresentation is an ordinary commercial invoice (as distinguished from a so-called

import value to comply with the Wool Products Labeling Act; (5) misrepresenting the character or amount of constituent fibers or the shrinkage factor of wool and/or textile products in any manner, including identification in invoices.

Respondents would also be required to give notice of misbranding to those customers who have bought misbranded products; to notify this Commission of changes in business affiliation or employment; to give notice to the Commission 30 days before making any structural change in their business which might affect compliance with this order; and to distribute copies of this order throughout their organization. [7]

II

PROCEDURAL HISTORY

From the issuance of the Commission's complaint on 6/24/75 to the filing of this initial decision on 11/25/77, a period of nearly two and a half years has elapsed. To one uninitiated in the lengthy discovery procedures and complex motion practice that have come to characterize Commission proceedings for the purpose of satisfying the requirements of due process of law for businessmen, it might appear that the administrative law judge and the parties put this relatively small and largely indefensible⁶ case on the back burner for many months at a time.

On the contrary, the two and a half years were crowded with constant motions and discovery procedures. Aside from an inexplicable delay by the contract reporter of more than three months in correcting the pagination and other clerical errors of this relatively small trial transcript, there was almost never a period of time when some pre-trial, trial or post-trial procedure was not in the offing.

Lest there be any question on this score, we have compiled a detailed procedural history of this matter which is attached hereto as Appendix I, to which any reader interested in the facts of this case or any student interested in its implications for the future of administrative jurisprudence is hereby referred. We now turn directly to our findings of fact, which are notably briefer than the procedural history of their evocation. [8]

⁶ On 11/16/76, respondents' counsel stated frankly in open court: "Now my fight will have to be a weak one since I have nothing to show on Banci's side but I still have the right to put the Commission to its proof." (Tr. 76.)

III

FINDINGS OF FACT

Parties

1. The sole individual respondent and principal figure in this matter is Walter Banci, partner with his wife, Lola Conti Banci, in a business known as Lanificio Walter Banci s.a.s. (Original Complaint; Ans. I, § 1; Ans. II, § 1; Ans. III, § 1), a firm which operates two textile mills near Prato, Italy (Tr. 78).

2. For some years Banci has sold his textiles in the United States through several corporations, all organized and existing under the laws of New York. (Original Complaint; Ans. I, § 1; Ans. II, § 1; Ans. III, § 1).

3. Four of these New York corporations were named as respondents in the original complaint here:

Verrazzano Trading Corp. (hereafter "Verrazzano")

Francesco Datini Inc. (hereafter "Datini")

Lanificio Tuscania Inc. (hereafter "Tuscania")

Lima Textiles Inc. (hereafter "Lima")

(Original Complaint; Ans. I, § 1; Ans. II, § 1; Ans. III, § 1)

4. A fifth corporation, named Hudson Textile Corporation (hereafter "Hudson"), also organized and existing under the laws of New York, was subsequently joined as a respondent without objection (Amended Complaint; Ans. III, § 1; failure of original respondents to deny amended complaint). [9]

5. All respondents together have constituted a unified family business operation designed to import and sell in the United States wool and textile products manufactured by Lanificio Walter Banci s.a.s. (RA I, ¶ 642; Amended Complaint and Ans. III, § 1; see also an earlier *Verrazzano* case, reported in 1971 in 78 F.T.C. 637, at 668.

6. Respondent Banci has formulated, directed and controlled the acts and practices of this unified family business operation, both the Italian family partnership (Lanificio Walter Banci s.a.s.) and the American corporate respondents, including the acts and practices challenged in the complaint here. (RA I, ¶ 641; Complaint § 1; Ans. I, § 1; Ans. II, § 1; Amended Complaint § 1; Ans. III, § 1). As his counsel put it: ". . . Mr. Banci's operation is such that he really is the man who does everything. . ." (Tr. 77).

7. All respondents were actively doing business from an office at 2 Penn Plaza in New York City (their only office in the United States, on this record) at least from 1/1/69 through 9/1/75 (ALJ's "Application Of Sanctions Under Rule 8.228 For Failure Of

Respondents To Make Discovery As Ordered," dated 4/16/76, at pp. 6-7.)

8. During the years in question here, respondents admit, fabric manufactured by Lanificio Walter Banci s.a.s. was shipped to the United States in substantial quantities (Tr. 58). Moreover, we have earlier found that since January 1972 and for the time period covered by the complaint respondents have maintained a substantial course of trade in wool and textile products in the United States. ("ALJ's Application Of Sanctions Under Rule § 3.38 For Failure Of Respondents To Make Discovery As Ordered," dated 4/16/76, at pp. 4-6.) We have further found that since January 1972 respondents have sold to United States customers substantial quantities of each of many specific textile products (including qualities Sioux, Manito, Totem, Veruska, Navajo, Ingrid and Myla) and wool products (including qualities Marnie, Gretel, Isabel, Spluga, Eva, and Ellen). [10] (ALJ's "Application Of Sanctions Under Rule § 3.38 For Failure Of Respondents To Make Discovery As Ordered," dated 4/16/76, at pp. 4-6.)

9. It is conceded by complaint counsel that after issuance of this complaint and at least by November 1976, respondents were no longer doing business in the United States and that their New York City office was closed by then. (Tr. 78.)

10. This record is barren of evidence, however, as to whether Banci may or may not resume his American sales, either through the present corporate respondents or through other vehicles.⁷

Importation and Sale in Commerce

11. All the original respondents, including Walter Banci, in their Answers admitted the allegations of complaint Paragraphs 2, 7 and 12,⁸ [11] concerning respondent's engagement in the importation of

⁷ Subsequent to the closing of the record here both sides made claims on this subject but neither moved to reopen the record to take further evidence. When submitting his proposed findings, counsel for respondents reported (but without benefit of affidavit) that Lanificio Walter Banci s.a.s. was adjudicated bankrupt in Prato, Italy on 9/2/77. Complaint counsel countered by attaching to their reply brief unverified copies of Customs records of a Banci sale to a New York customer as late as 9/29/77. We view both submissions as improper and we shall attach no weight to either.

⁸ The complaint allegations thus admitted are as follows:

"Paragraph Two: Respondents are now and for some time past have been engaged in the introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products which have been advertised or offered for sale in commerce, and have sold, offered for sale, advertised, delivered, transported, and caused to be transported after shipment in commerce, textile fiber products as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act."
"Paragraph Seven: Respondents now and for some time past have imported for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products, as "wool product" is defined therein."

(Continued)

textile fiber and wool products into the United States and their sale and shipment, etc. thereof from New York to other states, in [12] commerce, as "commerce" is defined in the Wool, Textile and FTC Acts. (Original Complaint; Ans. I, § 2; Ans. II, § 2).

12. When Hudson Textile Corporation was subsequently joined as a respondent, its Answer to the amended complaint, for no reason that has yet become apparent, denied the commerce allegations found in complaint Paragraphs 2, 7 and 12.⁹ However, respondent Hudson's Answer to the amended complaint admitted most of the allegations of complaint Paragraph 1, including an allegation that "the corporate respondents" — which by then included Hudson — together with respondent Banci, constituted "a unified family business operation designed to import and sell in the United States fabrics produced and exported from Italy by Lanificio Walter Banci s.a.s. and distribute such fabrics in commerce." (Complaint, § 1; "Order Granting Amendment Of The Complaint," dated 2/9/76; Ans. III, § 1). As a part of this "unified family business operation," respondent Hudson, was necessarily engaged in the business' importation of wool and textile products from Italy into the United States and the sale, shipment, etc. of such products "in commerce" from New York to other states and we now so find.

Investigation of Possible Misbranding

13. In 1971 this Commission agreed to dismiss misbranding charges against most of the same respondents on condition that they would voluntarily comply with the misbranding laws. See *Verrazza-no Trading Corporation t/a Lan Etruria, et al.*, 78 F.T.C. 637, 675 (1971).

14. Between 1973 and 1975 the Commission conducted a new investigation into possible misbranding by respondents of woolen and other textiles imported from Italy into the United States and thereafter distributed in interstate commerce. [13]

Sample Sources

15. Many samples of respondents' imported fabrics were obtained from the United States Customs Service in New York City and many

⁹Paragraph Twelve: Respondents, now and for some time past, have been engaged in the importation, offering for sale, sale, and distribution of certain products, namely fabrics. In the course and conduct of their business as aforesaid, respondents now cause and for some time past have caused their said products, when sold, to be shipped from the State of New York to purchasers located in various other States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of

others were obtained from United States customers of respondents, including the following:

- Bobbie Brooks, Inc., 3830 Kelley Ave., Cleveland, Ohio (Tr. 374-75)
- Ivy International, Ltd., 119 W. 40th St., New York, N.Y. (RA II, ¶ 45, ¶ 150, ¶ 170; RA III, ¶ 28)
- MelRose Mfg. Co., 712 Commerce St., Dallas, Texas (RA II, ¶ 1, ¶ 2; RA III, ¶ 17, ¶ 18)
- Jones of Dallas Mfg., Inc., 2316 N. Griffin St., Dallas, Texas (RA II, ¶ 15, ¶ 16; RA III, ¶ 19, ¶ 20)
- Abbott Fabrics, Inc., 1412 Broadway, New York, N.Y. (RA II, ¶ 47, ¶ 48, ¶ 49; RA III, ¶ 21, ¶ 22, ¶ 23)
- Artbro Sportswear, Inc., 1407 Broadway, New York, N.Y. (RA II, ¶ 88; RA III, ¶ 25)
- F. Resnick, Inc., 242 W. 39th St., New York, N.Y. (RA II, ¶ 107; RA III, ¶ 26)
- Fabri-Centers of America, Inc., 23550 Commerce Park, Beachwood, Ohio (RA I, ¶ 19; RA III, ¶ 2)

Sample Quantity

16. Although respondents concede that their total imports of wool and other textile products into the United States during the period in question were "substantial" (Tr. 58), they have declined to [14] provide data on the total quantities¹⁰ imported. It is therefore impossible, because of respondents' contumacy, to determine with any precision what percentage of their total imports during that period have been sampled.

17. However, the record shows that 58 undisputed samples were taken (RA I, ¶ 19, ¶ 38, ¶ 55; RA II, ¶ 1, 2, 15-18, 47-49, 87-88, 107-8, 145; RA III, ¶ 1-30; RA V, ¶ 1-40) and that the shipments from which they were taken totaled over 1,185,000 yards of woolen and other textile products. [Of this total, customs samples account for about 550,000 yards (see App. II. Col.) and one customer (Bobbie Brooks, Inc.) for 635,000 yards. (Tr. 374-375).]

18. We find that the woolen and other textile products from which the above samples were taken represent a very substantial

¹⁰ Respondents did reveal that the *value* of their imports to the United States was 1.424 billion lire in 1974 and .271 billion lire in 1975. At the exchange rate as published (.001543) in the "Bank & Quotation Record Magazine," of January 1975, these figures would convert to 2.2 million dollars and .4 million dollars, respectively.

amount of trade in and of themselves and, drawing an inference permissible under Rule 3.38¹¹ that withheld evidence would have been unfavorable, we find further that the goods sampled were quite probably a substantial portion of respondents' total imports during the period in question.

Testing Process

19. The 58 samples listed in Appendix II were each subjected to testing for actual fiber content, in some cases by the U.S. Customs laboratory technicians and in others by independent experts employed for that purpose by this Commission. The tests employed and their validity were the subject of testimony by three expert witnesses: [15]

20. *Dr. Samuel Golub*, a 20-year veteran of textile research, currently in charge of fabric analysis for Fabric Research Laboratories, Dedham, Mass. (Tr. 105-06); *Ms. Amelia Eaton*, holder of a degree in textile chemistry, veteran of fabric analysis, and currently laboratory director for the U.S. Customs Service (Tr. 205-06). Both she and Dr. Golub have been active in the American Society of Testing Materials (hereafter "ASTM") and the American Society of Textile Chemists and Colorists (hereafter "AATCC"), associations that have developed standard methods for qualitative and quantitative textile fiber analysis (Tr. 106-7, 118, 208); *Mr. Martin Youngberg*, holder of a degree in textile technology, has for eight years been a chemist in the fiber branch of the U.S. Customs Service laboratory, performing fiber content analyses throughout that time. (Tr. 330.)

21. All three witnesses described very similar procedures for analysis of fabric samples. Dr. Golub tested CX 5, 9 through 13, 19 through 28, and CX 30. He testified that in his opinion CX 112 a-f accurately represents the results of his testing. (Tr. 107-09.) He explained a typical multi-fiber analysis at the hearing. [The exact process for each test, he noted, may be different because of different fibers present in the sample. (Tr. 150.)]. He began by preparing two specimens so that he could run two separate tests on each sample. (Tr. 130.) He examined microscopic slides of the sample to identify the fibers present and thus determine the particular chemical sequence to be used to decipher the percentage weight of each fiber. (Tr. 136.)

22. Thereafter, Dr. Golub explained, the procedure is to extract the spinning oils from the fabric; dry and weigh the fabric; apply a reagent grade chemical which will dissolve one of the fibers; and

repeat the process until all fibers have been dissolved except one. (Tr. 136-142.) More specifically, Dr. Golub testified that if he identified fibers of acrylic, nylon, wool, cotton, rayon, and polyester, he would use cold dimethyl [16] formamide to remove acrylics, formic acid to remove the nylon, 5% sodium hydroxide to remove wool, 70% sulphuric acid to remove the cotton and rayon, with the remainder being polyester. The sample would be rinsed, dried and weighed between each application of a reagent. (Tr. 139-142.)

23. Ms. Eaton described similar procedures used at the U.S. Customs Laboratory where, just as with Dr. Golub's work, all tests are done in duplicate. (Tr. 210.) She explained that the chemists, who all work under her general supervision, use microscopic analysis to determine what fibers are present in the fabric and to devise an appropriate chemical sequence. (Tr. 212.) They then extract spinning oils and other non-fibrous material from the sample. (Tr. 213.) After the initial weighing under controlled temperature conditions, reagents are applied to the sample to remove a fiber. Then the sample is again rinsed, dried and weighed under constant conditions. (Tr. 243-44.) Specifically, Ms. Eaton suggested using sodium hypochlorite to dissolve wool (Tr. 250-51); dimethyl formamide to remove acrylics and acetate (Tr. 256); formic acid to remove nylon (Tr. 257); and 59.5% sulphuric acid to remove rayon (Tr. 257). Samples tested under the supervision of Ms. Eaton are CX 4, 31-33, and 35-71. The corresponding test reports are CX 154, 113, 114, 115, and 117-153. Respondents' counsel agreed that the above-listed exhibits are genuine U.S. Customs' laboratory reports of analyses done on the samples. (Tr. 215-16.)

24. Mr. Youngberg was the chemist who personally performed many of the tests cited above. (Tr. 330; CX 123, 129, 130, 135, 136, 140, 141, 142, 151, 152, 154.) The reports accurately represented his findings of his analyses according to Customs procedures. (Tr. 331.) He described the procedures he followed. He removed two specimens from each sample to run duplicate tests. He then began by removing non-fibrous material, then dried the sample, ground it up, mixed it and conditioned it. [17] He microscopically examined the sample to identify the fibers present and determined the "scheme of attack." (Tr. 335.) He would use either AATCC or established Customs methods (Tr. 335-37), that is, sodium hypochlorite for removing wool (Tr. 341); dimethyl formamide for dissolving acrylic and acetate (Tr. 324); formic acid to remove nylon (Tr. 341); 59.5% sulphuric acid for rayon (Tr. 342); 70% sulphuric acid for cotton. This procedure would leave a residue of polyester. (Tr. 324.)

24.1. There is no single standard chemical sequence to follow for

multifiber analysis. Dr. Golub testified that correct results can be obtained from several different methods, explaining that "[t]he only requirement is that the operator should know that and assure himself that his is not losing weight from one of the subsequent fibers which has not yet been dissolved by any particular step of the process." (Tr. 159.) Both Dr. Golub and Ms. Eaton have checked their fiber analysis methods for accuracy. (Tr. 150-51, 214.) Dr. Golub used acceptable methods for testing the samples given him by complaint counsel. (Tr. 158.) Mr. Youngberg followed regular Customs procedures, developed by Ms. Eaton, in testing the samples assigned to him. (Tr. 214, 331.) A stipulation was agreed to by the parties that, as to the remaining samples, the chemists performing the analyses would testify that they, too, followed regular Customs procedures. (Tr. 361.) Accordingly, we find that the samples reported in Appendix II were all tested in accordance with reasonable and scientifically acceptable chemical procedures and that the results of the tests are satisfactory evidence of the true fiber content of the samples. [17.1]

24.2. From time to time, respondents' counsel has alluded to the possibility that fabrics manufactured in Italy were made from used fibers and that this would affect test results. Beyond respondents' counsels' innuendo there is no evidence that used fibers were actually used in respondent Banci's mills, let alone in the particular runs involved here. In any event both experts Golub and Eaton testified that the presence of used fibers in the samples would not materially affect the fiber analysis. Even assuming that such a possibility existed, the testing chemist would recognize it and make corrections in the test accordingly. (Tr. 128, 286, 287.) We find that the speculative suggestions of respondents' counsel in this regard are without substance, at least as far as this record is concerned.

25. In assessing the deviations from respondents' representations concerning fiber content summarized in Appendix II, it should be borne in mind that this Commission, by regulation, will not deem such deviation "misbranding" if it does not exceed 3% (by weight) of a textile product's total fiber content. 16 C.F.R. 303.43(a).

Test Results

26. The results of the fiber content tests of these 58 fabric samples are embodied in Appendix II. Each sample is there denoted by its exhibit number, manufacturer's "quality", quantity of the source fabric, source of data (Customs or customer), year of shipment, represented fiber content, tested fiber content and

(expressed in percentage points above or below the representation). We find Appendix II to be an accurate statement of the facts it purports to show.

27. For purposes of analysis the 58 fabric samples whose characteristics are summarized in Appendix II are broken down into three groups. *Group I* includes 24 fabric samples which were represented by respondents to contain certain percentages of various textile fibers, but none of which samples were claimed to include or in fact turned out to include any wool. *Group II* includes 25 fabric samples which were represented by respondents to contain certain percentages of textile fibers, all of which samples were claimed to include and, in fact, turned out to include certain percentages of wool. *Group III* includes 9 fabric samples which were represented by respondents to contain certain percentages of various textile fibers, none of which samples, however, were claimed to include any wool but all of which, in fact, turned out to include at least traces of wool.

28. *Group I*. This group of 24 textile samples, as to which no wool content was either claimed or found by testing, reveals serious and pervasive misbranding. Of primary interest is misbranding which *overstates* fiber content. Disregarding 8 fiber overstatements of 3% or less as being within the tolerance of 16 C.F.R. 303.43(a), we find 29 other fiber overstatements, each in excess of 3% of total fiber weight. The number and magnitude of these overstatements was as follows:

Group I

Non-Wool Textiles

<i>Magnitude of overstatements</i>	<i>Number of overstatements</i>
3 to 10 percentage points	9
10 to 20 percentage points	12
over 20 percentage points	8
Total overstatements (over 3%)	29

[19] 29. As discussed later (p. 31 below), there is a question whether misbranding which merely *understates* fiber content violates the Textile or Wool Acts. The facts here reveal a considerable number of such understatements. Disregarding 1 understatement of less than 3%, we find 38 other fiber understatements, each in excess of 3% of total fiber weight. The number and magnitude of these understatements were as follows:

Initial Decision

91 F.T.C.

*Group I**Non-Wool Textiles*

<i>Magnitude of understatements</i>	<i>Number of understatements</i>
3 to 10 percentage points	16
10 to 20 percentage points	19
over 20 percentage points	3
Total understatements (over 3%)	38

29.1. We also find that in Group I, there were three instances (CX 61, 62, 63) where testing revealed the presence of acrylic in amounts over 5% of the total fiber weight of the sample and yet acrylic was not revealed by respondents to be a constituent fiber.

30. *Group II.* This group of 25 fabric samples, each of which was represented to include and did include some wool, also reveals serious and pervasive misbranding. It is desirable to analyze the extent of deviation from represented fiber content in this group of textile samples not only in terms of overstatements vs. understatements (as in Group I) but also in terms of wool fiber vs. all other fibers, for the legal consequences vary, depending on these factors.

31. *Wool fiber content.* There were no *understatements* of wool fiber content in any of the 25 samples in Group II but all 25 samples revealed *overstatements* of wool content, in almost all instances (23) by over 10 percentage points. The number and magnitude of wool fiber overstatements were as follows:

*Group II**Wool Fiber*

<i>Magnitude of overstatements</i>	<i>Number of overstatements</i>
3 to 10 percentage points	2
10 to 20 percentage points	23
over 20 percentage points	0
Total overstatements (over 3%)	25

[20] 32. *Other (non-wool) fibers.* The 25 textile samples in Group II reveal a substantial number of deviations from represented content, both overstatements and understatements of fiber constituents

number and magnitude of all other non-wool fiber *overstatements* were as follows:

Group II

Non-Wool Fibers

<i>Magnitude of overstatements</i>	<i>Number of overstatements</i>
3 to 10 percentage points	13
10 to 20 percentage points	6
over 20 percentage points	10
Total overstatements (over 3%)	29

33. There were also a number of *understatements* of the content of the non-wool textile fibers of Group II. Disregarding 7 understatements of less than 3%, their number and magnitude were as follows:

Group II

Non-Wool Fibers

<i>Magnitude of understatements</i>	<i>Number of understatements</i>
3 to 10 percentage points	8
10 to 20 percentage points	4
over 20 percentage points	0
Total understatements (over 3%)	12

33.1. We also find in Group II fibers were included in the wool products which were not revealed on respondents' fiber content tags. CX 19, 20, 21, 23, 24, 25, 26, 27, 28, 31, 32, 35, 36, 39, 41 and 42 all contained nylon and polyester, each in amounts of over 5% of the total fiber weight of the product but were claimed by respondents to contain only wool, cotton and acrylic. CX 22, 37, 38, 40 and 4 contained nylon in amounts over 5% of the total fiber weight.

34. *Group III*. This relatively small group of 9 textile samples is significant largely because it poses the unusual situation of textiles not *claimed* to contain any wool but *found* on testing to contain at least traces of wool (and, for that reason, pleaded here as [21] direct¹² violations of the FTC Act rather than as derived from either the

¹² The Group I and Group II situation, too, are alleged to constitute violations of the FTC Act but only a derivative theory. If a Textile Act and/or Wool Act charge fails in those situations, the derivative FTC Act charge would presumably fail automatically. Contra as to Group III situations.

Initial Decision

91 F.T.C.

Wool Act or the Textile Act.) The wool traces, found in *each* Group III textile sample, range from 1.1% to 9.6%, averaging 3.5%.

35. Disregarding 2 overstatements of less than 3%, Group III contains a number of substantial *overstatements* of non-wool fiber content as follows:

Group III

Textiles Containing Unclaimed Wool

<i>Magnitude of overstatements</i>	<i>Number of overstatements</i>
3 to 10 percentage points	5
10 to 20 percentage points	6
over 20 percentage points	5
Total overstatements (over 3%)	16

In addition to one understatement of less than 3%, Group III also contains a number of *understatements* of non-wool fiber content as follows:

Group III

Textiles Containing Unclaimed Wool

<i>Magnitude of understatements</i>	<i>Number of understatements</i>
3 to 10 percentage points	2
10 to 20 percentage points	1
over 20 percentage points	5
Total understatements (over 3%)	8

[22] 36. *Residual Shrinkage.* In 1973 and 1974 respondents sold approximately 790,000 yards of fabric (qualities Sioux, Totem and Manito) to Bobbie Brooks, Inc. Bobbie Brooks actually received 635,000 yards which were used in the manufacture of 25,000 dozen garments. (Tr. 374-75.) Respondents' sales invoices for qualities Sioux and Totem represented that the fabric had a residual shrinkage of from one to one and a half percent. (RA I, ¶ 43.) Several samples of this fabric (CX 15, 16, 17, 18) were tested by Dr. Golub for residual shrinkage. (Tr. 109.) Respondents admitted that the samples tested were samples of fabrics manufactured, sold and shipped by them. (RA I, ¶ 38; RA III, ¶ 13, 14, 15, 16.) Dr. Golub's tests indicated

was approximately 5-6%, substantially more than respondents' claim of 1 to 1 1/2% (CX 112d; Tr. 110) and also substantially more than the maximum of 3 1/2% permitted for such fabrics by the American National Standards Institute (Tr. 111).

37. Dr. Golub testified that washing has little effect on clothing manufactured from fabrics having a residual shrinkage of from 1 to 1 1/2%, but that shrinkage such as was discovered in these samples "would lead to improper fit, improper length and dimensions of the garment and of course, it would make a garment unsatisfactory." (Tr. 110.) He further testified that a fabric would have to be treated or stabilized to obtain residual shrinkage of only 1 to 1 1/2%. Stabilization is an additional costly process which can be undertaken by either the manufacturer or purchaser of the fabric. A claim of 1 to 1 1/2% residual shrinkage by the manufacturer would lead the purchaser to believe that the stabilization process had already been performed on the fabric (Tr. 195) and therefore to pay the higher price obtainable for stabilized fabrics. (Tr. 196.) [23]

Relief Factors

38. *Previous Assurances.* Signor Banci and his American corporate instrumentalities are not strangers to charges of fabric misbranding. A prior proceeding before this Commission, begun in 1961 and terminated in 1971, resulted in a dismissal of misbranding charges involving some rather close questions, on the condition that respondents Banci and Verrazzano "endeavor to engage in cooperative compliance procedures with the Commission's staff." *Verrazzano Trading Corporation t/a Lan Etruria, et al.*, 78 F.T.C. 637, 674-675 (1971). While complaint counsel made no effort to prove non-cooperation in compliance procedures, as such, our findings of substantial misbranding during 1973-74 now leave no doubt that respondents were not cooperating and indeed cast considerable doubt on the good faith of respondents when they pleaded in the prior case that they were "anxious to avoid future difficulties under the Textile Act as well as the Wool Act" and would "cooperate in a voluntary enforcement procedure. . ." *Ibid.*, p. 666.

39. *Warnings and Complaints.* Beginning in December 1972 (prior to this Commission's 1973-74 testing program) respondents admittedly received a substantial number of notifications from U.S. Customs that their shipments of wool and/or textile products had not been labeled in accordance with the Wool Act and/or the Textile Act. (RA I, ¶ 599.) Indeed, respondents' counsel conceded: "He (Banci) was receiving the notices (concerning fiber content) from Customs almost daily. . . . Not daily notices but you (Complaint

Counsel) know very well that . . . Customs frequently gave him notices and I have to admit that because its true" (and) "you should have copies. . . ." (Tr. 45-46.) As respects residual shrinkage, complaints were made to respondents by at least two customers, Starward and Bobbie Brooks. (Tr. 44.) [24]

40. *Abandonment of Practices.* Respondents rely heavily on Customs reports of four 1976 fabric test results turned over to respondents by complaint counsel before the hearing. (RX 7-10.) These reports tend to show no misbranding of primary textile constituents substantially in excess of 3% except for a fairly slight overstatement of one constituent (-4.5%) in one of the four tests (RX 8). Respondents concede that evidence of little or no misbranding in 1976 would not be a defense to a charge of misbranding in 1973-74 (Tr. 295-6) but argue that it could be taken into account in determining the terms of the order (Tr. 296). Complaint counsel, for their part, did not seriously question the accuracy of the four reports, arguing principally that four tests were much too few on which to base sweeping conclusions about all of respondents' 1976 importations (Tr. 294-5, 328). We admitted the test results but with a caveat that little weight might be attached to them. (Tr. 328.) Mature reflection has not changed our initial reaction. We find that the four reports (RX 7-10) accurately report what they purport to show but in the absence of further proof, which respondents did not even attempt, we decline to draw therefrom any inference as to whether these few tests fairly represent a substantial quantity of respondents' 1976 importations.

41. *Abandonment of Respondents' Business.* There have been occasional unsworn assertions by respondents' counsel to the effect that the Banci enterprise was in serious trouble. Thus, at a prehearing conference on 11/16/76, respondents' counsel stated (at Tr. 74-5):

The financial situation in Italy is atrocious. Mr. Banci informs me that he is owed substantial monies by the government of Italy. He is not receiving them. I've mentioned before (that) he hasn't been paying my firm for what we've done. [25]

* * * * *

Mr. Banci is a very depressed man. . . . and a man who really was the most optimistic of all my clients in the past sounded terrible to me. It was just not the Walter Banci I knew. He wrote me a letter: ". . . For us the firms Lima Textiles, Inc., Francesco Datini, Inc. and Verrazzano Trading Corporation are dead. And if they are not yet, then we are ready to close them definitely. . . ."

Judge Teetor: Counsel, is that list of companies that you read the total list of respondents? Does that cover everybody that is a respondent here?

Ms. Braun: No, there was also listed Lanificio Tuscania, Inc. and Hudson Textile Corporation and Walter Banci.

Mr. Botwinik: I'm certain (that) if Mr. Banci had thought of them he would have included them in the letter because they are dead to all practical purposes. Mr. Banci hasn't been in the United States for, I'd say, three years. I don't know what he is doing. Ms. Braun and Ms. Zweibel told me before (that) there had been a shipment from (in?) September in (from?) his factory. I know he is not shipping in the same quantities he did in the past and any shipments now would be in very small amounts.

42. To such assertions has now been added another unsworn allegation by respondents' counsel in his "Proposed Findings, etc." that Signor Banci's manufacturing company, Lanificio Walter Banci s.a.s. on 9/2/77 was adjudicated bankrupt, with creditors' claims exceeding 14 billion lire (about 17 million dollars). Thus, counsel argue, "it is highly [26] doubtful that Lanificio Walter Banci s.a.s. or Walter Banci, who was the unlimited partner, . . . will ever again be involved in the United States fabric trade in any substantial way." (RPF, pp. 1-2.) On this theory, respondents seek to have all findings of fact rephrased from the present to the past tense.

43. Complaint counsel concede that the corporate respondents are "currently dormant" (CCR, p. 10) but note that there is no record evidence that they have ever been dissolved. (CCR, p. 11.) Nor is there record evidence that Walter Banci or the corporate respondents have ceased doing business in the United States or, for that matter, that the Italian partnership, Lanificio Walter Banci s.a.s. is really bankrupt and, if so, under what conditions. *Ibid.* Indeed, it appears that respondents might have some difficulty in attempting to prove cesser of importation, since complaint counsel attach as Exhibit A to their reply to respondents' proposed findings Customs documents which purport on their face to be an exporter's invoice and consumption entry for a textile importation by Lanificio Walter Banci s.a.s. as late as 9/29/77. Obviously, we place no reliance whatever on either party's unverified assertions.

44. The Customs documents, however, may explain why respondents have never attempted to make actual proof of cesser of importation. There being nothing but a little lawyers' rhetoric on which to base a claim of abandonment or discontinuance of the business here, we find no satisfactory evidence that Lanificio Walter Banci s.a.s. is now out of business and no satisfactory evidence that its trade in the United States, though "dormant," may not be revived, either through the corporate respondents or other vehicles.

[27]

IV

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over all respondents.

Comment: Jurisdiction over the subject matter here is found in Section 5 of the Federal Trade Commission Act (hereafter "FTC Act"), 15 U.S.C. 41, et seq.; Section 7 of the Textile Fiber Products Identification Act (hereafter "the Textile Act"), 15 U.S.C. 70e; and Section 6 of the Wool Products Labeling Act (hereafter "the Wool Act"), 15 U.S.C. 68d. Jurisdiction over the person of the five original respondents (Verrazzano Trading Corporation, Francesco Datini Inc., Lanificio Tuscania Inc., Lima Textiles Inc., and Walter Banci) was obtained by delivering a copy of this complaint for each at their place of business at 2 Penn Plaza, New York, New York, on 7/23/75, and by the subsequent general appearance of each by his attorneys, Pavia & Harcourt (for details of which see Procedural History, App. I, pp. i-ii). Jurisdiction over the sixth respondent (Hudson Textile Corporation) was obtained by serving an order amending the complaint to include Hudson on its attorney, Pavia & Harcourt, on 2/18/76 and by said attorney's subsequent general appearance for said respondent (for details of which see Procedural History, App. I, p. v.).

2. The acts and practices charged in the complaint and proved here took place in commerce within the meaning of Section 2(k) of the Textile Act, 15 U.S.C. 70; Section 2(h) of the Wool Act, 15 U.S.C. 68; and Section 4 of the FTC Act, 15 U.S.C. 44. [28]

Comment: All respondents except Hudson concede this. See all answers to complaint paragraph except Hudson's. For our finding of fact that Hudson, as part of a unified family business operation, was necessarily engaged "in commerce" for present purposes, see Finding of Fact # 12.

3. All respondents have constituted a unified family business operation designed to import and sell in the United States wool and textile products manufactured in Italy by Lanificio Walter Banci s.a.s. a partnership between respondent Banci and his wife. Respondent Banci formulates, directs and controls the acts and practices of both the Italian manufacturing partnership and the

American corporate respondents, including the acts and practices that are the subject of this complaint.

Comment: All respondents, including Banci himself, concede the existence of this unified family business operation, Banci's dominance therein and his responsibility for any particular acts and practices challenged here. Findings of Fact # 5 and # 6. For a holding that such dominance of corporate affairs will be enough to hold an individual, see *Tractor Training Service, Inc. v. F.T.C.*, 227 F.2d 420 (9th Cir., 1955). Other courts require an additional showing of actual participation in the challenged practices, *Coro, Inc., et al. v. FTC*, 338 F.2d 149, 154 (1st Cir., 1964, *cert. den.*, 380 U.S. 954, but that, too, is conceded here. *Ibid.*

4. Respondents have violated Sections 4(a), 4(b) and 9 of the Textile Act, 15 U.S.C. 70b, and 70g, (and thereby also Section 5(a) of the FTC Act, 15 U.S.C. 45) by importing into the United States and selling in interstate commerce substantial amounts of non-wool textile fiber products in which one or more constituents were overstated on the label or other identification device contemplated by the Textile Act. [29]

Comment: Finding of Fact # 28 establishes that respondents have made 29 overstatements of fiber content in Group I of the textiles sampled and listed in Appendix II (not including 8 other overstatements of less than 3 percentage points). Two thirds of these overstatements are there shown to exceed 10 percentage points and a quarter of them to exceed 20 percentage points. Unless respondents' criticism of the Commission's testing methodology has some merit, it seems plain and we find that Group I of Appendix II evidences some 29 clear violations by respondents of the Textile Act (and, by derivation, the FTC Act) during the period 1973-74.

In addition, respondents failed to list all constituent fibers which amounted to over 5% of the total fiber weight on three of the Group I samples tested. (Finding of Fact # 29.1.) By this omission, respondents violated the clear requirements of Section 4(b)(1) of the Textile Act.

Test Methodology

Respondents argue that neither the Textile Act nor the Wool Act nor any regulation under either establishes any particular method for testing the fiber or wool content of specific samples of fabric. They contend (RPF, p. 5) that, absent such statutory standards,

complaint counsel must establish the superiority of their tests over all others in order to sustain reliance on them.

Prior Commission cases hold, however, that to support the validity of a test result, it is sufficient that complaint counsel establish only the expertise of the testers and their adherence to general procedures accepted by the scientific community.¹³ *Hunter Mills [30] Corp. v. F.T.C.*, 284 F.2d 70 (2nd Cir., 1960), *cert. den.*, 366 U.S. 903. Such expertise and acceptable methodology were clearly established here. See Findings of Fact # 19-24.1.

A similar question was raised in *Allenton Mills, Inc.*, 60 F.T.C. 1630 (1962). In the initial decision, (which was adopted by the Commission) it was found that the testimony of an expert witness as to the approximate percentages of reprocessed wool in the samples of fabric manufactured by the respondents, constituted "substantial and reliable proof" that said samples contained at least the amounts of reprocessed fibers to which the expert testified. It was further stated therein that:

[i]t is not essential that a test be capable of determining quantitatively the precise amount of a particular fiber. It is sufficient that the test under proper conditions when undertaken by a qualified expert, determines the approximate amount within reasonable limits. (p. 1640).

In the present case the expert witnesses clearly testified and we have found that their qualifications and the test methodology they employed were acceptable and proper. See Findings # 19-24.1. Although respondents' counsel cross-examined all complaint counsel's experts extensively, he made no serious inroads on their testimony. Moreover, respondents introduced no witnesses of their own to rebut the testimony of complaint counsel's experts. Nor did respondents offer any evidence of tests made by themselves or others which would support the fiber content claims made on their labels and other fiber identification devices.

The 2nd Circuit Court of Appeals' *per curiam* opinion in *Hunter Mills Corp.*, 284 F.2d 70, 71 (2nd Cir., 1960) is dispositive of respondents' contentions in this area:

The variance in testing techniques between the two experts testifying for the Commission does not impeach the testimony of either. The Commission has the duty of passing on the qualifications of the experts who testify [31] before it, and it may decide that both procedures are proper. . . . Moreover, it is unlikely that the allegedly "proper" procedure would have changed the ultimate fact-finding, since the percentages of wool content were substantially below those permitted by statute.

¹³ Respondents' citation of the Flammable Fabrics Act, 15 U.S.C. 1191, and the United States Grain Act, 7 U.S.C. 71, as statutes which provide specific test procedures to be followed seems to us to cut the other way. They

We conclude that there is nothing to respondents' attack on the testing process employed here.

Understatements of Fiber Content

Finding of Fact # 29 establishes that in addition to the 29 *overstatements* of fiber content analysed in Finding # 28 there were also 38 substantial *understatements* of fiber content in Group I. As to whether these should be held violations of the Textile Act in the present confused state of the law we are uncertain. In the predecessor case, *Verrazzano Trading Corporation, t/a Lan Etruria, et al.*, 78 F.T.C. 637, 670-71 (1971), this Commission expressly disagreed with but followed, as *stare decisis*, the ruling of the Second Circuit Court of Appeals in *Marcus v. Federal Trade Commission*, 354 F.2d 85 (2nd Cir., 1965) that an *understatement* of wool fiber content is not misbranding within the meaning of the Wool Act. Since the same logic seems applicable to understatements of *non-wool textiles*, we are inclined to apply the same rule here. Accordingly, we conclude that respondents did not, by *understating* certain fibers as shown in Finding # 29 add to the violations of law resulting from their *overstating* fiber content, as shown in Finding of Fact # 28.

5. Respondents have violated Sections 3, 4 and 8 of the Wool Act, 15 U.S.C. 68a, 68b and 68f (and thereby also Section 5(a) of the FTC Act, 15 U.S.C. 45) by importing into the United States and selling in interstate commerce substantial amounts of wool products in which the wool fiber content was overstated on the label or other identification device contemplated by the Wool Act. [32]

Comment: Finding of Fact # 31 establishes 25 instances where respondents overstated the wool content of their textiles, in 23 of which instances the overstatement was between 10 and 20 percentage points. Assuming, as we do, that respondents' attack on the Commission's testing methodology is no more convincing with regard to wool than with regard to other textile fibers, we conclude that the textile samples of Group II of Appendix II evidence some 25 clear violations by respondents of the Wool Act (and, by derivation, the FTC Act) during the period 1973-74.

In addition, respondents failed to list all constituent fibers which amounted to over 5% of the total fiber weight on twenty-one of the Group II samples tested. (Finding of Fact # 33.1.) By this omission, respondents violated the clear requirements of Section 4(2)(A) of the Wool Act.

Effect of Wool on Misbranding of Other Textiles

Finding of Fact # 32 establishes that wool was not the only fiber overstated in Group II textiles. It shows 29 overstatements of non-wool fibers considerably in excess of the Commission's "tolerance" (3%). A question naturally arises as to why 29 substantial overstatements of other textile fibers should not be actionable without regard to whether they occur in fabrics which contain wool.

The theory of non-actionability turns on Section 2 of the Wool Act, which makes a fabric containing any wool a "wool product" and Section 2 of the Textile Act, which exempts "wool products" from the strictures of the Textile Act. Against all common sense, therefore, all other textile fibers in a fabric that contains wool escape the requirements of *either* the Wool or Textile Acts. And this Commission in the earlier *Verrazzano* case, at pp. 670-1, apparently accepted such conclusion as the inevitable result of the Second Circuit's *Marcus* opinion (*supra*, pp. 670-1). [33]

Accordingly, we feel bound to hold that the overstatements of non-wool fiber content marshaled in Finding of Fact # 32 do not add anything to our finding of 25 misbranding violations arising out of overstatements of the wool content of Group II textile samples.

With reference to the *understatements* marshaled in Finding of Fact # 33, we are governed by the same considerations set out in connection with Group I textile samples (p. 31, above).

6. Respondents have violated Section 5(a) of the FTC Act, 15 U.S.C. 45, by engaging in certain unfair and deceptive acts and practices in the importation of wool and other textile products into the United States and the sale of substantial quantities of such textiles in commerce.

Comment: Insofar as the complaint charges violations of the FTC Act as simple derivatives of violation of the Wool and Textile Acts (see Section 3 of both Acts), we have already noted that failure to prove the Wool or Textile Act charge automatically carries with it failure of the derivative FTC Act charge. When, however, an independent FTC Act charge is pleaded, the situation is different: the question then is simply whether all the essential elements of an unfair/deceptive practice case have been made out.

Here Section 5(a) of the FTC Act has been invoked to reach several situations where it was apparently felt that neither the Wool nor the Textile Act could reach the wrong. One includes the Group III textile samples (see Findings of Fact # 34-35) where, for reasons already explained, the wool contents are

presence make it impossible in the existing confused state of the law to reach 16 serious overstatements of other (non-wool) fibers in these "wool products." [34]

A second situation where Section 5(a) of the FTC Act is invoked is found in the wool products exhibits of Group II (CX 4, 19-28, 31-33 and 35-45). The respondents admitted that their sales invoices for these wool products contained the same representations of fiber content as the product's other labels and tags. (RA I, ¶ 26; RA III, ¶ 33 through ¶ 37.) We have already found substantial deviations between fiber content as represented by respondents and actual tested fiber content. (Finding # 31.) However, the Wool Act, unlike the Textile Act, does not reach misrepresentations made on sale *invoices*. (cf. § 4(a) of the Textile Act, § 4(a)(1) of the Wool Act). Therefore, complaint counsel hope to invoke Section 5(a) of the FTC Act, arguing that "the gross misrepresentations to customers made by respondents on the sales invoices relating to these misbranded wool products are false and deceptive acts or practices under the Federal Trade Commission Act." (CPF, p. 42.)

A third such situation is set out in our Findings of Fact # 36-37 on misrepresentations by respondents to their customers regarding residual shrinkage, which are not, of course, governed by misbranding laws.

In all of these situations the threshold question is: what does proof of an unfair method of competition and/or deceptive act or practice entail that is not required to establish a Wool Act or Textile Act violation? More specifically, is the deceptive capacity or tendency which is the bare minimum for a Section 5 violation sufficiently evidenced by the mere fact of misbranding or must something more be shown? [35]

It is well established that proof of a Section 5 violation does not require a showing of actual injury or deception but only a capacity or tendency to injure or deceive. *Charles of the Ritz v. Federal Trade Commission*, 143 F.2d 676, 680 (2nd Cir., 1944). Still, there is supposed to be some record evidence as to how consumers may be injured or misled, as to price, quality, etc. *Federal Trade Commission v. Winstead Hosiery Co.*, 258 U.S. 483 (1922). That seems to be at least a theoretical difference between such cases and those brought under the Wool or Textile Acts, which "may be violated despite the absence of actual deception or a tendency to deceive. . ." *Taylor-Friedsan Co., Inc., et al.*, 69 F.T.C. 483, 494 (1966).

While we would certainly not be shocked by the idea that

deceptive tendency may reasonably be inferred from misbranding alone, we cannot make out that the law has progressed quite that far. Accordingly, we now conclude that neither the misbranding of Group III textile samples nor the misbranding of a textile product on a commercial invoice is sufficient, standing alone, to prove the deceptive tendency requisite to a Section 5 FTC violation. On the other hand, the charge of misrepresentation regarding residual shrinkage is supported here by sufficient additional evidence of deceptive tendency, as developed in Findings of Fact # 36-37, to justify a conclusion that Section 5(a) of the FTC Act has been violated independently in that respect and we now so conclude.

V

RELIEF

The "Public Interest" Defenses

Respondents have made several arguments as to why their violations of the Wool Labeling and Textile Fiber Identification Acts, even if established, should not be made the subject of an order by this Commission. [36] All such arguments are based ultimately on the rule laid down by Justice Brandeis in *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929). That case held that when the facts established in a proceeding before the Commission show, as a matter of law, that the relief would not be in the public interest, the complaint should be dismissed. Whether this holding in an FTC Act case has any application to special statutes enforced by the Commission seems very doubtful but for present purposes we assume, *arguendo*, such applicability.

The *Klesner* rule, although understandably popular among respondents, has not had the wide-ranging application that its statement might suggest. As a practical matter, it has been substantially confined to three kinds of situations which are, in fact, the ones relied upon by respondents here.

1. Private vs. public interest

In *Klesner* the unfair method of competition involved was the appropriation of a competitor's trade name in the retail window shade business in Washington. The Supreme Court, affirming dismissal of the suit, said:

* * * * *

The undisputed facts, established before the Commission at the hearings on the complaint showed affirmatively the private character of the controversy.

This aspect of the *Klesner* decision is now codified in Commission Rule 2.3:

The Commission acts only in the public interest and does not initiate an investigation or take other action when the alleged violation of law is merely a matter of private controversy and does not tend adversely to affect the public.

[37] While a purely private dispute is thus beyond the purview of the Federal Trade Commission it is nevertheless equally clear from these statements of the law that a dispute affecting the public interest is not beyond the Commission's jurisdiction merely because a private interest, as commonly happens, is *also* involved. For that reason while *Klesner's* language concerning private controversies has sometimes been quoted in other cases, the "rule" itself has rarely been deemed appropriate for application to particular factual situations. See, for example, *Curtis Publishing Company*, 78 F.T.C. 1472 (1971), where the hearing examiner held that a complaint seeking refunds for subscribers after the Saturday Evening Post suspended publication involved only a private controversy and should be dismissed but the Commission reversed, holding that the vindication of private rights was merely incidental to the proceeding's main purpose to terminate an illegal practice and cure its effects.

Respondents argue here (RPF, p. 8) that the question whether the shrinkage characteristic of fabrics sold by respondents was misrepresented is "solely between Bobbie Brooks and (respondent) Banci and not within the scope of the Act." Citing *Klesner* and noting that the Brooks-Banci dispute has already been the subject of court proceedings to determine the merits of the claim, respondents argue: "For the Commission to interpose itself in this matter and use it in the present matter (manner?) smacks of a persecutorial (sic) approach." (RPF, p. 8.)

Although the samples introduced in support of the shrinkage allegation of the complaint happen to have come from Bobbie Brooks, the record shows that substantial quantities of the affected qualities (Sioux and Totem) were sold to United States customers (Finding of Fact # 8). Bobbie Brooks was not the only customer to complain on this score. (Tr. 44.) Misrepresentations of the shrinkage characteristic of these qualities constituted an unfair and [38] deceptive practice injurious to all buyers and to the public in

general, not merely to the particular buyer whose evidence happened to prove the allegation. The existence of Bobbie Brooks' private interest in this matter is by no means inconsistent with the existence of a public interest in putting an end to the practice.

2. *De minimis* argument

The *Klesner* rule has sometimes been invoked when the violation proven is claimed to have affected only a inconsequential volume of business. A classic *de minimis* case was *Matter of William S. La Rue*, 47 F.T.C. 1472 (1950). There the Commission affirmed a hearing examiner's order of dismissal where a Chicago barber, without factory, laboratory or any employees made and sold his patrons about a thousand dollars worth of hair tonic over a year's period. Despite undisputed evidence that his claims for this concoction were exaggerated or untrue and therefore misleading and deceptive, it was held that such "inconsequential" volume would not support an allegation of substantial amount of commerce and that further proceedings would not be "in the public interest."

Once we move beyond obvious trivia, however, the Commission has been reluctant to disregard violations just because they are slight and the courts have properly been reluctant to interfere with the Commission's exercise of discretion in this respect. Thus the 2nd Circuit Court of Appeals pointed out in *Exposition Press Inc. v. FTC*, 295 F.2d 869 (2d Cir., 1961), a "vanity press" deception proceeding, that even though a particular case may seem trivial it may be "the means whereby in the long run the Commission may use its influence to prevent continuance of many similar deceptions." (p. 873.) Another appellate court has pointed out that the whole purpose of the Federal Trade Commission's policing of business practices is to prevent the growth of unfair acts and practices by stopping them, wherever possible, in their incipiency. This [39] purpose, by its very nature, will not infrequently result in the bringing of cases which may seem insignificant but are not. *Guziak v. F.T.C.*, 361 F.2d 700 (8th Cir., 1966); *cert. den.*, 385 U.S. 1007. (Deceptive practices by seller of aluminum siding held properly forbidden.) Indeed, to put it broadly, not even a mere tendency to deception — as distinguished from actual deception — is too trivial for Commission attention. *Spiegel, Inc. v. FTC*, 494 F.2d 59, 62 (7th Cir., 1974).

In this case respondents' *de minimis* claim goes neither to the volume of business involved, as claimed in *Surf Sales Co., Inc.*, 54 F.T.C. 483, 491-2 (1957), nor to the infrequency of violations, as claimed in *Hoving Corporation v. F.T.C.*, 290 F.2d 803 (2d Cir., 1961)

ed by the seller on invoices, consignee declarations, labels, etc.: "Even if the Commission's results (test) were accurate, the margin of error is so slight that we may well question the harshness of the remedies demanded." (RPF, p. 9.) Similarly, respondents' tests are said to "show a variation so slight as to render the order sought by complaint counsel overly harsh and punitive." (RPF, p. 10.)

It is plain, however, that we are not here dealing with "slight" (or even borderline) variations from represented wool/fiber content. No reasonable person could so describe the 29 substantial violations of the Textile Act summarized in Finding of Fact # 28 and the 25 additional substantial violations of the Wool Act summarized in Finding of Fact # 31. This is not a *de minimis* case.

3. Abandonment argument

The third area where *Klesner* has frequently been invoked is the claim of discontinuance or abandonment of either the practice charged or the business itself. Since the purpose of a cease and desist order (and presumably of a [40] compliance bond, too) is therapeutic rather than punitive, the need for an order to protect the public has long been thought to disappear if there is no reasonable expectation that the violation proved will likely be repeated.¹⁴ *Stokely-Van Camp, Inc. v. FTC*, 246 F.2d 458, 464-5 (7th Cir., 1957). While, however, the abandonment defense is well recognized and frequently pleaded by respondents, it is equally clear that not every disclaimer of intent to continue the practice or the business itself will move the Commission to dismiss a case on public interest grounds.

Thus the abandonment should be voluntary and that normally means before the Commission's hand is on the respondent's shoulder. *Spiegel, Inc.*, 86 F.T.C. 425, 446 (1975). It also normally means an abandonment of some duration, although not necessarily the decade or so understandably held to justify dismissal of charges in *New Standard Publishing Co. v. F.T.C.*, 194 F.2d 181 (4th Cir., 1952). In sum, what is called for is assurance that an alleged abandonment is in good faith and that there is no real likelihood of resumption of an unfair/deceptive practice after the threat of legal action has disappeared. *Beneficial Corp., et al.*, 86 F.T.C. 119, 165 (1975). "And the Commission has required respondents to meet a heavy burden to prevail on such a claim." *Ibid.*

Our Findings of Fact # 40 - # 44 make it clear that while the corporate respondents may recently have been "dormant," there is

¹⁴ Although this case does not involve a possible redress suit, it should be noted that there is real doubt since passage of the Magnuson-Moss Act, 15 U.S.C. 2301 in 1975 as to whether the public interest will ever permit dismissal of a cease and desist proceeding, if redress is a purpose of the proceeding.

no good proof in this record that Signor Banci, the dominant figure in this "unified family business organization," is [41] out of business and certainly no proof that he may not resume his American operations through the corporate respondents or other vehicles when this proceeding is over. To forego a proper order on the basis of unsworn and doubtful speculations by counsel as to possible abandonment of the business would be an error of the first magnitude. We reject any such suggestion.

The administrative law judge concludes that the violations of the Wool Act, Textile Act and FTC Act heretofore found to exist are all to the prejudice and injury of the public and that the relief hereafter ordered is in the public interest.

The Penal Bond

Respondents lay great stress on the prayer of the complaint that they be prohibited from further importing or participating in the importation of any wool or textile products unless they post a bond under Section 8 of the Wool Products Labeling Act and Section 9 of the Textile Fiber Products Identification Act, in double the value of any imports, conditioned on respondents' compliance with all applicable provisions of the above Acts and regulations thereunder. Respondents assume that such a bond is essentially a penal bond rather than an indemnity bond and we are inclined to agree with that assumption.¹⁵

From this starting point, however, respondents concoct a complex and confused argument with most of which we cannot agree. We now

¹⁵ Since the statute of 8 and 9 William III, cap. 11 (1696-97), (the gist of which is now found in 28 U.S. 1874), Anglo-American law courts have been authorized, like equity before the statute, to assess only actual damages for breach of a penal bond, unless the difficulty of determining actual damages justified the parties in recourse of a liquidated damage clause. For a classic dispute between *private* parties over whether a particular contractual stipulation should be treated as a penalty or as an agreed ascertainment of damages, see *Sun Printing & Publishing Association v. Moore*, 183 U.S. 642, 662-3 (1902) (penalty enforced.) However, in the case of penalties or forfeitures to the government imposed by statute upon the doing or omission of a certain act, there courts will not generally interfere to mitigate the penalty or forfeiture, if incurred, for it would be in contravention of the direct expression of the legislative will. *Clark v. Barnard*, 108 U.S. 436, 457 (1883) (penalty enforced.) [This case contains an excellent discussion of the history of the problem, at pages 454-456.]

An illustration of the usual result when a statutory bond is in question (penalty enforced) is found in *U.S. v. Dieckerhoff*, 202 U.S. 302 (1906). This case involved an importer's re-delivery bond for double the value of certain imported packages released to him during tests of a sample package: "In our opinion, it was the purpose of this statute and the bond executed in the case, to dispense with the necessity of resort to . . . showing damages and to fix double the value of the package ordered to be returned, as a definite sum to be paid for now fulfillment of the statutory duty. In such cases the recovery is for the stipulated sum and is not limited to the damages actually proven" (p. 311). While there are cases where a penal bond payable to a government has been held mere security for indemnification against proven damages, such cases require a very clear showing of intent to invoke an indemnity bond, not a penal bond. See, for example, *U.S. v. Zerby*, 271 U.S. 332, 339 (1926), where as here, the bond was conditioned on compliance with all applicable laws and regulations. However, the administrative history there left no doubt that the government's intent was to enforce the bond as a penal bond.

attempt to analyze what appear to be the high points of this argument. [42]

Respondents' own summary of their thesis is as follows:

Imposition of a penal bond on the facts of this case represents a criminal sanction and consequently should not be imposed under the guise of a civil enforcement proceeding. (RPF, p. 10.)

This cavalier assimilation of the penal bond contemplated in Sections 8 and 9 of the Wool Labeling Act and Textile Fiber Identification Act with the criminal penalty provisions of Sections 10 and 11 of the same statutes is insupportable. While there is some overlap, the concepts of "penalty" and "fine" do not necessarily have the same meaning. [43]

In general a fine is a sum of money exacted of a person guilty of a crime or contempt as a pecuniary punishment, the amount of which may be fixed by law or left to the directions of the court. It is true that a penalty, like a fine, is a pecuniary punishment inflicted by the law for its violations, *but a penalty is that which is demanded for the violation of a statute, which violations may or may not be a crime.* Indeed, statutes giving a penalty for committing a prohibited act [sometimes] preserve the distinctions by providing that the penalty may be recovered in a civil action, while the crime, if it be so declared, must be punished by the infliction of a fine or imprisonment, after a conviction in a criminal action. 36 Am. Jur. 2d, *Forfeiture and Penalties*, § 4 (emphasis and bracketed matter added)

Thus the U.S. Supreme Court has affirmed a holding that where a state constitution set apart as a permanent literary fund all "fines" collected for offense committed against the state, such provision comprehended only those fines which were affixed as penalties for *crime* and recoverable on the convictions of the offender but did *not* embrace those pecuniary penalties provided by statute that a popular or *qui tam* action ("which is a civil action") might be brought to recover. *Southern Exp. Co. v. Commonwealth (of Virginia), ex rel. Walker*, 92 Va. 59, 22 S.E. 809 (1895); *aff'd*, 168 U.S. 705 (1897). Here the penalty bonds in question are [44] found in sections which make no reference to criminal penalties and are entirely separate from those sections (9 and 10) headed "Criminal Penalty." Accordingly, there is no basis on which to treat the penal bonds as the "equivalent" of criminal sanctions.

Although the logic of respondents' argument is extremely difficult if not impossible to follow, they apparently argue that if a penal bond may be assumed to be the "equivalent" of a criminal sanction,

. . . the principles underlying the section dealing with criminal sanctions must be applied to the provision for posting of bonds by an importer, in order to insure equitable and just enforcement of the laws. (RPF, p. 14.)

While this is an interesting jurisprudential speculation, it flies on the face of several hundred years of Anglo-American law, which has never required that the plaintiff in a *qui tam* or other civil penalty action must prove his case beyond a reasonable doubt or satisfy other of the more stringent requirements of a criminal trial. (One good reason, of course, is that the defendant in a civil penalty action is not faced with the possibility of imprisonment as a sanction, if he loses.)

The ultimate goal of respondents' tortured logic seems to be the proposition that if a civil penalty could be viewed as the "equivalent" of a criminal sanction, the civil penalty provision concerned here would not be constitutional unless construed to apply only to "willful or intentional misconduct as the term is understood in the criminal law" because "(t)he fundamental distinction between a criminal versus a statutory violation of either Act is the element of willful or intentional misconduct, as the term is understood in the criminal law." (RPF, p. 15.) It should be sufficient to point out that while a *mens rea* is still generally required in a case of *mala in se*, for *mala prohibita* there is no requirement of a *mens rea*, especially in the area of public welfare offenses. These are crimes which depend on no mental element but consist only of forbidden acts or omissions. *Morisette v. United States*, 342 U.S. 246 (1952). Where [45] the legislature creates such an offense, criminal intent in any of its forms — including "wilfulness" — is no element of the crime and need not be proved to justify a conviction, *People v. McClennegen*, 195 Cal. 445, 234 P. 91, 100-1 (1925) although some courts reconcile this with the older law of crimes by saying that where a statute denounces the doing of an act as criminal, the law imputes criminal intent from the mere doing of the act. *Hargrove v. United States*, 67 F.2d 820 (5th Cir., 1933). The only question is whether the prohibited act was done or the required act omitted. *United States v. Balint*, 258 U.S. 250 (1922).

While, in a certain sense, intent is essential to the commission of a crime and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases where purposely doing a thing prohibited by statute may amount to an offense, although the act does not invoke turpitude or moral wrong. *Armour Packing Co. v. United States*, 209 U.S. 56 (1908).

Since a statutory crime need involve no *mens rea*, it follows a fortiori that a statutory *civil penalty* — even if it were viewed as the "equivalent" of a crime — need involve no "wilfulness" or other specific intent to violate the law. Thus there is no reason for reading the word "wilful" into the penal bond clauses of Section 8 of the Wool Products Labeling Act of Section 9 of the Textile Fiber Products

A further argument by respondents is that while Congress concededly ("expressly") granted the Commission authority to enforce both the Wool Labeling and Textile Fiber Products Identification Acts, "such jurisdiction is not without limits" (RPF, p. 14). Respondents' brief, at the same page, purports to "quote" a statement attributed to the U.S. Supreme Court in *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) but, in fact completely rewritten by respondents' counsel: [46]

<i>Supreme Court Statement</i>	<i>Verrazzano Version</i>
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<i>"Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."</i>	<i>"Commission proceedings are neither compensatory nor punitive in character, they are strictly corrective and preventive measures taken (in) the interest of the general public."</i>
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The same brief, at p. 17, argues that "in view of the fact that a bond would operate as a punishment for past acts, while the Commission's authority is directed to the regulation of future activities, it is inappropriate to invoke it here."

We note that the requirement of a compliance bond in double the value of respondents' imports serves the very purpose "to prevent illegal practices in the future" stressed by the Supreme Court in *Ruberoid*. However, we need not decide whether such a bond could be justified as part of an ordinary cease and desist order because it is plain that the Supreme Court was speaking in the context of a Clayton Act rather than a Wool Labeling or Textile Fiber Products Act violation. Neither the Clayton nor Federal Trade Commission Acts contains any such penal bond provisions as are found in the Wool Labeling and Textile Fiber Products Identification Acts. In the latter cases, however, Congress explicitly granted this Commission authority to prohibit a proven violator from making further importations without posting a compliance bond. Whether this Commission would have authority to require such a compliance bond if the Wool Labeling and Textile Fiber Products Acts had never been passed is a purely academic question which has no bearing on this matter.

Finally, respondents argue that "if a mere finding that goods have been misbranded by an importer could give rise to the use of a bond,

it would be clear that importers were being held to a far higher standard than all other groups who fall within the purview of the Acts." (RPF, p. 11.) The fact that we are dealing here with [47] the importations of foreign goods into this country — and thus dealing frequently with unusual jurisdictional, procedural and executional problems — would seem to justify classification as between those who participate in importation arrangements and have already at least once violated the law, on the one hand, and, on the other, those who may also have violated the law but are engaged only in the more easily policed domestic trade. Consider, for example, the continuing validity of so-called foreign attachment in the face of the present Supreme Court's virtual demolition of domestic attachment/garnishment before judgment under ordinary circumstances. Cf. *Ownbey v. Morgan*, 256 U.S. 94, 110-112 (1921) and *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 339 (1969).

We do not, however, propose to involve this tribunal in the constitutional argument which respondents seek to make. We have hitherto already stricken a substantially identical affirmative defense contained in ¶ 5 of the answers of all respondents except Hudson Textile Corporation. See both initial ruling (7/14/76) and denial of applications for review (10/1/76). In the latter we said:

Since it is elementary law that the constitutionality of Congressional legislation cannot be litigated before this Commission (or, *a fortiori*, before this Administrative Law Judge), Davis K., *Administrative Law Text*, (3rd Ed., 1972), pp. 388-89, injection of such an issue into the pleading and proof of this proceeding would only confuse the issues and waste time. We do not think there is even a serious doubt about this.

Nothing has since been said by respondents to change our mind. Our ruling declining to consider the constitutionality of a compliance bond for violators involved in importation arrangements remains the law of this case. [48]

Necessity of Imposing a Bond in This Case

To require respondents to post a bond for double the value of their imports is particularly appropriate to their situation. Despite assurances of good intention in 1971, and although since 1972 respondents have received numerous notifications from U.S. Customs advising that their shipments of wool and textile products had not been labeled in accordance with the Wool Act and the Textile Act, (Findings of Fact # 38-9). Respondents, nevertheless, continued to import into the United States misbranded wool and textile products. This evidences a blatant disregard, on respondents' part, of

Respondent Banci resides in Italy, the corporate respondents are currently dormant and apparently have no assets in the United States. Under these circumstances, liability for civil penalties alone might present no deterrent to future misconduct by respondents as disregarding a Commission cease and desist order may not result in any financial loss. Requiring respondents to post bonds, conditional upon compliance with our labeling laws, is the only way to insure that the respondents will adhere to the mandates of those laws.

The following order will issue:

ORDER

It is ordered, That respondents Verrazzano Trading Corporation, a corporation, Francesco Datini Inc., a corporation, Lanificio Tuscania Inc., a corporation, Lima Textiles Inc., a corporation, and Hudson Textile Corporation, a corporation, their successors and assigns and their officers, and Walter Banci, individually and as agent for said corporations, and as an officer of Lanificio Tuscania Inc. and Lima Textiles Inc., and as a partner trading and doing business as Lanificio Walter Banci s.a.s., and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or any other device, in [49] connection with the introduction, sale, advertising or offering for sale in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce of any textile fiber product, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from misbranding such textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of constituent fibers contained therein.

2. Failing to affix a stamp, tag, label, or other means of identification to each such textile fiber product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act. [50]

It is further ordered, That respondents Verrazzano Trading Corporation, a corporation, Francesco Datini Inc., a corporation,

Lanificio Tuscania Inc., a corporation, Lima Textiles Inc., a corporation, and Hudson Textile Corporation, a corporation, their successors and assigns and their officers, and Walter Banci, individually and as agent for said corporations and as an officer of Lanificio Tuscania Inc. and Lima Textiles Inc. and as a partner trading and doing business as Lanificio Walter Banci s.a.s., and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from importing, or participating in the importation of, any textile fiber product into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said products and any duty thereon, conditioned upon compliance with the provisions of the Textile Fiber Products Identification Act.

It is further ordered, That respondents Verrazzano Trading Corporation, a corporation, Francesco Datini Inc., a corporation, Lanificio Tuscania Inc., a corporation, Lima Textiles Inc., a corporation, and Hudson Textile Corporation, a corporation, their successors and assigns and their officers, and Walter Banci, individually and as agent for said corporations and as an officer of Lanificio Tuscania Inc. and Lima Textiles [51] Inc. and as a partner trading and doing business as Lanificio Walter Banci s.a.s., and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the introduction into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment in commerce of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

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

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner 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 respondents Verrazzano Trading Corporation, a corporation, Francesco Datini Inc., a corporation, Lanificio Tuscania Inc., a corporation, Lima Textiles Inc., a corporation, and Hudson Textile Corporation, a corporation, their successors and assigns and their officers, and Walter Banci

Lanificio Tuscania Inc. and Lima Textiles [52] Inc. and as a partner trading and doing business as Lanificio Walter Banci s.a.s., and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from importing or participating in the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Verrazzano Trading Corporation, a corporation, Francesco Datini Inc., a corporation, Lanificio Tuscania Inc., a corporation, Lima Textiles Inc., a corporation, and Hudson Textile Corporation, a corporation, their successors and assigns and their officers, and Walter Banci, individually and as agent for said corporations and as an officer of Lanificio Tuscania Inc. and Lima Textiles Inc. and as a partner trading and doing business as Lanificio Walter Banci s.a.s., and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the importing, advertising, offering for sale, sale or distribution of wool and/or textile products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the shrinkage factor of such products on [53] contracts, invoices, shipping memoranda or labels applicable thereto, or in any other manner.

It is further ordered, That respondents deliver a copy of this order by registered mail to each of their customers that purchased qualities Sioux, Manito, Totem, Marnie, Gretel, Isabel, Veruska, Spluga, Eva, Navajo, Ellen, Ingrid or Myla during the period January 1, 1973 to June 24, 1975.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and his affiliation with a new business or employment. Such notice shall include said respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the corporate respondents shall forthwith distribute a copy of this order to each of their operating divisions and/or subsidiaries.

It is further ordered, That the corporate respondents notify the Commission at least thirty (30) days prior to any proposed change in

said respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order. [54]

It is further ordered, That respondents herein 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 this order.

APPENDIX I

PROCEDURAL HISTORY¹

On 6/24/75, the date of issuance of this complaint, it was assigned for hearing to Administrative Law Judge Paul R. Teetor, who thereafter conducted all pre-trial and trial proceedings. The notice hearing set for 8/13/75, was postponed indefinitely on 8/4/75 at the request of certain respondents.

On 8/1/75 respondent Francesco Datini, Inc. and "all other Respondents (not identified) who have been properly served" appeared generally by their attorneys, Pavia & Harcourt, and moved for a more definite statement of charges. Simultaneously, respondent Banci appeared specially by his attorneys, Pavia & Harcourt, and requested a determination whether service of process on him had been properly made. On 8/25/75 complaint counsel filed answers to both the request for a more definite statement and the jurisdictional objection.

In response to the request for a more definite statement, on 9/10/75, reciting complaint counsel's representations that they had been unable to obtain all information required during the pre-complaint investigation of this matter, in an "Order For Bill Of Particulars And Discovery In Aid Thereof" the administrative law judge directed complaint counsel to file all their foreseeable discovery requests (whether or not necessary for preparation of a Bill of Particulars) within 21 days and then, as soon as possible after [ii] receipt of a response, to prepare a Bill of Particulars identifying the name, line and style of the goods referred to in complaint Paragraphs 3, 4, 5, 8, 9, 10 and 13 and also the time period involved. Respondents were given until 10 days after service of such Bill of Particulars to file their answers to the complaint.

In response to the jurisdictional objection, on 9/19/75 the administrative law judge held that service on respondents Banci and

¹ Dates recited here are those on which papers were filed with the Commission.

Verrazzano Trading Corporation by delivering a copy of the complaint to one Hamm at the New York office of respondent Francesco Datini Inc. was sufficient to obtain jurisdiction over the person of Banci by collateral estoppel, in view of the Commission's litigated finding only four years earlier that respondent Banci and all respondents named here except Lima Textiles, Inc. constitute "a single unified enterprise — an integrated family-owned business — designed to sell in the United States fabrics manufactured by Lanificio Walter Banci" in Italy and that over this business Banci exercises sufficient direction and control to make him accountable individually for the practices of the unified enterprise and each of its parts. *Verrazzano Trading Corporation, t/a Lan Etruria, et al.*, 78 F.T.C. 637, 638 (1971).

On 9/26/75 the administrative law judge gave formal notice to respondents Verrazzano Trading Corporation, Lanificio Tuscania Inc. and Lima Textiles Inc. that they were in default on their obligation to appear and answer these charges and that an initial decision to that effect would be entered under Rule 3.12(c) unless within 10 days after service of this notice a proper appearance be entered and a proper pleading filed. On 10/6/77 respondents Verrazzano Trading Corporation, Lanificio Tuscania Inc., Lima Textiles Inc. and Walter Banci appeared generally in this proceeding and on the same date requested the benefit of our [iii] earlier "Order For Bill Of Particulars And Discovery In Aid Thereof" filed on 9/10/75. (See p. 2 above) This motion was granted by order filed 10/20/75 and the anticipated default simultaneously held cured.

Meanwhile, on 10/10/75 complaint counsel had made an informal "Initial Discovery Request" for a large number of admissions by respondents. On 10/28/75 complaint counsel moved for a time limit on respondents' answers to said informal discovery request. On 10/29 the administrative law judge directed respondents to make return of all responsive documents and/or information requested within 3 weeks from the date of his order or explain in writing, with affidavits, why such return could not be made by that date.

On 11/17/75 all respondents sought a so-called "protective order" limiting discovery to such information as complaint counsel might need to draft a Bill of Particulars but on 12/1/75 complaint counsel opposed such a restriction on their discovery and any extension of time for respondents to produce. On the same date (12/1/75) the administrative law judge reaffirmed that complaint counsel were to get all their foreseeable discovery out of the way at once, holding that there is nothing wrong with post-complaint discovery simply because a complaint has issued. In view, however, of the number of

disputes by then arising concerning such discovery, the administrative law judge directed complaint counsel to convert their voluntary requests into subpoena demands and to make certain changes in their specifications appropriate to such conversion. Forty-five days were allowed for a search and an additional 15 days for communication back and forth between the United States and Italy regarding such search.

On 12/11/75 respondents sought additional time for compliance with complaint counsel's subpoenas, so that their search for responsive [iv] documents might be coordinated with a trip to Italy planned by respondents' counsel. Respondents also sought to begin their own discovery before complying with complaint counsel's subpoenas. On 12/12/75 the administrative law judge denied respondents' motion for intervening discovery but granted a delay until 3/15/76 for return of all requested documents available only in Italy or elsewhere outside the United States. Meanwhile respondents and their counsel were warned that they would be held strictly accountable for the integrity and safe-keeping of all records in this country responsive either to complaint counsel's informal discovery requests or to their new subpoenas, which the administrative law judge proceeded to issue on 12/18/75. On 12/19/75 prehearing conferences for the receipt of formal returns were scheduled for 1/22/76 for domestic documents and 3/15/76 for foreign documents.

An informal letter from Pavia & Harcourt, counsel for respondents, dated 12/22/75, informed the administrative law judge that respondent Banci's companies in the United States no longer had any employees here and that counsel could not be held "strictly accountable for the integrity and safe-keeping of these companies' records," although it would "do the best it can" to obtain the "voluminous" and "burdensome" information requested by complaint counsel. On 12/29/75 the administrative law judge by informal letter accepted counsel's assurance that his firm would use its "best efforts" to obtain the requested information but noted the seriousness with which "any substantial loss of relevant records" would be viewed by the administrative law judge.

Pursuant to the aforementioned order filed 12/19/75, a prehearing conference was held in the Commission's Regional Office in New York, N.Y. on 1/22/76 to receive the return of domestic documents called for by complaint counsel's subpoena. [v] No company official appeared to make a return but Mr. Botwinik of Pavia & Harcourt, on his oath of office as an attorney, handed over a few papers he had picked out of his own (attorney's) files. He further suggested that the

be drastically reduced if complaint counsel would submit requests for admissions of the facts to be proved by documents subpoenaed and thereby render production of such documents necessary. The administrative law judge encouraged complaint counsel to submit as many such requests as possible before counsel's forthcoming departure for Europe. Complaint counsel undertook to do so.

On 2/9/76 complaint counsel filed their "Initial Request For Admissions" comprised of 642 proposed factual and documentary admissions. Simultaneously, by letter dated 2/6/76, complaint counsel advised respondent which admissions would render which subpoena calls unnecessary and inoperative. On 3/3/76 complaint counsel filed an additional 170 requests for admissions.

On 2/9/76 complaint counsel moved to amend the complaint by adding as a respondent Hudson Textile Corporation, a New York corporation, alleged to be part of the same unified family business carried on by the original respondents. There being no objection by respondents, said motion was granted by the administrative law judge on 2/10/76. Thereafter Hudson Textile Corporation appeared generally and participated in all proceedings by Pavia & Harcourt, counsel for all respondents.

On 3/22/76 another prehearing conference was held, again in the regional office of this Commission in New York, N.Y. Counsel reported that, with only a few exceptions, the further return of documents in response to complaint counsel's subpoena issued 12/18/75 had now been [vi] rendered unnecessary by respondents' acquiescence in most of counsel's Requests for Admissions. However, with reference to the exceptions (subpoena specifications 13 thru 18), respondents' counsel reported that he had not yet received various responsive documents promised by his clients. Accordingly, the administrative law judge ruled that respondents were now in default and that, unless such default be cured no later than 4/12/76, sanctions would be applied under Rule 3.38.

At the same prehearing conference respondents advised that sufficient knowledge of the case against them had been obtained in the course of complaint counsel's discovery. They accordingly waived their right to the Bill of Particulars granted them by order of 9/10/75. It was then ordered by the administrative law judge that respondents file their answers to the complaint by 4/12/76 and initiate such discovery as they might require no later than 4/26/76, after which complaint counsel would have at least three weeks to respond.

On 4/14/76 three separate answers to the complaint were filed by respondents. Individual respondent Walter Banci admitted the

allegations of complaint paragraphs 1, 2, 7 and 12 (except as to his business address); denied all other allegations; and raised five so-called affirmative defenses. A second answer, by respondents Verrazzano Trading Corporation, Francesco Datini Inc., Lanificio Tuscania Inc. and Lima Textiles Inc., made the same admissions and denials of the complaint's allegations (except as to the group's main office and principal place of business) and raised the same five affirmative defenses as respondent Banci's individual answer. The third answer, by lately-joined respondent Hudson Textile Corporation, admitted only the allegations of complaint Paragraph 1 (except those relative to doing business under the laws of New York and relative to its main office and principal place of business) and denied all [vii] other allegations but, unlike the original respondents, raised no affirmative defenses.

On 3/25/76, complaint counsel had filed a motion, under Rule 3.38, for the administrative law judge to make 21 specified findings of fact to compensate for respondents' failure to produce the documents requested in specifications 13 thru 18 of complaint counsel's subpoena duces tecum issued 12/18/75 and, further to preclude respondents from introducing in evidence or otherwise relying in support of any claim or defense upon testimony or evidence relating to any documents responsive to specifications 13 thru 18 and, further, to preclude respondents from objecting to complaint counsel's use of secondary evidence to show what the withheld documents would have shown.

Respondents' answer to this preclusion motion, filed on 4/2/76, asserted (although without benefit of any supporting affidavit) that respondents had submitted "all extant copies" of certain documents sought by the subpoena, attacked the reasonableness of certain of complaint counsel's proposed constructive findings of fact and urged that complaint counsel might better obtain from Customs certain documents sought by complaint counsel as the basis for other proposed findings. By special order of the administrative law judge (4/5/76) complaint counsel were then permitted to reply to respondents' answer. Complaint counsel pointed out (4/8/76) that there had been no testimony or even an affidavit that anyone had searched company files in New York or Italy and that the statements of respondents' counsel were limited to his own legal file. In response to respondents' suggestion that complaint counsel should get the needed documents from Customs, affidavits from Customs officials explained why such would be an "impractical if not impossible task."

[viii]

Sanction Under Rule 3.38 For Failure Of Respondents To Make Discovery As Ordered." With respect to proposed findings concerning complaints about shrinkage, it was held that even if statements in court by respondents' counsel on his oath of office should be construed as denying the existence of responsive documents, such "testimony" showed on its face his lack of sufficient testimonial knowledge to make such statements. Complaint counsel's proposed findings # 1 and # 2 were accordingly adopted but subject to a *tempus penitentiae*. Respondents were given five days in which to move for another prehearing conference at which to present the sworn testimony of anyone with actual personal knowledge as to the completeness of whatever search may have been made by respondents and to turn over to complaint counsel all responsive documents found in such search.

No *tempus penitentiae* was allowed, however, with respect to two other deficiencies for which sanctions were sought. Firstly, failure by respondents to produce records responsive to subpoena specifications # 3 thru # 20 was held to be deliberate and willful. Furthermore, their argument that complaint counsel might get the desired evidence from Customs was held legally immaterial and, in any event, an unsatisfactory substitute under the facts here. Accordingly, complaint counsel's proposed findings # 3 thru # 20 were adopted and respondents were also precluded from later offering in evidence any documents which would have been responsive to these subpoena specifications. Secondly, in view of respondents' failure to produce leases, etc. from their files at 2 Penn Plaza in New York, the administrative law judge found that location to be a place of business of respondents in the United States (although declining to infer, as suggested in complaint counsel's proposed finding # 21, it was respondents' "principal" place of business here). [ix]

Finally, a general request for an order precluding respondents from using any evidence which had been denied complaint counsel and, further, permitting complaint counsel to make use of secondary evidence as to such matters was denied for the time being but held in abeyance pending possible application in specific situations.

At another prehearing conference held at the Commission's regional office in New York, N.Y. on 5/4/76 respondents' counsel presented a telex message from respondent Banci reciting a search of Italian files yielding certain stated statistics concerning respondents' volume of business in the United States in 1974 and 1975 but advising that such files yielded no claims by customers concerning the composition of fabrics. Thereupon the administrative law judge ruled that respondents would be relieved of sanctions # 1 and # 2 on

receipt of a sworn statement by respondent Banci to the same effect as his telex. After some delays a time limit of 6/11/76 was set for filing such affidavit and after the filing of such an affidavit on 6/14/76, the administrative law judge on 6/22/76 relieved respondents of sanctions # 1 and # 2, while maintaining all other sanctions under the Ruling of 4/16/76 in full force and affect.

At the same prehearing conference (5/4/76) respondents were given five days (later informally extended to seven days) within which to apply for a discovery subpoena and complaint counsel were given five days thereafter to answer the application. On 5/17/76 respondents filed a motion for a broad discovery subpoena and complaint counsel filed their answer on 6/2/76. On 6/23/76 respondents filed a motion for special leave to reply, with proposed reply attached. By this time, however, it had become apparent that the proper scope of respondents' discovery would be greatly affected by the outcome of a pending attack by complaint counsel on respondents' so-called affirmative defenses. [x] Accordingly, no further action on respondents' motion for a discovery subpoena was taken at that time. We turn now to complaint counsel's attack on respondents' affirmative defenses.

On 5/18/76 complaint counsel had moved to strike 4 of 5 affirmative defenses in the answers to the complaint filed by respondent Banci individually and by all corporate respondents except Hudson Textile Corporation. These four affirmative defenses and complaint counsel's position concerning each may be summarized as follows.

Answer § 5

Respondents attacked the constitutionality of the bonding provisions of Section 8 of the Wool Products Labeling Act of 1939 and Section 9 of the Textile Fiber Products Identifications Act (and auxiliary rules and regulations) as denying due process of law and equal protection of the law, because discriminatory in their application solely to importers. Complaint counsel denied that this is a proper forum in which to raise such a constitutional defense and noted that exhaustion of the administrative process might not leave any constitutional question to be decided.

Answer § 6

Respondents asserted that the bringing of this complaint was not really in the public interest because only a private dispute is

once a complaint issues, the Commission's determination that there is a reason to believe a violation has occurred and that a proceeding would be in the public interest are not reviewable. [xi]

Answer § 7

Respondents argued that this is an action designed to protect competitors whereas the purpose of Section 5 of the F.T.C. Act is to protect consumers. Complaint counsel explained that while consumers have been protected explicitly only since the Wheeler-Lea Amendments in 1938, the protection of competitors has always been a purpose of Section 5.

Answer § 8

Respondents' final affirmative defense was that any violations constituted but a small part of respondents' total volume of business. Complaint counsel denied the relevancy of this defense and pointed out that under such a rule a big enough business could violate the law with impunity.

By order filed 5/27/76 respondents were granted until 6/11/76 to answer complaint counsel's motion and on 6/14/76 filed such an answer (see above) elaborating on respondents' position as to each of these four affirmative defenses. On 7/14/76 the administrative law judge filed a lengthy ruling not reaching the merits of the constitutional argument but otherwise granting complaint counsel's motion to strike the affirmative defenses contained in Paragraphs 5, 6, 7 and 8 of the answers of all respondents except Hudson Textile Corporation (whose answer contained no such affirmative defenses).

On 7/20/76 respondents gave oral notice that they intended to apply for interlocutory review of the administrative law judge's decision to strike four affirmative defenses contained in the answers of all respondents except Hudson Textile Corporation. The judge thereupon gave respondents until 8/2/76 to file such application and complaint counsel until 8/16/76 to file any response thereto. The application was filed on 8/3/76 and complaint counsel's reply on 8/12/76. On 10/1/76 the administrative law judge filed another lengthy ruling denying [xii] respondents application for interlocutory review, reaffirming and explaining his earlier opinion as to the impropriety of the four affirmative defenses in question, and finding nothing in his earlier opinion sufficiently doubtful to merit bothering the Commission with a special appeal at this time.

Meanwhile complaint counsel had been seeking a supplementary discovery subpoena said to be required by a fifth affirmative defense

(Par. 4 of all answers to the complaint except that of Hudson Textile Corporation). In a motion filed 8/8/76, complaint counsel recited respondents' pleading that deviations from the stated fiber contents were the result of "unavoidable manufacturing variations despite the exercise of due care." The interjection of this defense, complaint counsel argued, required discovery which would enable complaint counsel to "trace respondents' manufacturing process from raw material to finished product" in order to determine "at what stage in production unavoidable manufacturing variations may have occurred and what procedures are generally followed at respondent's mill to insure due care and quality control."

On 8/23/76, all respondents moved to limit or quash complaint counsel's requested supplementary subpoena in substantial respects and, in any event, to be given extra time in which to obtain any properly subpoenaed documents from Italy. On 9/1/76 complaint counsel opposed respondents' motion to limit or quash. In his ruling filed 10/1/76 the administrative law judge limited the proposed specifications as requested in certain respects; denied alleged irrelevancy as to one specification; declined to restrict discovery to the time period covered by the complaint; and took the problem of communicating with Italy into consideration in making the revised subpoena returnable at a prehearing conference scheduled for 11/16/76. [xiii]

When said prehearing conference was convened at the Regional Office of this Commission on 11/16/76, respondents' counsel informed the administrative law judge that respondents would neither appear nor produce any of the documents specified in the subpoena duces tecum because of the expense of producing such evidence and because respondents' American business is now relatively insignificant. An oral application in open court by complaint counsel to apply sanctions against respondents under Rule 3.38 for failure to make discovery as ordered was then and there granted by the administrative law judge. It was duly ordered that (1) an inference be drawn that documents responsive to subpoena specifications 1 thru 15 would be adverse to respondents' claim of unavoidable manufacturing variations despite the exercise of due care; (2) it be now established that violations charged in the complaint are not the result of unavoidable manufacturing variations despite the exercise of due care; (3) respondents may not introduce into evidence or otherwise rely, in support of any claim or defense upon any document which would have been responsive to subpoena specifications 1 thru 15; that Paragraph 4 of each of respondents' answers be stricken.

With the pleadings thus pruned, a considerable amount of the discovery sought earlier by respondents now became unnecessary and on the same principle the administrative law judge determined to further postpone his ruling on said discovery request until respondents had received complaint counsel's proposed exhibits and summaries of expected witness' testimony. By order filed 10/1/76 complaint counsel were directed to turn their case over to respondents in two weeks, after which respondents would have another two weeks to revise the specifications of their long-pending requested subpoena duces tecum to eliminate material already received in the turnover. [xiv]

At the aforementioned prehearing conference held on 11/16/76 it was confirmed that respondents would have two weeks (until 11/30/76) to revise the specifications for their discovery subpoena in light of recent developments and complaint counsel would then have four weeks (until 12/31/76) to make responsive production, subject to the usual time limit of 10 days in which to make objections. Thereafter, on 12/10/76 respondents moved for their subpoena duces tecum, specifying eight categories of documents desired from the Commission's files. These included (1) reports on investigations into respondents' textile/wool products; (2) complaints received about respondents' products; (3) communications between the Commission and Bobbie Brooks concerning fiber content or the shrinkage factor of textile/wool products which respondents had sold Bobbie Brooks; (4) studies made by the Commission in connection with the Care Labeling Act; (5) explanations of the manner in which the Commission tests, samples and otherwise enforces the Textile and Wool Acts domestically; (6) statistics comparing the volume of investigations and enforcement proceedings brought against foreign manufacturers and importers with the volume of actions taken against domestic manufacturers and sellers; (7) statistics showing the volume of actions taken under those acts against importers or domestic resellers; and (8) statistics showing the number of field employees enforcing the Textile and Wool Acts, either full-time or part-time. Complaint counsel's opposition was filed on 12/27/76.

On 1/26/77 the administrative law judge denied all of respondents' specifications except (3), as to which complaint counsel were required to produce within two weeks. This ruling was based principally on the view that in most instances respondents were merely "fishing" in the private area of Commission decision-making which is not subject to discovery, absent a showing of probable cause not even attempted here. On the substantive side, it was held, [xv] the Commission's exercise of administrative discretion, as in

choosing the sequence of prosecution of different offenders is not ordinarily open to litigation, and mere relevance to the exercise of such discretion is insufficient to make discovery proper in such a situation as this. In view, too, of the striking of respondents' so-called affirmative defenses, all but specification (3) were held improper.

Throughout the pre-trial discovery period a good deal of real progress in preparing for trial was made by the use of many complex admissions requested and accepted under Rule 3.11 (See filings on 9/20/76, 11/1/76, 11/26/76). With the completion of the admissions procedure and reciprocal discovery, as set out above, on 2/11/77 the administrative law judge ordered evidentiary hearings in the New York Regional Office to begin on 3/21/77. He simultaneously ordered respondents to turnover to complaint counsel by 3/4/77 a list of all their proposed exhibits, with copies thereof, and a list of all their proposed witnesses, with summaries of the thrust of their expected testimony. It was further laid down that "witnesses and exhibits not so pre-viewed will not be received in evidence during said hearing." On 3/3/77 complaint counsel were directed to advise respondent of the sequence in which they expected to call their witnesses (the identity and testimony of whom had already been provided to respondent as noted above).

By letter to complaint counsel, with copy to the administrative law judge, respondents on 3/7/77 gave notice that they did not expect to call any witnesses at trial but did submit certain fiber test results and a record of the testimony of one Professor Antonio Rota in an earlier matter (Dkt. 8801) to be offered in this hearing.

Evidentiary hearings began on Monday, March 21, 1977 and continued through Wednesday, March 23, 1977. [xvi]

Complaint counsel called the following witnesses:

<i>Name and Address</i>	<i>Date of Testimony</i>	<i>1 Transcript Reference</i>
Samuel A. Golub 1000 Providence Highway Dedham, Mass.	3/21/77	105
Amelia Eaton U.S. Customs Service 6 World Trade Cen- ter	3/22/77	205

888

Appendix

New York, N.Y.

Martin Youngberg 5 Richard Court Lincoln Park, N.J.	3/23/77	329
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Kenneth Schaden 9318 Girdle Road Middlefield, Ohio	3/23/77	371
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In addition to the foregoing witnesses, counsel for both sides stipulated on 3/23/77 at pages 324-5 of the transcript that Edward Feder, import specialist for the U.S. Customs Service, would testify as therein stated. Respondents, as anticipated, called no witnesses in their behalf.

During the hearing complaint counsel introduced approximately 121 exhibits and respondents approximately 18, all during the case-in-chief. When the case-in-chief was closed (Tr. 395), respondents' counsel stated that because respondent Banci had informed him that he had neither the time nor the finances to properly defend this matter, respondents would have nothing further to offer in evidence except a record of the 1970 testimony of Professor Rota in a similar proceeding before this Commission (Dkt. 8801). (Tr. 395-6). The latter was excluded from evidence but with permission for respondents to re-offer it by written motion with an explanatory brief, for reconsideration (Tr. 396). [xvii]

On 4/5/77 respondents filed their motion to admit into evidence Professor Antonio Rota's testimony on 7/29/70 at pp. 966-1036 of the transcript in D. 8801, arguing that Professor Rota's testimony would be relevant to the alleged willfulness of respondents' mislabeling here and that Rota, an Italian citizen, was "unavailable" within the meaning of Rule 804(a)(5) and 804(b)(1) of the new Federal Rules of Evidence. Complaint counsel's reply, filed 4/12/77 argued that Professor Rota was not "unavailable" merely because he resides in Italy and in any event his testimony would be of little value or positively misleading, chiefly because it was originally addressed to a different issue (unavoidable manufacturing variations despite due care) and, being seven years old, might be quite inaccurate at present. On 4/21/77 the administrative law judge denied respondents' motion to reconsider the admissibility of Professor Rota's former testimony, holding that Rota was not "unavailable" within the meaning of F.R.E. Rule 804(a)(5) and that the offer also seemed like a back-door effort to get into the field of unavoidable manufacturing defects, from exploring which respondents had been

precluded by the order of 11/23/76 (for failure to make discovery on such subject). Finally the judge agreed that Rota's testimony, being quite out of date, could be misleading, absent opportunity for cross-examination thereof.

There followed a period of incomprehensible length while the reporting contractor attempted several times to correct a number of errors in the transcript, particularly the numerical pagination thereof. It was not until 8/18/77 that a stipulation of transcript corrections could be entered into and incorporated into the record by the administrative law judge. On 8/24/77 the record was officially closed. [xviii]

Pursuant to earlier arrangements (Tr. 398) complaint counsel on 9/20/77 filed their proposed findings of fact, conclusion of law, and order, with arguments in support thereof. An order issued on 10/12/77 noting respondents' default in serving proposed findings and conclusions but on the same date said proposals were actually filed, curing the default. At the same time respondents advised that on 9/2/77 respondent Banci's manufacturing vehicle, Lanificio Walter Banci s.a.s., had been adjudicated bankrupt. At the same time respondents filed their corresponding proposals. On 11/1/77 complaint counsel filed their proposed reply findings and brief.

Appendix

APPENDIX II
 REPRESENTED BY ACTUAL FIBER CONTENT
 Selected Samples of Polyester Fabric Imported from the United States by Respondents, 1973 and 1974

Item	Col. 1 Sample	Col. 2 Fiber Reference	Col. 3 Quantity (Gross)	Col. 4 Year	Col. 5 Reference	Col. 6 Sample Reference	Col. 7 Sample Reference	Col. 8 Reference	Col. 9 Fiber Reference	Col. 10 Reference	Col. 11 Fiber Reference	Col. 12 Reference	Col. 13 Fiber Reference
(01)	CE 3	Stow (277043)	8 1/4	1973	W/A	Bobbie Brooks, Inc.	MA 111, 91	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(02)	CE 4	Stow (277043)	8 1/4	1973	W/A	Bobbie Brooks, Inc.	MA 111, 91	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(03)	CE 10	Stow (277043)	8 1/4	1973	W/A	Bobbie Brooks, Inc.	MA 111, 91	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(04)	CE 11	Stow (277043)	8 1/4	1973	W/A	Bobbie Brooks, Inc.	MA 111, 91	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(05)	CE 12	Stow (277043)	8 1/4	1973	W/A	Bobbie Brooks, Inc.	MA 111, 91	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(06)	CE 13	Stow (277043)	8 1/4	1973	W/A	Bobbie Brooks, Inc.	MA 111, 91	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(07)	CE 17	Stow (277043)	8 1/4	1973	W/A	Bobbie Brooks, Inc.	MA 111, 91	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(08)	CE 18	Stow (277043)	8 1/4	1973	W/A	Bobbie Brooks, Inc.	MA 111, 91	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(09)	CE 19	Stow (277043)	8 1/4	1973	W/A	Bobbie Brooks, Inc.	MA 111, 91	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(10)	CE 20	Stow (277043)	8 1/4	1974	W/A	U.S. Customs Entry 4725182	MA 111, 912	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(11)	CE 31	Stow (277043)	8 1/4	1974	W/A	U.S. Customs Entry 4725183	MA 111, 912	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(12)	CE 32	Stow (277043)	8 1/4	1974	W/A	U.S. Customs Entry 4725184	MA 111, 912	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(13)	CE 33	Stow (277043)	8 1/4	1974	W/A	U.S. Customs Entry 4725185	MA 111, 912	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(14)	CE 34	Stow (277043)	8 1/4	1974	W/A	U.S. Customs Entry 4725186	MA 111, 912	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(15)	CE 36	Stow (277043)	8 1/4	1974	W/A	U.S. Customs Entry 4725187	MA 111, 912	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(16)	CE 37	Stow (277043)	8 1/4	1974	W/A	U.S. Customs Entry 4725188	MA 111, 912	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon
(17)	CE 45	Stow (277043)	8 1/4	1974	W/A	U.S. Customs Entry 4725189	MA 111, 912	502 Cotton 132 Nylon	MA 111, 911	CE 1179	35.52 Cotton 64.48 Polyester 21.42 Nylon	CE 1179	41.12 Cotton 58.88 Polyester 6.04 Nylon

/ Figures not available

Appendix

Item	Col. 1 Sample	Col. 2 Quotient Reference	Col. 3 Date	Col. 4 Case No.	Col. 5 Date	Col. 6 Reference	Col. 7 Statute	Col. 8 Reference	Col. 9 Material/Comer	Col. 10 Reference	Col. 11 Material	Col. 12 Reference	Col. 13 Quotient (in percentage points)
(18)	CF 55	Mawjjo	MA T, 912	MA 1, 9033	28,770 2/8 1976	U.S. Customs Entry 737864	MA T, 912	40% Cotton 40% Polyester 20% Nylon	MA 111, 938	18.42 Cotton 31.85 Polyester 31.85 Nylon	CF 137	+23.85 Cotton -11.85 Polyester -11.85 Nylon	
(19)	CF 58	Mawjjo	MA T, 917	MA 1, 9038	29,007 1976	U.S. Customs Entry 738026	MA T, 917	40% Cotton 40% Polyester 20% Nylon	MA 111, 938	19.12 Cotton 44.12 Polyester 31.85 Nylon	CF 140	+20.95 Cotton -9.95 Polyester -11.85 Nylon	
(20)	CF 59	Mawjjo	MA T, 920	MA 1, 9039	29,676 6/8 1976	U.S. Customs Entry 738137	MA T, 920	40% Cotton 40% Polyester 20% Nylon	MA 111, 938	21.12 Cotton 39.88 Polyester 39.88 Nylon	CF 141	-17.95 Cotton -11.85 Polyester -11.85 Nylon	
(21)	CF 60	Mawjjo	MA T, 928	MA 1, 9040	45,268 2/8 1976	U.S. Customs Entry 738359	MA T, 928	40% Cotton 40% Polyester 20% Nylon	MA 111, 938	24.95 Cotton 30.42 Polyester 44.35 Nylon	CF 142	+35.12 Cotton -11.85 Polyester -11.85 Nylon	
(22)	CF 61	Mawjjo	MA T, 930	MA 1, 9019	25,937 2/8 1976	U.S. Customs Entry 743817	MA T, 930	40% Cotton 40% Polyester 20% Nylon	MA 111, 938	29.22 Cotton 39.88 Polyester 30.90 Nylon	CF 143	+10.82 Cotton -11.85 Polyester -11.85 Nylon	
(23)	CF 62	Mawjjo	MA T, 931	MA 1, 9020	19,448 2/8 1976	U.S. Customs Entry 743817	MA T, 931	40% Cotton 40% Polyester 20% Nylon	MA 111, 938	21.12 Cotton 39.88 Polyester 39.88 Nylon	CF 144	+12.42 Cotton -11.85 Polyester -11.85 Nylon	
(24)	CF 64	Veronka	MA T, 915	MA 1, 9022	1038 4/8 1973	U.S. Customs Entry 818173	MA T, 915	95% Acrylic 5% Cotton 5% Other Fibers	MA 1, 934	17.42 Acrylic 7.42 Cotton 7.42 Polyester	CF 138	+26.95 Acrylic -11.85 Cotton -11.85 Polyester +2.82 Nylon +2.82 Polyester	

Appendix

Item	Col. 1 Sample	Col. 2 Label	Col. 3 Reference	Col. 4 Date (month/year)	Col. 5 Section Reference	Col. 6 Sample Source	Col. 7 Section Reference	Col. 8 Material Reference	Col. 9 Material Reference	Col. 10 Section Reference	Col. 11 Text Reference	Col. 12 Section Reference	Col. 13 Section Reference (to percentage points)
(17)	CE 37	Label	SA V, 86	1711 4/8 1974	SA 1, 8603	U.S. Customs Entry A620531	SA V, 86	335 Acrylic 205 Wool 315 Cotton 35 Other Fibers	SA 111, 935	SA 111, 935	2.1% Wool 4.1% Acrylic 14.1% Cotton 37.7% Nylon/Poly 4.1% Polyester	CE 119	-17.1% Wool -4.1% Acrylic -14.1% Cotton -37.7% Nylon -4.1% Other Fibers
(18)	CE 38	Merch	SA V, 97	3432 4/8 1974	SA 1, 8604	U.S. Customs Entry A630136	SA V, 97	335 Acrylic 205 Wool 315 Cotton 35 Other Fibers	SA 111, 933	SA 111, 933	9.0% Wool 34.9% Acrylic 29.0% Nylon/Kap 4.1% Polyester	CE 120	-9.0% Wool -34.9% Acrylic -29.0% Nylon -4.1% Other Fibers
(19)	CE 39	Merch	SA V, 98	5150 2/8 1974	SA 1, 8605	U.S. Customs Entry A631208	SA V, 98	335 Acrylic 205 Wool 315 Cotton 35 Other Fibers	SA 111, 933	SA 111, 933	31.1% Wool 43.7% Acrylic 14.0% Nylon/Kap 9.8% Polyester	CE 121	10.1% Wool -4.1% Cotton -9.3% Acrylic -47.4% Other Fibers
(20)	CE 40	Merch	SA V, 99	2607 6/8 1974	SA 1, 8606	U.S. Customs Entry A632131	SA V, 99	335 Acrylic 205 Wool 315 Cotton 35 Other Fibers	SA 111, 933	SA 111, 933	9.5% Wool 39.2% Acrylic 39.2% Cotton 11.1% Polyester	CE 122	-10.1% Wool -4.0% Cotton -15.4% Acrylic -32.3% Other Fibers
(21)	CE 41	Merch	SA V, 110	1931 1974	SA 1, 8609	U.S. Customs Entry A632199	SA V, 110	335 Acrylic 205 Wool 315 Cotton 35 Other Fibers	SA 111, 933	SA 111, 933	11.0% Wool 19.4% Cotton 39.2% Acrylic 39.2% Polyester	CE 123	- 9.0% Wool - 3.4% Cotton - 33.2% Acrylic - 46.4% Other Fibers
(22)	CE 42	Merch	SA V, 111	3717 6/8 1974	SA 1, 8610	U.S. Customs Entry A632916	SA V, 111	335 Acrylic 205 Wool 315 Cotton 35 Other Fibers	SA 111, 933	SA 111, 933	9.9% Wool 17.4% Cotton 39.2% Acrylic 39.2% Polyester	CE 124	-10.1% Wool - 2.1% Cotton - 33.2% Acrylic - 46.4% Other Fibers
(23)	CE 4	Env	SA 1, 918 SA 111, 92	N/A	SA 111, 92	Fabric-Centers of America	SA 111, 92	435 Acrylic 315 Wool 315 Cotton 35 Other Fibers	SA 111, 928	SA 111, 928	7.1% Wool 14.0% Cotton 39.2% Acrylic 39.2% Polyester	CE 125	-17.2% Wool - 4.0% Cotton - 33.2% Acrylic - 45.7% Other Fibers
(24)	CE 33	Env	SA V, 93	567 2/8 1973	SA 1, 8614	U.S. Customs Entry A621331	SA V, 93	335 Acrylic 205 Wool 315 Cotton 35 Other Fibers	SA 111, 929	SA 111, 929	16.1% Wool 19.1% Acrylic 39.2% Nylon/Kap 3.2% Polyester	CE 126	16.1% Wool 19.1% Acrylic 39.2% Nylon 3.2% Polyester
(25)	CE 63	Env	SA V, 112	3892 6/8 1974	SA 1, 8611	U.S. Customs Entry A622918	SA V, 112	335 Acrylic 205 Wool 315 Cotton 35 Other Fibers	SA 111, 929	SA 111, 929	3.2% Wool 3.2% Cotton 39.2% Acrylic 39.2% Polyester	CE 127	17.4% Wool 14.0% Cotton 39.2% Acrylic 39.2% Polyester
(26)	CE 44	Env	SA V, 113	6235 6/8 1973	SA 1, 8612	U.S. Customs Entry A617850	SA V, 113	435 Acrylic 315 Wool 315 Cotton 35 Other Fibers	SA 111, 928	SA 111, 928	13.1% Wool 17.1% Cotton 39.2% Acrylic 39.2% Polyester	CE 128	-17.2% Wool - 7.9% Cotton - 4.0% Acrylic - 31.1% Other Fibers
(27)	CE 45	Env	SA V, 114	2099 2/8 1973	SA 1, 8613	U.S. Customs Entry A621720	SA V, 114	435 Acrylic 315 Wool 315 Cotton 35 Other Fibers	SA 111, 928	SA 111, 928	13.5% Wool 16.4% Cotton 39.2% Acrylic 39.2% Polyester	CE 129	-12.3% Wool - 4.4% Cotton - 34.1% Acrylic - 41.1% Other Fibers

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

This case principally involves the question of whether the Commission can and should apply provisions of the Wool Products Labeling Act of 1939 (15 U.S.C. 68) and the [2] Textile Fiber Products Identification Act (15 U.S.C. 70) which empower the Commission to require an importer that has violated those acts to post a bond with the Treasury Department in double the amount of future imports as a guarantee against further violations of the law.

The complaint in this matter was issued June 24, 1975, and charged respondents with a variety of violations of the Wool and Textile Acts, as well as Section Five of the Federal Trade Commission Act (15 U.S.C. 45) in connection with the importation from Italy into the United States of various wool and other textile fiber products. Protracted pretrial skirmishing followed by a short and peaceful trial before Administrative Law Judge (ALJ) Paul Teetor led to his initial decision sustaining in large measure the allegations of the complaint. Judge Teetor found that respondents had violated the Wool Act, after review of numerous samples of wool products which evidence substantial overstatements of their wool content. He found that respondents had violated the Textile Act upon consideration of numerous fabric samples evidencing substantial overstatements of the content of textile fibers other than wool. Based upon these violations, the ALJ recommended entry of an order requiring that respondents cease and desist from future violations and, in addition, post a bond in double the value of future imports to be forfeited in the event of further violations of the Wool and Textile Acts.

Judge Teetor also found that respondents had violated Section Five by misrepresenting the shrinkage factor of certain of their imports and recommended that an order enter prohibiting that practice.

The ALJ rejected complaint allegations that misstatements of the amount of non-wool fibers in wool products constituted violations of Section 5 of the Federal Trade Commission Act, and that misstatements of wool content on sales invoices of wool products constituted Section 5 offenses. Judge Teetor also rejected the argument that *understatements* of textile fiber components violated the Textile Act. Complaint counsel have appealed each of these adverse rulings, while respondents have objected to imposition of the bond and the finding of Section 5 liability for misrepresentation of shrinkage factor. Our disposition of these appeals follows: [2]

Bond Requirement

The record reveals that 58 samples were taken from shipments totalling over 1,185,000 yards of woolen and other textile products. (I.D. 17)¹ Of these 58 samples, 25 were represented to and did include some wool. (I.D. 27) In 23 of the wool samples, wool content was overstated by 10 to 20 percentage points.² In the other two the overstatement was 3-10%. (I.D. 31)³ Another group of 24 textile samples, as to which no wool content was either claimed or found by testing, involved 29 overstatements of fiber content in excess of 3%, including 8 overstatements of fiber content in excess of 20%. (I.D. 28)⁴ The ALJ found that [4] these substantial and pervasive overstatements of wool and textile fiber content constituted violations of the Wool and Textile Acts respectively. (I.D. pp. 29, 31-32)

Section 8 of the Wool Products Labeling Act, 15 U.S.C. 68f, provides in relevant part that, with respect to fiber content information which the Act requires to be disclosed:

any person who falsifies, or fails to set forth, said information in said invoices, or who falsifies or perjures said consignee's declaration insofar as it relates to said information, may thenceforth be prohibited by the Commission from importing, or participating in the importation of, any wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of this Act.

Section 9 of the Textile Fiber Products Identification Act, 15 U.S.C. 70g, provides in relevant part that, with respect to information required to be provided by a seller of textile products:

any person who falsifies, or perjures the consignee's declaration insofar as it relates to such information, may thenceforth be prohibited by the Commission from importing, or participating in the importation of, any textile fiber product into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value

¹ The following abbreviations are used herein:
 I.D. - Initial Decision Finding of Fact No.
 I.D. p. - Initial Decision Page No.
 Tr. - Transcript of Testimony, Page No.
 CX - Complaint Counsel's Exhibit No.
 RX - Respondent's Exhibit No.

² - referring to an overstatement or understatement of fiber content by "x" percent, we mean that the number representing the indicated percentage of wool exceeds or falls short of the actual percentage of wool in the product by the number "x". Thus, a claim that a product with 20% wool contains 40% wool is considered an overstatement of "20%", although one might also view it as overstating the wool content by 100%.

³ Those samples involving misstatements of wool content also involved 41 misstatements of non-wool fibers, including 29 overstatements, of which 10 were in excess of 20 percentage points. (I.D. 32-33) Judge Teetor found no violation based on these misstatements. We discuss them in regard to complaint counsel's appeal, *infra* at p. 13.

⁴ As a corollary, these samples also contained numerous understatements of textile fiber content in excess of 3% (I.D. 29). Judge Teetor concluded that these understatements did not violate the law. Our discussion of this point occurs *infra* at p. 15.

of said products and any duty thereon, conditioned upon compliance with the provisions of this Act.

The purpose of these provisions is to allow the Wool and Textile Acts to be enforced against previous violators who may be, by virtue of their status as importers with assets outside and unreachable from the United States, immune, in practice, to the threat of civil penalties (the ordinary mode of enforcement of orders to cease and desist. [5])

The applicability of the bonding provisions to the facts of the instant case is clear. Respondent Banci is an Italian citizen, while the corporate respondents appear dormant within the United States. It thus seems quite likely that the threat of civil penalties would do little to deter a resumption of misbranding in the future by the individual or corporations through which he might act. Need for the bond is further enhanced by the fact that respondents have evidenced a pattern of repeated violations of the labeling laws (despite notifications from U.S. Customs) at least since 1972, notwithstanding their promise in 1971 (in conjunction with dismissal of previous misbranding charges) that they would undertake to comply with the labeling laws. *Verrazzano Trading Corp., et al.*, 78 F.T.C. 637, 675 (1971). As Judge Teetor properly observed, imposition of a bond, to be forfeited in the event of further violations, appears to be the only way to ensure respondents' compliance with the Wool and Textile Acts. (I.D. p. 48)

Respondents argue that imposition of a bond requires a finding that the law has been willfully breached. This is belied by the plain language of the statutes, which applies to a party who "*falsifies or perjures*" the consignee's declaration.⁵ While perjury, of course, denotes an element of willfulness, falsification may occur by design or otherwise.⁶ To read into the term a necessary element of intent would render its use in the statute redundant.⁷ The plain meaning of the statute is, moreover, wholly consistent with its plain purpose. It is apparent that misbranding that results from recklessness, [6] carelessness, or incompetence is no less inimical to the public interest than that which is done with specific intent to deceive. The

⁵ In addition, the Wool Act authorizes imposition of a bond where the importer has falsified or failed to set forth the requisite information in its customs invoices.

⁶ Webster's *New International Dictionary* (2d ed.) defines "falsify" as "To make false; specif. (a) to represent falsely . . ." at page 915.

⁷ It would also lead to different constructions of "falsify" in different Sections of the Acts. For example, Section 4(c) of the Textile Act (15 U.S.C. 70(b)) defines a textile product to be "falsely . . ."

careless violator is no less dangerous, and no less likely to repeat its unlawful carelessness or heedlessness, than the willful one.⁸ Accordingly, it comports fully with the statutory scheme that the bonding requirement should apply to misbranding whether intentional or not.

Respondents also observe that the bonding provision of the Wool Act may be invoked for falsification only of the *consignee's declaration* or the special invoices required by the Tariff Act of 1930, while the Textile Act bonding provision is triggered by falsification only of the consignee's declaration. Respondents contend that the ALJ did not find that these particular customs documents had been falsified.

While the ALJ did not focus precisely on this technical point, the requisite finding of falsification is implicit in the initial decision, and, in any event, our own review of the record leaves no doubt that the relevant invoices and consignee's declarations were falsified. The ALJ found, in "Appendix II" of his initial decision and the findings which summarize it, that misbranding of numerous fabrics had occurred. Respondents admitted before trial (RA III, ¶ 29-41; 9/20/76) and did not dispute at trial, that the representations found by the ALJ to be false had been made on "all fiber content tags, supplier's invoices, special customs invoices and consumption entries . . ." relating to each fabric in question. From this it is clear that falsification of supplier's and special customs invoices occurred, as required for imposition of a bond under the Wool Act. It is also clear that falsification of consignee's declarations occurred. The consignee's declaration is merely a sworn statement contained in the consumption entry in which the importer vouches for the accuracy of the invoices accompanying the entry (e.g., CX 73E). Falsification of the invoices is tantamount to falsification of [7] the consignee's declaration. Accordingly, we find that falsification of supplier's invoices, special customs invoices, and consignee's declaration has occurred with respect to all fabrics found by the ALJ to have been misbranded.

Constitutionality of Bond Requirement

Respondents also contend that the bonding provisions of the Wool and Textile Acts are unconstitutional. The ALJ refused to address the merits of this argument, concluding that it would be inappropri-

⁸ That Congress clearly recognized the distinction between the two kinds of behavior is evident from Section 10 of the Wool Act (15 U.S.C. 68h) and Section 11 of the Textile Act (15 U.S.C. 70h) which impose criminal penalties for "Any person who willfully" violates various provisions of the laws, including Section 8 of the Wool Act and Section 9 of the Textile Act.

ate for an administrative agency to consider the constitutionality of one of its organic statutes. Wishing to preserve our options pending further consideration of this issue, the Commission instructed both sides to brief the merits of the constitutional argument, subject to the Commission's determination as to whether it should be considered.

With all the arguments now in hand, we find it much easier to answer the constitutional question than to decide whether we ought to ask it. While the Commission is frequently called upon to assess the impact of constitutional provisions upon various proposed *interpretations* of its organic statutes, or *orders* proposed to remedy violations of those statutes [e.g., *National Commission on Egg Nutrition*, 88 F.T.C. 84 (1976); *aff'd and ordered enforced as modified*, 570 F.2d 157 (7th Cir. 1977)] the situation presented here is somewhat different, because respondents squarely challenge the constitutionality of an entire provision of law, however applied, and adoption of their position would lead to non-enforcement under any circumstances of a provision which Congress and the President believed to pass constitutional muster.

As complaint counsel and the administrative law judge contend, there is considerable case law support for the view that an administrative agency lacks jurisdiction or authority to consider the constitutional validity of the statutes it enforces, e.g., *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Public Utilities Commission v. United States*, 355 U.S. 534, 539 (1958); *Macy Industries, Inc.*, 51 F.T.C. 931, 151 (1955), *aff'd*, 355 U.S. 411 (1958). Policy reasons justifying such an approach are readily imagined. However, viewed, an [8] administrative agency is created to enforce the law and effect the mandate of Congress. Were an agency to conclude that a duly enacted statute was unconstitutional, it might thereby preclude any review of that issue by the courts, thus thwarting a constitutional scheme which contemplates passage of laws by Congress, enforcement of them by the executive, and ultimate determination of their constitutionality by the judiciary.

There are, however, persuasive reasons which argue in favor of constitutional consideration by administrative agencies. For one thing, Commissioners, like other federal officials, take an oath of office to "support and defend the Constitution," which presumably entails that we not wholly ignore its effect, when relevant, upon contemplated action. It may be argued that in upholding the Constitution, the administrative agency should defer in the first instance to the judgment of Congress as to what the Constitution

of relevant case law. However, one may imagine many situations, short of an adverse Supreme Court ruling directly on point, in which the unconstitutionality of a statute would be strongly indicated to all reasonable minds. For example, one might ask what would happen if, (to take a pure hypothetical) during the pendency of this litigation the Supreme Court were to rule unconstitutional the bonding provisions of the Fur Products Labeling Act, 15 U.S.C. 69, 69d, a statute closely analogous in form and purpose to the Wool and Textile Acts. Such a ruling might well compel any reasonable person to conclude that the bond provisions of the Wool and Textile Acts must fall. It is only a matter of degree to move from precedents of this sort to the less pointed precedents which defense counsel may believe warrant condemnation of the statute here or others that might be challenged. It is no secret that certain statutes fall into disuse because prosecutors conclude, from their reading of case law and in the exercise of largely unreviewable discretion, that the constitutionality of those statutes could not survive challenge. It seems an artificial distinction to maintain that an administrative agency cannot consider the same issues when it acts, on the record for all to see, in its adjudicative capacity. [9]

Moreover, as pointed out in the article upon which respondents rely for support,⁹ there may be instances in which agency review of constitutional issues will furnish the informed factual and legal basis that is needed for reviewing courts to reach the best decision when they must face the constitutional question. Perhaps the lesson to be drawn from these conflicting observations is that administrative agencies ought not blind themselves to constitutional considerations, but in taking them into account they should give extreme deference to the implicit view of Congress that such statutes are constitutional, so as to avoid thwarting the Congressional intent by precluding judicial review of a statute's constitutionality.

Fortunately for the Commission, this is not a case in which we need risk bringing the pillars of the republic crashing down about our ears. Having considered respondents' sketchy constitutional arguments, we find them without merit, and we can thus discern no reason to question the determination of Congress that the bond provisions of the Wool and Textile Acts are constitutionally sound.

Respondents appear to contend that the bonding provisions constitute a denial of due process because they restrain unreasonably, or without need, respondents' ability, if not "right" to engage in the importation of fabrics. Implicit in this part of the argument is

⁹ Note, "The Authority of Administrative Agencies to Consider the Constitutionality of Statutes," 90 Harv. L. Rev. 1682 (1977).

also an equal protection claim, that importers have been impermissibly singled out for imposition of the bond requirement. As complaint counsel observe, however, there is no vested right to carry on foreign commerce with the United States and the power of Congress over foreign commerce is plenary. *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 125-6 (1973). Given that Congress might, if it chose, exclude all foreign imports, *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904), it can surely place less restrictive conditions upon importers found to have violated federal labeling laws without offending due process.¹⁰

[10] Nor do the bond provisions discriminate impermissibly. While the necessity to post a bond imposes some incremental restraint upon an importer's ability or inclination to import, the requirement is clearly tailored reasonably to ensure non-repetition of previous violations by a class of violators which may reasonably be thought less likely than others to be amenable to the sanctions ordinarily imposed for violations of an order. *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 584 (1935). Although respondents claim that Italian law would permit enforcement of a civil penalty judgment against them rendered by an American court, the ease with which this might be accomplished is by no means clear, and surely the process would be fraught with much greater uncertainty and expense than that by which civil penalties are ordinarily exacted. Under the circumstances, we think that Congress quite reasonably provided an alternative means to ensure deterrence of repeat violations by importers, and its judgment in this matter affecting foreign commerce is one that ought not lightly be disturbed, cf. *Mathews v. Diaz*, 426 U.S. 67, 78-82 (1976).

Finally, we reject respondents' contention that the relevant provisions of law are impermissibly vague. Counsel's strained attempts to misunderstand what these provisions mean are perhaps the best indication of their clarity.

For the foregoing reasons we are unpersuaded by respondents' constitutional challenge, assuming *arguendo* that we ought to consider it. [11]

Misrepresentation of Shrinkage Factor

The administrative law judge found that respondents had violated Section 5 by misrepresenting the residual shrinkage of large quantities of cloth sold to Bobbie Brooks and other purchasers. (I.D. 8, 36) The fabric in question was represented as possessing residual

¹⁰ This consideration also speaks to respondents' argument that the bond constitutes an unconstitutionally

shrinkage of 1% to 1-1/2%, when, in fact, it was likely to shrink by 5-6%. (I.D. 36)

There is no serious dispute as to the existence of the misrepresentation, or its materiality. Fabric with a residual shrinkage of less than 1-1/2% is suitable for immediate incorporation in clothing, and implies to the manufacturer some sort of pre-treatment, for which additional payment may be warranted. Fabric with residual shrinkage approaching 6% is not suitable for incorporation in many kinds of clothing without further treatment, since washing may result in substantial shrinkage that would materially alter the size of the clothing. (I.D. 37)

While not challenging these facts, respondents appear to contend that what is involved is merely a "private controversy" which injured no consumers. Respondents contend that Bobbie Brooks tested the cloth itself before making any use of it, so that it was aware of its true shrinkage factor. Any transmission of the fabric untreated to the public was, therefore, the responsibility of the manufacturer.

The principal point to be made about all this, we think, is that Section 5 does not tolerate deceptive practices by businesses merely because they are visited upon other businesses rather than directly upon consumers. In either case the public is harmed. The law prohibits deceptive practices affecting commerce because such practices make it impossible for purchasers to make the informed buying decisions that are needed to maximize the welfare of all citizens in a capitalist economy. These market-distorting effects of deception are no less significant in the middle of the chain of distribution than they are at its end. If a manufacturer pays extra money for fabric because it is represented to be pre-shrunken, that cost must inevitably be [12] passed along to the consuming public, in one form or another. Deceptive practices which alter the buying patterns of manufacturers must inevitably affect, in turn, the way such manufacturers relate to their customers.¹¹

It is true, of course, that manufacturers may be in a better position than consumers to pursue private remedies to redress the effects of deception. For this reason, the Commission, in the exercise of its discretion, may be less inclined to pursue deceptions occurring between businesses. However, this can in no way constitute a legal defense to charges of misrepresentation. The deception challenged

¹¹ This is true even where the deception is detected by the manufacturer and not passed on to consumers. With respect to the shrinkage problem, we think that while Bobbie Brooks may be sufficiently large to test its own fabrics for shrinkage, other, smaller manufacturers might well not be in a position to detect such misrepresentations, and might, therefore, pass them on directly to consumers. This, then, is a further potential source of injury from respondents' practice.

here occurred with respect to a substantial volume of commerce (I.D. 36), and in addition to Bobbie Brooks involved at least one other customer of respondents, and may well have involved numerous customers to whom respondents made representations of shrinkage. (I.D. p. 37) It is obviously in the public interest that such practices be curbed. [13]

Complaint Counsel's Appeal - Section Five Labeling Violations

Nine samples of respondents' fabrics were tested and found to contain small, undisclosed traces of wool ranging from 1.1% to 9.6% (I.D. 34). These samples also exhibited 16 substantial overstatements of the percentage of non-wool fabrics, including 5 overstatements in excess of 20 percentage points. (I.D. 35). In addition, as noted *supra* at n. 3, those fabric samples in which wool content was overstated also involved 29 overstatements of fiber content other than wool. The complaint alleged that the overstatements of non-wool fibers constituted violations of Section 5 of the Federal Trade Commission Act.¹²

The administrative law judge dismissed the Section 5 count on grounds that a deceptive tendency required under Section 5 could not be inferred from "mere misbranding alone." We reverse.

Misstatements of the fiber content of fabrics are, by definition, "misrepresentations," and that misrepresentations of more than *de minimis* character may be materially misleading is, we think, equally clear. The fiber composition of a fabric is likely to affect its perceived value in the eyes of both some manufacturers and some consumers. Perhaps the best indication of this comes from the customs invoices present in the record of this case. In these, respondents [14] declared both the fiber percentage composition by *weight* of their products, and the fiber percentage composition by *value*. As might be supposed, different fabrics have different relative values. Thus, for example, respondents' Navajo was represented to consist of 40% cotton, 40% polyester, and 20% nylon. However, 86% of the *value* of the same fabric was declared to be accounted for by cotton (9% by polyester, and 5% by nylon) because of the greater relative value of cotton. (CX id 102I). In fact, none of the samples of Navajo present in the record contain anything approaching 40% cotton. Some contain less than 25% cotton, one only 22.4% cotton (CX 69), which means that the *value* of this fabric was implicitly

¹² These violations were alleged under Section 5 upon the theory that the decision in *Marcus v. Federal Trade Commission*, 354 F.2d 85 (2d Cir. 1965) precluded a finding of Wool Act violation for mislabeling of the non-wool content of wool products, while the Textile Act does not apply to products which contain wool. Recognizing the

overstated to a very substantial degree. Misrepresentations of fiber content may thus lead manufacturers and consumers to misestimate the value of the fabrics they are purchasing, as well as their characteristics. We believe, accordingly, that such misrepresentations possess the capacity to mislead consumers materially.

While the materiality of a misrepresentation is clearly a matter which the Commission, in its expertise, may infer, *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *Leonard F. Porter, Inc., et al.*, 88 F.T.C. 548, 628 (1976), we need not rely in this instance solely upon such inference to support our conclusion. The same conclusion has been reached by Congress when it passed the Wool and Textile Acts. These laws are premised upon a clear determination that accurate fiber content information is an important factor in consumer purchase decisions. See, e.g., Report to Accompany H.R. 944, Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., Report 907, 1939; Report of Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., Report 1658, June 6, 1958; Report to Accompany H.R. 469, Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., August 5, 1957. Accordingly, by holding that misrepresentations of non-wool fiber content constitute violations of Section 5, the Commission does no more than give effect to the Congressional determination that these practices are misleading and may tend to injure consumers.¹³ [15]

While the foregoing findings are adequate to address complaint counsel's appeal,¹⁴ we must note that having again considered the Second Circuit's holding in the *Marcus* case, we respectfully question whether it is an appropriate interpretation of the law. [16]

The Second Circuit in *Marcus* held that the Wool Act was concerned only with protecting buyers against substitution of

¹³ We also hold that misrepresentations of both wool and non-wool fibers in sales invoices constitute violations of Section 5. While the Wool Act does not extend to sales invoices, the misrepresentations contained therein may be no less misleading to consumers than those made on the label or in customs documents covered by the Act. See *G. Sherman Corp., et al.*, 56 F.T.C. 783, 786 (1960); cf. *Grand Union Co. v. FTC.* 300 F.2d 92, 98 (2d Cir. 1962).

¹⁴ Complaint counsel have also argued on appeal that understatements of textile fibers should also be considered violations of the Textile Act. The ALJ concluded they were not violations, analogizing from *Marcus v. Federal Trade Commission, supra* which held that understatements of wool content were not violations of the Wool Act. The Second Circuit's rationale was that the Wool Act was designed only to protect consumers who viewed wool as a desirable component product and who would presumably not be injured if wool content were understated. This holding is patently not generalizable to the Textile Act, which is designed to ensure accurate disclosure of the constituent fibers in textile products and embodies no assumption as to which fibers consumers will prefer. Obviously understatements of disfavored fibers may be just as deceptive and injurious as overstatements of preferred fibers. Accordingly, we believe that understatements of fiber content constitute violations of the Textile Fiber Products Identification Act. However, the point may be of little significance for most proceedings. The existence of an understatement of one fiber is likely to ensure the existence of an overstatement of at least one other, since even a manufacturer which fabricated the contents of a label would doubtless take care to ensure that the stated components of its product added up to 100%. Therefore, proof of an understatement is likely to accompany proof of an overstatement, and will certainly imply the existence of one. Whether this is regarded as involving one or two violations of the law hardly seems to alter the gravity of the offense.

inferior products for wool. Where the wool content was not overstated, the court held that no violation could result merely because of misstatement of the content of other, "inferior" fibers. In reaching this conclusion, the Court sought to overcome Section 4(a)(2)(A)(4) of the Wool Act which defines a wool product to be misbranded if it lacks a stamp, tag, or label which shows, *inter alia*,

the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of . . . (4) each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; . . . (emphasis added).

In our view the underlined words prescribe that each and every non-wool fiber in a wool product should be identified and its percentage given, if such fiber constitutes more than 5% of the product.

Marcus suggests that this requirement could be satisfied merely by designating all non-wool fibers together as "man-made" fibers, with their combined percentage stated. This interpretation, however, appears inconsistent with use of the word "each" in the statute.

Moreover, while Congress was apparently silent at the time of passage of the Wool Act as to what it intended to require by way of labeling of non-wool fibers (except for its express statement in the statute) its intent with respect to the earlier Act can be glimpsed by a consideration of the history of the Textile Act which the *Marcus* decision does not appear to address. In passing the Textile Act, Congress acted on the assumption that consumers would be interested in knowing the content of *all fibers* in covered products, without regard to superiority. Therefore, in language virtually identical to that employed in the above-quoted portion of the Wool Act, Congress required a listing in *non-wool* products of

the percentage of each fiber present, by weight, in the total fiber content of the textile fiber product, exclusive of ornamentation not exceeding 5 per centum by weight of the total fiber content. . . .

[17] Congress undoubtedly excluded products "required to be labeled under the Wool Products Labeling Act of 1939" from its definition of products covered by the Textile Act because it presumed that the Wool Act already required virtually identical labeling requirements for non-wool fibers contained in wool products. That assumption does not appear unreasonable since the Wool Act would seem to have expressly so required.

Accordingly, it is our view that whatever omissions exist in the legislative history of the Wool Act as to how it should be construed

passed the Textile Act. The concern of Congress with wool representations when it passed the Wool Act cannot be allowed to obscure the fact that in plain language it did establish a regulatory scheme to require percentage labeling of non-wool fibers, a scheme which was ultimately perfected in the Textile Act. As complaint counsel point out, the interpretation rendered in *Marcus* would defeat this statutory design. While a product with no wool must be labeled as to each constituent fiber under the Textile Act, a product with small amounts of wool becomes subject to the Wool Act (and exempt from the Textile Act) and thereby need not be labeled at all, even though the consumer's principal interest in the product will surely be with respect to non-wool fibers. In the instant case, actual misrepresentations of fiber content have occurred and as noted above we believe these are readily reached under Section 5. However, Section 5 is clearly not an adequate substitute for the careful Congressional design, because it lacks the same criminal and civil remedial provisions that are contained in the labeling laws. Moreover, it is not clear that a finding of "deception" under Section 5 alone could be properly applied to the unscrupulous manufacturer who simply included tiny quantities of wool in its fabric (thereby rendering it a product covered by the Wool Act) and thereafter proceeded to label it accurately "other non-wool fibers 99%," a formulation seemingly endorsed by the Second Court in *Marcus*.

For the foregoing reasons, the Commission remains persuaded of the view that the Wool Act applies to misbranding non-wool fibers in wool products, and requires accurate statements of the amount of each non-wool fiber which constitutes more than 5% by weight of the product. It is the Commission's respectful hope and desire that the Second Circuit, when faced with the compelling facts of this case or others like it, would reconsider its holding in the *Marcus* case in the respects indicated above. [18]

Synopsis of Determinations for 15 U.S.C. 45(m)(1)(B)

In order to facilitate application of the Commission's holdings in this case to others who may be engaged in the same practices as respondents, pursuant to the provisions of 15 U.S.C. 45(m)(1)(B) [(§205 of the Magnuson-Moss Act)], the Commission has determined to set forth in synopsis form a statement of the acts or practices determined to be unfair and deceptive in this proceeding:¹⁵

¹⁵ The Commission's decision to prepare a synopsis of its determinations in this case is undertaken in the exercise of its discretion, in order to simplify application of these determinations to other cases. Such a procedure is not required by 15 U.S.C. 45(m)(1)(B).

I. Acts or Practices Which Are Unfair or Deceptive Pursuant to the Wool Products Labeling Act or the Textile Fiber Products Labeling Act, and Section 5 of the Federal Trade Commission Act

1. It is an unfair and deceptive act or practice to falsely or deceptively stamp, tag, label, or otherwise identify wool products as to the character or amount of the constituent fibers which they contain.

2. It is an unfair and deceptive act or practice to fail to affix securely to, or to place on, a wool product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner the correct percentage of the total fiber weight of such wool product exclusive of ornamentation not exceeding five percent of said total fiber weight of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool when said percentage by weight of such fiber is five percent or more, and (5) the aggregate of all other fibers.

3. It is an unfair and deceptive act or practice (a) to falsify or fail to set forth upon invoices of imported wool products required by Section 484 of the Tariff Act of 1930, all information required by the Wool Products Labeling Act (15 U.S.C. 68) to be disclosed in connection with those products; and (b) to falsify or perjure the consignee's declaration provided for by Section 485 of the Tariff Act of June 17, 1930, insofar as it relates to the information required by the Wool Products Labeling Act to be disclosed in connection with wool products. [19]

4. It is an unfair and deceptive act or practice to falsely or deceptively stamp, tag, label, invoice, advertise, or otherwise identify any textile fiber product as to the name or amount of constituent fibers contained therein.

5. It is an unfair and deceptive act or practice to fail to affix to a textile fiber product a stamp, tag, label, or other means of identification showing in words and figures plainly legible the true percentage of each fiber present by its true generic name, if the weight of such fiber is 5 percent or more of the total weight of the product.

6. It is an unfair and deceptive act or practice (a) to falsify or fail to set forth upon invoices of imported textile fiber products required under Section 484 of the Tariff Act of 1930, all information required by the Textile Fiber Products Identification Act (15 U.S.C. 70) to be disclosed in connection with those products; and (b) to falsify or perjure the consignee's declaration provided for by Section 485 of the Tariff Act of June 17, 1930, insofar as it relates to the information required by the Textile Fiber Products Identification Act to be disclosed in connection with textile fiber products. [19]

be disclosed by the Textile Fiber Products Identification Act to be disclosed in connection with textile fiber products.

II. Acts or Practices Held To Be Unfair and Deceptive Pursuant to Section 5 of the Federal Trade Commission Act:

1. It is an unfair and deceptive act or practice to misrepresent the amount by which a fabric will shrink when it is washed.
2. It is an unfair and deceptive act or practice to misrepresent the amount of constituent fibers contained in a wool or textile fiber product.

FINAL ORDER

This matter has been heard by the Commission upon the cross-appeals of complaint counsel and respondents' counsel from the initial decision and upon briefs and oral argument in support and in opposition to each appeal. The Commission, for the reasons stated in the accompanying Opinion, has granted the appeal of complaint counsel and denied the appeal of respondents' counsel. Therefore, [2]

It is ordered, That the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except for p. 31 paragraph headed "Understatements of Fiber Content"; p. 35, line 7, sentence beginning "Still . . ." through line 29, sentence ending with "violation"; p. 47, first full paragraph onward.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be entered:

ORDER

It is ordered, That respondents Verrazzano Trading Corporation, a corporation, Francesco Datini Inc., a corporation, Lanificio Tuscania Inc., a corporation, Lima Textiles Inc., a corporation, and Hudson Textile Corporation, a corporation, their successors and assigns and their officers, and Walter Banci, individually and as agent for said corporations, and as an officer of Lanificio Tuscania Inc. and Lima Textiles, Inc., and as a partner trading and doing business as Lanificio Walter Banci s.a.s., and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the introduction, sale, advertising or offering for sale in commerce, or the transportation or causing to be transported in commerce, or the

importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce of any textile fiber product, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from misbranding such textile fiber products by: [3]

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of constituent fibers contained therein.

2. Failing to affix a stamp, tag, label, or other means of identification to each such textile fiber product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondents Verrazzano Trading Corporation, a corporation, Francesco Datini Inc., a corporation, Lanificio Tuscania Inc., a corporation, Lima Textiles Inc., a corporation, and Hudson Textile Corporation, a corporation, their successors and assigns and their officers, and Walter Banci, individually and as agent for said corporations and as an officer of Lanificio Tuscania Inc. and Lima Textiles Inc. and as a partner trading and doing business as Lanificio Walter Banci s.a.s., and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from importing, or participating in the importation of, any textile fiber product into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said products and any duty thereon, conditioned upon compliance with the provisions of the Textile Fiber Products Identification Act.

It is further ordered, That respondents Verrazzano Trading Corporation, a corporation, Francesco Datini Inc., a corporation, Lanificio Tuscania Inc., a corporation, Lima Textiles Inc., a corporation, and Hudson Textile Corporation, a corporation, their successors and assigns and their officers, and Walter Banci, individually and as agent for said corporations and as an officer of Lanificio Tuscania Inc. and Lima Textiles Inc., and as a partner trading and doing business as Lanificio Walter Banci s.a.s., and

through any corporation, subsidiary, division, or other device, in connection with the introduction into commerce, or the offering for sale, transportation, distribution, delivery for shipment or shipment in commerce of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by: [4]

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

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner 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 respondents Verrazzano Trading Corporation, a corporation, Francesco Datini Inc., a corporation, Lanificio Tuscania Inc., a corporation, Lima Textiles Inc., a corporation, and Hudson Textile Corporation, a corporation, their successors and assigns and their officers, and Walter Banci, individually and as agent for said corporations and as an officer of Lanificio Tuscania Inc. and Lima Textiles Inc. and as a partner trading and doing business as Lanificio Walter Banci s.a.s., and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from importing or participating in the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

It is further ordered. That respondents Verrazzano Trading Corporation, a corporation, Francesco Datini Inc., a corporation, Lanificio Tuscania Inc., a corporation, Lima Textiles Inc., a corporation, and Hudson Textile Corporation, a corporation, their successors and assigns and their officers, and Walter Banci, individually and as agent for said corporations and as an officer of Lanificio Tuscania Inc. and Lima Textiles Inc. and as a partner trading and doing business as Lanificio Walter Banci s.a.s., and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the importing, advertising, offering for sale, sale or distribution of wool and/or textile products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease

and desist from misrepresenting the character and amount of constituent fibers contained in such products and the shrinkage factor of such products on contracts, invoices, shipping memoranda or labels applicable thereto, or in any other manner. [5]

It is further ordered, That respondents deliver a copy of this order by registered mail to each of their customers that purchased qualities Sioux, Manito, Totem, Marnie, Gretel, Isabel, Veruska, Spluga, Eva, Navajo, Ellen, Ingrid or Myla during the period January 1, 1973 to June 24, 1975.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and his affiliation with a new business or employment. Such notice shall include said respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the corporate respondents shall forthwith distribute a copy of this order to each of their operating divisions and/or subsidiaries.

It is further ordered, That the corporate respondents notify the Commission at least thirty (30) days prior to any proposed change in said respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That respondents herein 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 this order.

Interlocutory Order

IN THE MATTER OF

KOSCOT INTERPLANETARY, INC., ET AL.

Docket 8888. Interlocutory Order, May 16, 1978

Order denying petition for reconsideration on finding that respondents failed to show the existence of circumstances which would warrant reopening or reconsidering the docketed proceeding.

ORDER DENYING "PETITIONS FOR RECONSIDERATION"

The Court of Appeals, by order of December 28, 1977, granted leave to two respondents in *Koscot Interplanetary, Inc., et al.*, Dkt. 8888, 86 F.T.C. 1106 (1975), to apply to the Commission for reconsideration of that proceeding based on further defenses or additional evidence.¹ Having carefully considered the contentions raised by respondents Glenn W. Turner and Raleigh P. Mann in petitions filed April 14, 1978,² and the answering submission of complaint counsel, the Commission hereby denies the petitions and directs that the Court of Appeals be notified that the Commission will not request the Court to remand the record for further proceedings. The Commission finds that respondents have failed to show the existence of circumstances which would warrant reopening or reconsidering the docketed proceeding.

In so holding, the Commission takes note of the exhaustive nature of the proceedings in *Koscot*, which stretched from May 24, 1972, when complaint issued, through the filing of the initial decision on March 20, 1975, to the issuance of the Commission's decision and order on November 18, 1975, and subsequent modifying order on January 13, 1976 [87 F.T.C. 75]. The trial spawned a transcript in excess of 5000 pages, accompanied by numerous documents. Respondents received a proper hearing on the record, with notice and a fair opportunity to be heard, to be represented by counsel, to conduct cross-examination, and to offer rebuttal evidence. See 5 U.S.C. 554, 556, 557; 15 U.S.C. 45.

Moreover, they exercised their rights. Respondent Turner had counsel of record throughout the entire proceeding and at no time objected to the competency or adequacy of such counsel. Respondent

¹ The Court also gave permission to respondents to petition the Commission for appointment of counsel, upon a proper showing of indigency. They have made no such motion and are represented in this matter by retained counsel.

² The following abbreviations are used in this order:

Turner petition - Petition by respondent, Glenn W. Turner, for Reconsideration

Mann petition - Petition by respondent, Raleigh P. Mann, for Reconsideration

C.C. Answer - Complaint Counsel's Answer to above Petitions

ALJ - Administrative Law Judge

Mann had legal representation during parts of the adjudication, including, contrary to his statement, the period "during the very critical post-hearing proceedings." Mann petition at 4. Notice of Appeal of Administrative Law Judge's Initial Decision filed May 29, 1975, see Appendix A to C.C.'s Answer, point 49. Complaint counsel has sworn that he timely advised respondent Mann of the availability of appointed counsel for indigents, but petitioner Mann declined to pursue this option. See Appendix D to C.C. Answer.³ Mann testified on the record and presented all the evidence which the instant petition seeks to reassert. At that time he was afforded the right to make a statement on his own behalf for the record, and did so. See Mann petition at 9. A month later, respondent Mann filed, *pro se*, a motion to dismiss, which was denied in the initial decision. 86 F.T.C. at 1127. He was, however, excepted from the requirements of the ALJ's restitution order, at least partly on the basis of his testimony. 86 F.T.C. at 1155. Counsel for respondent Turner filed a Brief in Opposition to Complaint Counsel's Proposed Findings of Fact. The same counsel filed an Appeal Brief and argued the cause for *all* respondents before the Commission. While the Commission affirmed most aspects of the initial decision, it excised the order provisions requiring restitution, which objective was the main focus of respondents' counsel's argument on appeal to the Commission.

Respondents now contest the order on the ground of inadequacy of representation. They claim that insufficiency in representation, which was not visited upon them by any act of the Commission, led to a failure to offer exculpatory evidence. Respondents have not, however, actually presented any additional or "newly discovered" evidence, see *Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952), and content themselves with restating their desire for further proceedings which appear to hold only the promise of reviewing old evidence. Respondent Mann offers nothing more than a reiteration of matters already in the record, which were the subject of findings by the ALJ and of a denial of Mann's motion to dismiss. Mann petition at 5-8. That respondent now believes a more articulate presentation or more cogent marshalling of his arguments would have exonerated or might still vindicate him cannot be the basis of reopening and further protracting proceedings where the evidence was already fully considered, and with benefit to respondent. The doctrine of *res judicata* is not without purpose. Cases cannot be reheard whenever respondents find a better orator or a superior way to package their contentions. There is an interest in finality, and in

³ Even without notice of the Commission's policy of appointment of counsel for indigents.

preserving scarce public resources. Care must be taken to protect the public interest, and the rights of those who fall victim to the few who would violate the law.

It is understandable that respondent Mann now regrets his failure to present a defense on the merits, but such was his choice, and one echoed by others who had the benefit of counsel throughout (including Koscot itself, which even respondent Turner does not allege was inadequately represented). Mann's petition reaffirms that he believed his testimony and documentary evidence were sufficient to absolve him of liability for any violations of law. Mann petition at 9-10. This was a strategic decision made in presenting his case and cannot be undone because the ALJ and Commission were not persuaded to his view. Respondent Mann suffered no denial of rights incident to a fair hearing.

Respondent Turner claimed before the Court of Appeals and now here that his legal representation fell short of the mark because his counsel appeared on behalf of multiple parties, subjecting respondent to a conflict of interest which prejudiced him since "certain evidence tending to disprove the allegations against [him] was not proffered." Court of Appeals Order of December 28, 1977. See Turner petition at 5-7. To support this contention, he offers only a conclusory, *ex post facto* affidavit of his former counsel which appears to contradict earlier statements made by that attorney on the adjudicative record, that there was no conflict of interest. See Appendix B to C.C. Answer, transcript at 4326-27.⁴ Even assuming that respondent did not waive, either formally or constructively, objection to a possible conflict of interest, he points to no evidence which was omitted from the adjudication because of a real or

⁴ Canon 5 of the Code of Professional Responsibility and attendant Ethical Considerations and Disciplinary Rules plainly warn against the representation or continued representation of multiple clients where a conflict of interest may occur. See especially EC5-14 to EC5-19 and DR5-105. Respondent's counsel specifically represented that he was familiar with Canon 5 and was not in violation of it. He admitted of the potential for conflict between respondents if less than all wished to effect a consent agreement, but this situation did not develop. He adverted to a "conflict of itself [sic] between Mr. Wilder and Mr. Bunting," transcript at 4325, but not to any involving Mr. Turner. He also used the word "conflict" in a looser sense, in saying "But quite realistically, there is a conflict. If they had each [the individual respondents] had money and had their druthers, I think each of them would have had a different attorney representing them in all kinds of litigation across the country, but circumstances were that they were stuck with one law firm for which they pay no money." Transcript at 4326. It is not clear which meaning is intended by Mr. Robinson's affidavit, see Exhibit I to Turner petition and also p. 6 of the petition. Moreover, the affidavit indicates that any conflict affecting Glenn Turner could only have arisen after the "early August 1974" sale of Koscot. Affidavit at 4. In fact, the sale occurred in August 1973, according to the ALJ's findings, 86 F.T.C. at 1121. Mr. Robinson's averment on the record of the absence of a conflict of interest took place on August 19, 1974, and any conflicts triggered by the sale would presumably have come to light by the time Mr. Robinson denied that any existed.

Complaint counsel has pointed out other inconsistencies in this affidavit which must erode its credibility. C.C. Answer at 8-9. One of the most serious is prior counsel's implication in the 1976 affidavit that he repeatedly tried to withdraw his representation on the ground of conflict of interest. See Turner petition at 6, point 3. His motion to withdraw, attached as Exhibit D to the Turner petition does not plead conflict of interest as a supporting basis. See C.C. Answer at 6-7.

theoretical conflict. Instead, he relies on a theory of diminished vigor, that is, that counsel slighted the case for Turner to concentrate on that of Koscot, the client for which he received some compensation.⁵ There is no evidence that this occurred to any noticeable degree, and considering that Turner was found to be the alter ego of Koscot (86 F.T.C. at 1123) a radical divergence of interests appears unlikely.

To show prejudice, respondent states that no defense on the merits was presented on his behalf, that "virtually all of the relatively few . . . items of documentary evidence submitted on behalf of respondents were related to the interest of Respondent Koscot," and that "the principal post-hearing filings on behalf of respondents . . . only tangentially, and with minimal efficacy, tended to protect, advance, or defend the significant interests of Respondent Turner." Turner petition at 5-6. The ALJ found, however, that no real defense on the merits was presented on behalf of Koscot either, since none of the respondents represented by attorney Robinson objected to the issuance of the order proposed by complaint counsel except with regard to restitution. 86 F.T.C. at 1118-19, 1178. The documentary evidence introduced for respondents accordingly went to the contested restitution issue, "primarily relating to the status of respondent Koscot as a result of its petition for an arrangement under Chapter 11 of the Federal Bankruptcy Act," 86 F.T.C. at 1118. As the other respondents had refused to discuss their finances, standing on their Fifth Amendment rights (86 F.T.C. at 1183), there were not many disputed issues about which respondents could have submitted documentary evidence. With regard to the post-hearing filings, the Commission can detect little difference in the force and persuasiveness of the arguments for the various respondents. Respondent Turner concedes that the Brief in Opposition and Appeal Brief "ostensibly" defended the interests of all the respondents counsel represented. Turner petition at 5. He offers no clue as to what, if anything, negated this appearance of representation of all the parties' interests. Counsel seems to have made a tactical decision

⁵ In any case, it appears that the representation of Koscot had not proved so lucrative for Mr. Robinson that it would likely have induced him to abandon the other respondents in Koscot's favor, to the extent that their interests may have differed. Compare Turner petition at 6, point 2, with transcript at 5098, 5104-05, and respondents' "Response Complaint Counsel's Answer to Motion for Extension of Time," cited in Appendix A TO C.C. Answer, points 30, 52. The performance of special bankruptcy counsel for Koscot, and any particularized assistance he gave to Koscot is not relevant to the charge of deficient representation originating in Mr. Robinson's alleged conflict of interest.

It should also be noted that "none of the respondents put on an individual defense in the Jacksonville mail fraud trial either," (transcript at 5117, quoted in C.C. Answer at 11), which ended in a hung jury. Mr. Robinson's decision to follow the same course before the Commission may well have reflected a tactical judgment based upon his experience. Courts do "not sit to second guess strategic and tactical choices made by trial counsel." *United*

that only the restitution issue should be pursued, and his arguments would seem to have benefited all the respondents. Indeed, there is ample evidence that respondents were willing from the start to agree to an order very like the one the Commission ultimately adopted and only really opposed the restitution remedy. See Appendix A to C.C. Answer, points 4-5, 32-34. Particularly as the Commission dropped the restitution provisions from its order, we agree with complaint counsel that "it simply cannot be said that prior counsel did not defend the significant interests of petitioner." C.C. Answer at 12.

Most important is the fact that the record shows, and respondent has not demonstrated otherwise, that the actions counsel did not take, the witnesses he did not call, the exhibits he did not introduce, and the case he did not make, derived from strategic decisions or possibly lack of funds^e and not from any conflict of interest respondent here argues prevented the proffering of exculpatory evidence. Nor has respondent offered any additional evidence to contradict the record on this point. Respondent Turner has failed to show the existence of a conflict of interest or that any prejudice has accrued to him from what he mistakenly perceives to be a possible conflict. Especially in a civil case, where the application and policy of the Sixth Amendment are unclear, see *United States v. Rogers*, 534 F.2d 1134, 1135 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976), the courts do not lightly assume the inadequacy of counsel. *United States v. McCord*, 509 F.2d 334, 353 (D.C. Cir. 1974), *en banc, cert. denied*, 421 U.S. 930 (1975).

Respondent Turner raises another issue, collateral to those directed for Commission consideration by the Court. He argues that the assertion of their privilege against self-incrimination prevented him and the other respondents from testifying and therein exonerating some or all of the respondents from liability. Turner petition at 7. Even though respondents did not request immunity, Mr. Turner contends that the Commission's failure to secure it for respondents under Section 4.12 of the Rules kept him from participating "actively and directly in the proceedings without the necessary intervention of unwilling, and consequently ineffective, counsel." Turner petition at 8. To the extent that this represents an assertion that conducting one's case *pro se* is impossible for those who seek to preserve their Fifth Amendment rights, it is mistaken. Only by voluntarily testifying on the stand and only in response to questions related to incriminating matters, would he have risked waiver of the privilege.

^e Although counsel for respondents hinted several times during the proceeding that some or all of them were in straitened circumstances, respondents refused to give evidence on the question, citing the privilege against self-incrimination, and thus no related findings were made. 86 F.T.C. at 1183. Accordingly, it is not known whether their failure to fund their attorney was a matter of choice or necessity.

8 Wigmore, Evidence §2276 (McNaughton rev. 1961). Respondent did not need immunity to examine or cross-examine witnesses or to submit evidence on his own behalf. Had he wished to introduce his own testimony, which was evidently not needed by complaint counsel, respondent could himself have sought immunity by applying to the ALJ under Section 4.12.⁷ The same procedure could have secured for him the immunized testimony of other respondents. Respondent Turner made no effort during the proceeding to avail himself of the immunity provision and now claims that he was prejudiced in his case because complaint counsel did not do so for him. Turner petition at 8. But complaint counsel had no such duty. It is no abuse of the right against self-incrimination to respect its privilege of silence.

Respondent Turner now seeks to turn that shield into a sword (cf. *United States v. Newman*, 468 F.2d 791 (5th Cir. 1972), cert. denied, 411 U.S. 905 (1973)), by claiming a right to additional hearings where undescribed testimony of co-respondents may be elicited, if they are willing, now that the criminal charges against them have been resolved. Turner petition at 7. Respondent Turner himself would like another chance to testify. He supplies no information, however, upon which to judge the likelihood or value of this possible testimony. Nor does he address the fact that respondents had already pleaded *nolo contendere* before the oral argument⁸ and thus could have sought leave to give their testimony even before the Commission reviewed the initial decision and issued its opinion and final order. He would have us remand for new hearings on the strength of a vague intimation that further evidence may be forthcoming and, if so, that it may be valuable. Turner petition at 7. He does not even assert that this hypothetical evidence would change the outcome of the proceedings. Under the circumstances, the Commission does not find it unduly harsh or in any way contrary to the public interest to reject this gambit. "A respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action." *Gross v. SEC*, 418 F.2d 108, 109 (2d Cir. 1969).

The capacity of the administrative process to resolve cases will be seriously compromised, and the public badly disserved,⁹ if respon-

⁷ The Commission has made no determination that immunity would or should have been granted in this case. See, e.g., *United States v. Bautista*, 509 F.2d 675, 677 (9th Cir.), cert. denied sub nom. *Monsivais v. United States*, 421 U.S. 976 (1975); *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967).

⁸ Indeed, their counsel was directly asked about the status of the criminal proceedings during oral argument before the Commission and revealed their conclusion. Transcript of Oral Argument, October 2, 1975, at 14-15.

⁹ We do feel compelled to note that the lengthy trial record presented to the Commission in this matter, analyzed in depth in the ALJ's initial decision, and summarized in the Commission's opinion, reveals violations of 15 U.S.C. 45 and losses to the public of enormous proportions. Unless and until the Commission's order in this matter becomes final against respondents, they remain free to repeat the practices which contributed to those

965

Interlocutory Order

dents in such cases are permitted to delay their finality for long periods of time by waiting for the conclusion of the administrative process and then hinting at the existence of further relevant evidence which might, in any event, have been presented at trial.

Having thoroughly and carefully considered the submissions of petitioners and complaint counsel, the Commission has determined that they do not raise any grounds that would warrant reconsideration by the Commission of its earlier decision, and therefore the Commission does not request that the Court of Appeals remand this matter to it for further proceedings. Accordingly,

It is ordered, That the "Petitions for Reconsideration" by respondents Mann and Turner are hereby denied.

adduced to warrant reopening of administrative proceedings, the Commission is distressed that 2 1/2 years should have elapsed since the issuance of its order, without its consideration on the merits. The Commission is hopeful that this proceeding may be brought to a speedy conclusion and the public given the protection which the record indicates it deserves.

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

KOSCOT INTERPLANETARY, INC., ET AL.

Docket 8888. Interlocutory Order, May 16, 1978

Grant of complaint counsel's motion requesting leave to file an answer to petition for reconsideration.

ORDER GRANTING LEAVE TO FILE ANSWER

Counsel supporting the complaint in this matter have filed two requests for brief extensions of time within which to file an answer to "Petitions for Reconsideration" filed by respondents Glenn W. Turner and Raleigh P. Mann pursuant to an order entered December 28, 1977 by the United States Court of Appeals for the District of Columbia. Complaint counsel, having received no response to these motions, subsequently filed an "Answer" accompanied by a motion to file the answer "out of time."

Complaint counsel have apparently assumed that the time established for filing of an answer is governed by Section 3.55 of the Commission's Rules of Practice, pertaining to requests for reconsideration of Commission orders. This section of the Rules requires that petitions for reconsideration be filed within 20 days after service of a Commission order. Thereafter, opposing counsel are given 10 days within which to file an answer. The Commission doubts whether Section 3.55 should properly be applied to the case at hand, because it plainly applies only to requests for reconsideration filed within a short time of the entry of an order, before the matter has left the Commission's jurisdiction.

Complaint counsel's position doubtless results from the use by petitioners and the Court of Appeals of the term "reconsideration" to characterize petitioners' request. Petitioners have also referred to Section 3.55 of the Rules. Assuming *arguendo* that this section of the Rules has any applicability to the matter at hand, the Commission has determined that the 8 days' total extension of time requested by complaint counsel is appropriate, given that respondents have had a much longer period of time than that allowed by Section 3.55 of the Rules within which to prepare the petition to which complaint counsel responds. Accordingly,

It is ordered, That complaint counsel's motion requesting leave to file an Answer to Respondents' Petitions for Reconsideration be granted.