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Complaint

the order served upon them, file with the Commission a report, in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

 IN THE MATTER OF

 VERRAZZANO TRADING CORPORATION TRADING AS
 LAN ETRURIA, ET AL.

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

Docket 8801. Complaint, Oct. 17, 1969—Decision, Apr. 13, 1971*

Order dismissing the complaint which charged a New York City importer and seller of Italian woolen and textile fabrics with misbranding, falsely invoicing, and deceptively guaranteeing its wool and textile fiber products.

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, trading under its own name or as Lan Etruria; Francesco Datini, Inc., a corporation, and Walter Banci, individually and as agent for said corporations, and for Lanificio Tuscania, a foreign entity which trades under its own name and as Lan Etruria, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act, 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 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, trading under its own name or as Lan Etruria, with its office and principal place of busi-

*Reporting as amended by Hearing Examiner's order of July 16, 1970, by amending Paragraph One.

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ness located in Room 1500, Two Pennsylvania Plaza, New York, New York.

Respondent Francesco Datini, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located in Room 1500, Two Pennsylvania Plaza, New York, New York.

Individual respondent Walter Banci is agent for the aforesaid corporations, and in such capacity is authorized to bind said corporations in their names and in the names of their officers. His office and principal place of business is the same as that of the corporate respondents.

Respondents are engaged in the business of importation from Italy and sale of woolen and textile fabrics to customers in various States of the United States. Respondent Walter Banci is also agent for Lanificio Tuscania, a foreign entity which trades under its own name and as Lan Etruria, and in such capacity is authorized to bind said foreign entity and its principals.

PAR. 2. Respondents, now and for some time last past, have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in said Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the 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 woolen fabrics stamped, tagged, labeled, or otherwise identified as containing "20% Linen, 70% Reprocessed wool, 5% Nylon and 5% Other Fibers," whereas in truth and in fact, such fabrics contained substantially different fibers and amounts of fibers than represented.

PAR. 4. 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.

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Among such misbranded wool products, but not limited thereto, were woollen fabrics without labels or 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 not exceeding five 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 five per centum or more; and (5) the aggregate of all other fibers.

PAR. 5. The respondents furnished false guaranties that certain of their said wool products were not misbranded when respondents in furnishing such guaranties had reason to believe that the wool products so falsely guaranteed might be introduced, sold, transported or distributed in commerce, in violation of Section 9(b) of the Wool Products Labeling Act of 1939.

PAR. 6. The acts and practices of the respondents as set forth above 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 intent and meaning of the Federal Trade Commission Act.

PAR. 7. Respondents are now and for some time last past have been engaged in the advertising, 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 last past, have caused their said products, when sold, to be shipped from their place of business in 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. 8. Respondents in the course and conduct of their business have made statements on 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 of such products as "20% Linen, 70% Reprocessed wool, 5% Nylon and 5% Other Fibers," whereas, in truth and in fact, the said products contained substantially different amounts and types of fibers than represented.

PAR. 9. The acts and practices of respondents, as alleged in Paragraph Eight above, were, and are, all to the prejudice and injury of the public, and constituted, and now constitute, unfair and de-

ceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 10. Respondents are now and for some time last past have been engaged in the introduction, delivery for 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, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 11. 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 textile fiber products, namely fabrics, which contained substantially different amounts and types of fibers than as represented.

PAR. 12. Certain of said 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, namely fabrics, without labels or with labels on or affixed thereto which failed:

1. To disclose the true generic name of the fibers present.
2. To disclose the true percentage of the fibers present by weight.

PAR. 13. The acts and practices of respondents as set forth above in Paragraphs Eleven and Twelve 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 and unfair and deceptive acts and practices in commerce, under the Federal Trade Commission Act.

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Initial Decision

Mr. Thomas J. Kerwan and Mr. Arthur B. Patrizio supporting the complaint.

Pavia & Harcourt, New York, N.Y., by Mr. David A. Botwinik and Mr. Walter T. Cassidy for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER
NOVEMBER 2, 1970

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PRELIMINARY STATEMENT

The complaint in this proceeding was issued by the Federal Trade Commission on October 17, 1969, and was duly served on respondents on October 31, 1969.¹ The complaint charges respondents with misbranding wool and textile fiber products, falsely invoicing such products, and falsely guaranteeing wool products, in violation of the Wool Products Labeling Act of 1939, the Textile Fiber Products Identification Act, and the Federal Trade Commission Act.

After complaint counsel filed a more definite statement concerning the allegations of the complaint, pursuant to the examiner's order of November 26, 1969, each of the respondents filed answer on January 5, 1970, admitting in part and denying in part the various factual allegations of the complaint, essentially denying any violation of law, and alleging as an affirmative defense that respondents

¹ The complaint was amended during the hearings to clarify the status of Lanificio Tuscania by eliminating from the caption and from the preamble, references indicating that it was a trade name used by respondent Verrazzano Trading Corporation, and by adding an allegation that Lanificio Tuscania is an Italian entity for which respondent Walter Banci is an agent. The amendment also added an allegation that both Verrazzano and Lanificio Tuscania traded as Lan Etruria. (See Order Confirming Amendment of Complaint, filed July 17, 1970.)

"acted with due care" and that "any violation charged in the complaint is the result of unavoidable manufacturing variations." In their answers, respondents also contended, that "[i]n relation to the total volume of respondents' business the allegations charged in the complaint are not substantial and thus, this proceeding is not in the public interest as required by Sec. 5(b) of the Federal Trade Commission Act."

Following a prehearing conference on January 22, 1970, 12 days of hearings were held between April 14, 1970, and July 31, 1970, a series of intervals between hearings having been necessitated by a variety of circumstances, including a postponement occasioned by difficulties in arranging for the testimony of a witness from Italy on behalf of respondents. (See Commission Order Suspending Hearings filed June 15, 1970.)

The record consists of 1,271 pages of trial transcript and approximately 75 physical exhibits and documentary exhibits.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and evidence have been duly recorded and filed. The parties were represented by counsel and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order, accompanied by supporting briefs, were filed by counsel supporting the complaint and by counsel for respondents. Reply briefs were also filed by counsel for both parties. Those proposed findings that are not adopted herein, either in the form proposed or in substance, are rejected as lacking support in the record or as involving immaterial matters.

Having heard and observed the witnesses and having carefully reviewed the entire record in this proceeding, together with the proposed findings and briefs filed by the parties, the hearing examiner makes the following findings of fact, enters his resulting conclusions, and issues an appropriate order.

As required by Section 3.51(b)(1) of the Commission's Rules of Practice, the findings of fact include references to the principal supporting items in the record. Such references are intended to serve as convenient guides to the testimony and to the exhibits supporting the findings of fact, but they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the

parties, such references are ordinarily intended to include their citations to the record.

References to the record are made in parentheses, and certain abbreviations are used as follows:

CPF—Proposed Findings of Fact, Conclusions of Law and Order filed by counsel supporting the complaint.

CRB—Complaint counsel's Reply [Brief] to Respondents' Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law.

CX—Commission Exhibit.

RPF—Respondents' Proposed Findings of Fact, Conclusions and Order.

RML—Respondents' Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law.

RRB—Respondents' Reply [Brief] to Complaint Counsel's Memorandum of Law.

RX—Respondents' Exhibit.

Tr.—Transcript.

Sometimes references to the testimony cite the name of the witness and transcript page number without the abbreviation "Tr."—for example, Golub 299. References to the submittals of counsel are keyed to page numbers—for example, CPF 14, RML 17.

FINDINGS OF FACT

I. Respondents and Their Business

Respondents Verrazzano Trading Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York. It trades under its own name and as Lan Etruria.

Respondent Francesco Datini, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York.

Respondent Walter Banci is agent for the aforesaid corporations and, in such capacity, is authorized to bind these corporations in their names and in the names of their officers. He is also agent for Lanificio Tuscania, a foreign entity which trades under its own name and as Lan Etruria, and, in such capacity, is authorized to bind such foreign entity and its principals.

Respondents are engaged in the business of the importation from Italy and the sale of woolen and textile fabrics to customers in various States of the United States.

Both corporate respondents and Mr. Banci have their office and principal place of business at Two Pennsylvania Plaza, New York, New York.

The foregoing facts are established by the admissions of respondents in their answers to the complaint or in the course of hearing. However, Mr. Banci's "agency" is only nominal, and a broader finding is warranted, as follows:

In conjunction with certain Italian business entities, both corporate respondents and Mr. Banci constitute a unified family business operation designed to import and sell in the United States fabrics produced in Italy. Although, technically, Mr. Banci is, as alleged, the "agent" for the named corporations, the record establishes that he directs and controls a bi-national enterprise designed to sell fabrics from the Italian mill that he owns and controls.

Mr. Banci, in partnership with his wife, Lola Conti (his share, 98 percent; hers, 2 percent), owns a mill—Lanificio Walter Banci—in Prato, Italy, that produces fabrics or piece goods. Established in 1938, the mill is the largest in Prato and the third largest in Italy. Mr. Banci represents the mill in the United States. The mill began exporting goods to the United States through a jobber about 1958 and later began making direct sales in this country. In 1964–1965, Mr. Banci established Verrazzano "to bring piecegoods in this country, to import the piece goods, to clear the goods, to pay the duty, and to deliver the goods to the customer . . ." (Tr. 526). Through Verrazzano, Mr. Banci has sold directly to such "big customers" as Bobbie Brooks and Jonathan Logan. For dealing with smaller customers, Mr. Banci contracted with Maylis Associates of New York City to act as sales agent. However, because Maylis Associates did not want to use the name Verrazzano, it was agreed that sales through Maylis would be in the name of Lanificio Tuscania, an Italian entity owned by Mr. Banci's wife² from whom Mr. Banci had a broad power of attorney (CX 52 A–H) that gives him control. Lanificio Tuscania has now been incorporated as a New York corporation, but it will continue to operate in conjunction with Maylis Associates. (Banci 526–28, 534, 539–40, 544, 548–49, 741–42, 822–25.)

According to one of the partners in Maylis Associates, this firm represented both Verrazzano and Tuscania, but he was unsure of the exact relationship between the two. Although this witness dealt "basically" with Mr. Banci's son Rodolfo Banci in Italy (as to whose

² Although generally referred to simply as Lanificio Tuscania, the formal name of this entity appears to be Lanificio Tuscania Ditta Individuale (CXs 47–51). The power of attorney (CX 52 A–H) identifies the entity as "Lanificio Tuscania Di Conti Lola."

exact role he disclaimed knowledge), he had frequent contacts in New York with Walter Banci, whom he assumed to be "someone of interest." (Ellis 473-79, 483, 489, 517-18; see CXs 48, 49.)

Subsequently, in order to facilitate and to distinguish sales made through agents other than Maylis Associates, the trade name "Lan Etruria" was used (Banci 528-30, 535). Although Lan Etruria is a trade name of Tuscania (CX 50, Banci 530-31), it was actually used on behalf of Lanificio Walter Banci (Banci 534-35, 604-09). Verrazzano also used the trade name Lan Etruria, representing itself as "selling agent" for Lan Etruria (CXs 13 A, 14 A; Tr. 472).

Francesco Datini, Inc., was incorporated in 1967 or 1968 to sell fabrics manufactured by Lanificio Walter Banci to American coat manufacturers. Because Maylis Associates was already representing another Italian mill in the coat fabric field, Datini entered into a sales agency arrangement with Berkshire-Cerey of New York City. Datini later sold goods to or through other outlets. (Banci 527, 531, 533-34.)

Although its business relationship was primarily with Datini, Berkshire-Cerey dealt with Mr. Banci and with other personnel of Verrazzano respecting shipments and sales. In addition, Berkshire-Cerey occasionally sold goods on behalf of Verrazzano. The president of Berkshire-Cerey was under the impression that Banci was the "owner" of both Verrazzano and Datini. (Gordon 445, 447-49.)

Datini now appears to be dormant (Banci 827).

Regardless of the corporation or the trade name involved in any transaction—whether it was Verrazzano, Datini, Tuscania, or Lan Etruria—the fabrics were the products of Lanificio Walter Banci, and Verrazzano was the "importer of record" (Banci 537-39, 545, 611, 736-37, 822).

Mr. Banci testified that in the case of Verrazzano, his son Marzio Rodolfo Banci "is the president, the shareholders, he is everything." (Tr. 543; see CX 2 A-C.)

Although Mr. Banci initially could not identify the other officers of Verrazzano, he did so after his memory was refreshed. Similarly, his memory was uncertain regarding the officers of Datini, but he agreed that they were the same as the officers of Verrazzano. (Tr. 543-44, 828-29.) Mr. Banci testified that his son Rodolfo is the principal stockholder in both Verrazzano and Datini and referred to him as the "owner" (Tr. 615, 824-25).

Nevertheless, it is essentially undisputed that Walter Banci exercises direction and control over Verrazzano (Tr. 597, 825) and Tuscania (CX 52 A-H), and it is clear also that he played a similar

role with respect to Datini (Banci 596-98, 826-27; Gordon 445-49). Although Mr. Banci minimized his role in connection with the Tuscania transactions handled through Mayliss Associates (Tr. 544-45, 548, 551-53, 555, 826), disavowed any control of Datini (Tr. 836-37), and denied any personal participation in the labeling, invoicing, and shipping of goods (Tr. 580-83), the record as a whole establishes that he directs and controls the policies and practices in this country of the corporate respondents and other entities involved in this proceeding. The whole complex of corporations, trade names, and other entities, both American and Italian, is a single unified enterprise—an integrated family-owned business—designed to sell in the United States fabrics manufactured by Lanificio Walter Banci. The corporate respondents were created by Mr. Banci, and he put his son in as owner (Tr. 824-25). As the entrepreneur of the whole operation, as the representative in the United States of Lanificio Walter Banci and Lanificio Tuscania, and also as the so-called “agent” for Verrazzano and Datini, he may properly be held accountable individually for the practices of the unified enterprise and of each of its component parts.

The business of respondents is substantial. Since 1965 Lanificio Walter Banci has exported to the United States, for sale and distribution through respondents, approximately 20 million yards of fabric, including 6 million yards in each of the years 1968 and 1969. Of the 1968 total, from 2 million yards to 2.5 million yards were imported under the name of Lanificio Tuscania. (RX 5; Banci 738-39.)

Sales in the name of Lanificio Tuscania through Maylis Associates from early 1967 to April 30, 1970, totalled \$7.3 million (CX 49; Ellis 518-19).

The annual gross sales volume of Verrazzano has ranged from \$4 million to \$7 million (Banci 539).

The total gross volume of Datini was estimated as from \$100,000 to \$200,000 (Banci 541-42).

Respondents are now, and for several years have been, engaged in the introduction, delivery for introduction, advertising, offering for sale, and sale in commerce, in the transportation and shipment in commerce, and in the importation into the United States, of wool products and textile fiber products, as such products are defined in the Wool Products Labeling Act and in the Textile Fiber Products Identification Act, and as “commerce” is defined in those statutes and in the Federal Trade Commission Act. In the course and conduct of their business, respondents have caused their products, when sold,

to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States, and they have maintained a substantial course of trade in such products in commerce as "commerce" is defined in the cited statutes.

II. The Statutory Provisions

Applicable statutory provisions are set forth in pertinent part as follows:

Wool Products Labeling Act of 1939

SEC. 3. The introduction, or manufacture for introduction, into commerce, or the sale, transportation, or distribution, in commerce, of any wool product which is misbranded within the meaning of this Act or the rules and regulations hereunder, is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act; and any person who shall manufacture or deliver for shipment or ship or sell or offer for sale in commerce, any such wool product which is misbranded within the meaning of this Act and the rules and regulations hereunder is guilty of an unfair method of competition, and an unfair and deceptive act or practice, in commerce within the meaning of the practice, in commerce within the meaning of the Federal Trade Commission Act. (15 U.S.C. § 68a.)

* * * * *

SEC. 4 (a) A Wool product shall be misbranded—

(1) If it is falsely or deceptively stamped, tagged, labeled, or otherwise identified.

(2) If a stamp, tag, label, or other means of identification, or substitute therefor under section 68c of this title, is not on or affixed to the wool product and does not show—

(A) 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 (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; and (5) the aggregate of all other fibers: *Provided*, That deviation of the fiber contents of the wool product from percentages stated on the stamp, tag, label, or other means of identification, shall not be misbranding under this section if the person charged with misbranding proves such deviation resulted from unavoidable variations in manufacture and despite the exercise of due care to make accurate the statements on such stamp, tag, label or other means of identification. (15 U.S.C. § 68b.)

* * * * *

SEC. 9. (b) Any person who furnishes a false guaranty, . . . with reason to believe the wool product falsely guaranteed may be introduced, sold, transported, or distributed may be introduced, sold, transported, or distributed in commerce, is guilty of an unfair method of competition, and an unfair and deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act. (15 U.S.C. § 68g(b).)

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Textile Fiber Products Identification Act

SEC. 3. (a) The introduction, delivery for introduction, manufacture for 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 which is misbranded or falsely or deceptively advertised within the meaning of this Act or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(b) 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, and which is misbranded or falsely or deceptively advertised, within the meaning of this Act or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(c) The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, which is misbranded or falsely or deceptively advertised, within the meaning of this Act or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act. (15 U.S.C. § 70a.)

* * * * *

SEC. 4. (a) [With exceptions not here material] a textile fiber product shall be misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

(b) * * * a textile fiber product shall be misbranded if a stamp, tag, label, or other means of identification, or substitute therefor authorized by Section 5, is not on or affixed to the product showing in words and figures plainly legible, the following:

(1) The constituent fiber or combination of fibers in the textile fiber product, designating with equal prominence each natural or manufactured fiber in the textile fiber product by its generic name in the order of predominance by the weight thereof if the weight of such fiber is 5 percentum or more of the total fiber weight of the product * * *

(2) 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: * * * *Provided further*, That in the case of a textile fiber product which contains more than one kind of fiber, deviation in the fiber content of any fiber in such product from the amount stated on the stamp, tag, label, or other identification shall not be a misbranding under this section unless such deviation is in excess of reasonable tolerances which shall be established by the Commission:³ *And provided*

³ Rule 43 of the Commission's Rules and Regulations under the Textile Fiber Products Identification Act provides in part as follows:

"RULE 43—*Fiber Content Tolerances*. [see next page]

further, That any such deviation which exceeds said tolerances shall not be a misbranding if the person charged proves that the deviation resulted from unavoidable variations in manufacture and despite due care to make accurate the statements on the tag, stamp, label, or other identification. (15 U.S.C. § 70b (a) (b).)

Federal Trade Commission Act

Sec 5(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. (15 U.S.C. § 45(a) (1).).

Definition of Commerce

The term "commerce" means commerce among the several States or with foreign nations. * * * (Wool Products Labeling Act, Sec. 2(h); Textile Fiber Products Identification Act, Sec. 2(k); Federal Trade Commission Act, Sec. 4, 15 U.S.C. §§ 68(h), 70(k), 44.)

III. The Evidence As To Misbranding

A. *Under the Wool Products Labeling Act*

The record contains evidence that labels and invoices concerning five fabrics imported by one or more of the respondents bore tags or labels setting forth fiber-content information that did not conform to the actual fiber content, as disclosed by the testing of samples.

The exact procedures used by respondents for the fiber-content labeling of the fabrics that are imported by or for them is not altogether clear, but no issue has been raised as to the responsibility of respondents for the labeling of goods introduced into commerce. Some fabrics are labeled in Italy by Lanificio Walter Banci, but if a backing is to be bonded to the fabric after importation, the label is affixed by the bonder (Banci 612-14; Gordon 446). The fiber content is ordinarily shown on the invoices and related shipping documents (CXs 57 D-E, 58 D-E, 59 D-E).

The witness from Lincoln Processing Corporation, which bonded

"(a) A textile fiber product which contains more than one fiber shall not be deemed to be misbranded as to fiber content percentages if the percentages by weight of any fibers present in the total fiber content of the product, exclusive of permissive ornamentation, do not deviate or vary from the percentages stated on the label in excess of 3% of the total fiber weight of the product. For example, where the label indicates that a particular fiber is present in the amount of 40%, the amount of such fiber present may vary from a minimum of 37% of the total fiber weight of such product to a maximum of 43% of the total fiber weight of such product.

"(b) Where the percentage of any fiber or fibers contained in a textile fiber product deviates or varies from the percentage stated on the label by more than the tolerance or variation provided in subsection (a) of this Rule, such product shall be misbranded unless the person charged proves that the entire deviation or variation from the fiber content percentages stated on the label resulted from unavoidable variations in manufacture and despite the exercise of due care." (16 CFR 303.43.)

fabrics for Verrazzano and Lanificio Tuscania, did not know the source of the fiber-content information placed on the labels prepared by Lincoln (Kivor 616-19, 631).

Further information respecting labeling will be developed in connection with the findings of fact relating to the specific fabrics alleged to have been wrongfully labeled.

Four of the questioned fabrics (CXs 1, 11, 12 and 15) are attributable to Verrazzano and respondent Walter Banci. As to these, the factual allegations are found to be supported by the evidence, although there remains the legal question whether the misbranding is within the coverage of the Wool Act (*infra*, p. 661). The fifth fabric (CX 24) is attributable to both Datini and Verrazzano, as well as to Mr. Banci, but the evidence is insufficient to support a finding of violation. The essential facts relating to each are set forth below:

CX 1

CX 1 is a swatch from a "Milo" fabric shipped by Verrazzano in June 1966 to Slifka Fabrics, New York City. This swatch was obtained in January 1967 by a Commission investigator, who also identified a hand-tag attached to the role of fabric that listed the fiber content (CX 2). The Verrazzano invoice reflecting the sale to Slifka (CX 3) listed the same fiber composition as shown on CX 2 and also certified that the fiber content indicated in the invoice "appears on all hang-tags." This certification bears the signature of Walter Banci on behalf of Verrazzano. (Rose 160-68; Tr. 414-15.)

CX 1 was tested by Fabric Research Laboratories, Inc. (CX 36 A-G; Golub 225), this fabric being identified in the report as Sample 2 (Slifka Exhibit A). The fiber content shown on CX 2 and CX 3 and the fiber content shown by testing are compared below:

Hang-tag and invoice (CXs 2, 3):	Percent
Reprocessed wool.....	70
Fur fibers.....	15
Nylon.....	10
Other fibers (unknown fibers).....	5
Test report (CX 36 F):	
Wool.....	82.9
Fur (chiefly rabbit type).....	11.0
Nylon.....	5.3
Other fiber (cotton and man-made).....	0.8

CX 11 and CX 12

CX 11 and CX 12 are swatches of fabric sold by Verrazzano to Tunxis Sportswear, Inc., New London, Connecticut. CX 11 is a

sample of "Napoli Melton" sold to Tunxis in early 1968. CX 12 is a sample of the "Larry" style sold to Tunxis in late 1967. The samples were obtained by a Commission investigator in the course of a routine inspection of Tunxis in June 1968. The investigator did not obtain the hang-tags attached to the bolts of fabric from which the swatches were cut, but he copied the information as to each on separate inspection forms. Each hang-tag bore a registered identification number that is conceded to be the registered identification number of Verrazzano. Tunxis officials also identified Verrazzano as the supplier, and invoices were later obtained showing the shipments from Verrazzano to Tunxis. (Moody 322-69; Detz 454-63; Parker 373-83; CXs 43, 44, 13 A, 14 A.) Each of the invoices (CXs 13 A, 14 A) guaranteed compliance with the Wool Products Labeling Act.^{3a}

Although respondents contend that "there is considerable question as to the labeling and identity of CX 11 and CX 12 and as to their connection with respondents" (RML 28-33, 2-3), the record as a whole leaves no doubt as to the identity of the fabrics, the fiber content information on the tags, or the responsibility of Verrazzano therefor. There would have been more certainty if the hang-tags had been physically obtained rather than copied, but there is no basis for finding that any mistake was made either in the identification of the fabrics or the copying of the fiber-content information and the registered identification number from the hang-tags. Similarly, the fact that part of each inspection form (CX 43 and CX 44) was written in ink and part was written in blue pencil or blue crayon does not discredit the accuracy of the information shown on the forms, even though the investigator could not remember why he had used two different writing instruments to record the information (Moody 335, 349-55, 362-63).

Moreover, it does not appear to the examiner that the partial misidentification of the "Larry" style raises any serious problem with respect to CX 12. The style as handwritten at the top of CX 44 appears to be "Larry," but the handwriting is such that it is readily misread as "Lang." This is apparently what happened when the investigator wrote "Lang" as the style in the middle of CX 44 and

^{3a} In explaining its delay in paying Interstate Factors for the Napoli fabric (CX 11), Tunxis stated that it was "having problems with the material and payment is being withheld pending investigation by Verrazzano Trading" (CX 13 B), but no testimony was adduced to show whether or not the "problems" related to fiber content.

likewise on the identifying label that he placed on CX 12 (Moody 363-64).⁴

Respondents also rely on a conflict between the testimony of the investigator and the Tunxis employee concerning the identity of the person who actually cut the swatches from the fabrics in question (RML 32). Whereas the investigator testified that the samples were cut for him by a Mr. Stern, who died in December 1968, the Tunxis employee who was called as a witness testified that he "believed" that he got the sample swatches—that he "helped get them" at the request of Mr. Stern (Moody 325, 353; Detz 457-58). This is a minor detail, and the nature of the conflict is such that, in the examiner's opinion, it does not discredit the testimony of the investigator.

Finally, respondent Walter Banci expressed doubt that CXs 11 and 12 were fabrics manufactured by his mill. Although he testified that CX 11 appeared to him to be of American origin, he conceded the possibility that the fabric was manufactured by his mill, and also that it could have been erroneously labeled as containing silk. He expressed greater certainty that CX 12 was not manufactured by his mill but was made by a Prato competitor. (Tr. 780-E-781, 806)

On consideration of the foregoing, the examiner finds that CX 11 and CX 12 and their labeling have been sufficiently connected to respondents. A comparison between the fiber-content information on the tags and the fiber content disclosed by testing follows:

As to CX 11:

Hang-tag and invoice (CXs 43, 13 A):	<i>Percent</i>	
Reprocessed wool.....		87
Silk.....		13
Test report (CX 36 F):		
Wool.....		84.3
Nylon.....		12.9
Other fiber (acrylic, polyester, cotton).....		2.8
Test report (RX 3):		
	<i>Test a</i>	<i>Test b</i>
Woolen fibers and silk.....	85.4	84.8
Other fibers.....	14.6	15.2

As to CX 12:

Hang-tag and invoice (CXs 44, 14 A):	<i>Percent</i>	
Reprocessed wool.....		70
Fur fiber.....		15
Nylon.....		10
Other fibers.....		5

⁴In expressing doubt as to the reliability of the information on CX 43 and CX 44, respondents note (RML 32) that a similar form purportedly prepared by another investigator had been prepared by someone else (Gevarter 424-25, 428-29). However, this

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Test Report (CX 36 F):		<i>Percent</i>
Wool.....		46.2
Fur (chiefly rabbit type).....		11.9
Nylon.....		11.3
Other fiber.....		30.4
(consisting of 12.9 percent cotton and viscose, 11 percent polyester, 6.5 percent miscellaneous other fiber, with 0.2 percent fly fiber lost during analyses).		
Test Report (RX 1):		<i>Test a</i>
Acetate.....		5.1
Woolen fibers and fur.....		62.7
Nylon.....		10.0
Other fibers.....		22.2
		<i>Test b</i>
Acetate.....		5.0
Woolen fibers and fur.....		62.0
Nylon.....		9.7
Other fibers.....		23.3

CX 15

CX 15 is a swatch of "Mel" fabric obtained by a Commission investigator from United Manufacturing Co., Marlboro, Mass. The hang-tag, attached to CX 15, bears the registered identification number of Verrazzano. Invoices and related documents (CXs 16-23) trace the shipment of the goods from Verrazzano to United through C. Haedke & Co., Inc., New York City. Each of the Verrazzano invoices (CXs 22 A-C) contains a guarantee of compliance with the Wool Act and certifies that the indicated fiber composition "appears on all Hang-Tags." (Parker 383-92; Tr. 399-400, 413-14; Gevarter 417-19). The fiber-content claims and the test results for CX 15 are as follows:

Hang-tag and invoices: ⁵		<i>Test a</i>
Reprocessed wool.....		70
Fur fibers.....		15
Nylon.....		10
Other fibers (unknown fibers).....		5
Test Report (CX 37):		
Woolen fibers and fur.....		80.6
Nylon.....		8.0
Other fibers.....		11.4
		<i>Test b</i>
Woolen fibers and fur.....		80.7
Nylon.....		7.7
Other fibers.....		11.6

circumstance does not discredit the sworn testimony of Mr. Moody that he had in fact prepared and signed CX 43 and CX 44 and that all the entries had been made by him (Tr. 335, 350, 360, 362).

⁵ The hang-tag is affixed to CX 15, and the invoices are CXs 22 A-C.

CX 24

Although the record shows that a swatch of "Vienna" fabric (CX 24) was grossly misbranded (CX 36 F), there is no evidence clearly linking this piece of fabric with sales in commerce, and there is testimony that it was simply a sample that was never used to promote or effect sales in commerce (Gordon 442-44, 449-50). The evidence respecting the Vienna fabric is of such a nature that it does not warrant a finding of violation.

CX 24 was obtained by a Commission investigator from Berkshire-Cerey, Inc., New York City, a sales agent for Datini, in the course of a special inspection on August 20, 1968. He did not take the fiber-content tag attached to the bolt of fabric from which CX 24 was cut but copied the information, including the registered identification number of Verrazzano. The fabric was labeled 40% wool, 20% nylon, 20% linen, 20% cotton. The investigator also noted the presence of a "Drava Foam" fabric labeled as 50% wool, 30% nylon, 20% linen. The investigator subsequently returned to Berkshire-Cerey in July 1969 to obtain invoices showing sales and shipments of the Vienna fabric. Except for the fact that the style designation was the same, these documents (CXs 25-31) were not connected with the CX-24 fabric; actually, they showed a different fiber content—50% wool, 30% rayon, 20% linen—corresponding to the fiber content of the Drava fabric. (Gevarter 420, 423-35; RX 4 A-J) The fiber content of CX 24 as shown by the label and the fiber content disclosed by testing are compared as follows:

Label (RX 4 G-H) ⁶ :	Percent
Wool.....	40
Nylon.....	20
Linen.....	20
Cotton.....	20
Test Report (CX 36 F):	
Nylon.....	26.6
Wool.....	25.6
Flax.....	23.8
Cotton.....	6.5
Other fibers.....	17.5
(chiefly acrylic and polyester.)	

As a witness in support of the complaint, Barnett Gordon, the president of Berkshire-Cerey, testified that the fabric from which CX 24 was cut was only a sample and that Berkshire-Cerey had

⁶ Although the record contains invoices for the Vienna fabric, there is no basis, other than the style designation, and the identity of the claimed fiber content, for connecting any invoice with the fabric exemplified by CX 24.

never sold a Vienna fabric labeled as containing 40% wool, 20% nylon, 20% linen, 20% cotton. He stated that his customers objected to a fabric containing four fibers and that he requested that the number be reduced to three so that the fabric would comprise 50% wool, 30% nylon, and 20% linen. (Tr. 442-44, 449-50.) However, this testimony regarding such a change in the fiber content of the Vienna fabric at that time is inconsistent with Mr. Gordon's statement that the Vienna fabric and the Drava fabric were "the same thing," the name having been changed because the fabric was being sold in two consecutive seasons (Tr. 440). Moreover, respondent Walter Banci referred to Drava and Vienna as "two different tweeds" (Tr. 584).

Although both Mr. Banci and Mr. Gordon doubted that there could be fabrics of different fiber composition manufactured and sold under the same style designation (Tr. 441, 571-72), the fact is that respondents imported considerable quantities of Vienna fabric between July 1968 and September 1968, some of which was represented on invoices and related documents as comprising 40% wool, 20% nylon, 20% linen, 20% cotton, while other shipments purportedly involved a fabric containing 50% reprocessed wool, 30% nylon, and 20% linen (CXs D-E and 59 D-E; Shea 675-91).

Respondents contend (RML 27) that "the shipment of fabric from which the sample [CX 24] must have been taken contained only 110 2/8 yards of fabric valued at \$110.25 * * * because the said importation documents in possession of the Bureau [of Customs] showed that as the only shipment of that type of fabric imported prior to August 24, 1968."⁷ Actually, there were two importations of Vienna fabric in July 1968, and as to both of them, the fiber content was indicated as 50% reprocessed wool, 20% linen, 30% nylon (Shea 686-88).

The record thus establishes that respondents imported quantities of the Vienna fabric as to which the represented fiber content varied. However, there is no showing that the fabric exemplified by CX 24 was representative of any of these goods. Aside from the Vienna fabric sold through Berkshire-Cerey (CXs 25-31) and the shipments covered by CXs 58 A-H and 59 A-H, showing sales to Russ Togs, Inc., Long Island City, New York (CXs 58 D, 59 D), the disposition of the imported Vienna fabric remains essentially unclear (Banci 532, 568-73, 583-84, 609-10). In any event, there is no proof that any Vienna fabric of the actual fiber composition of

⁷ CX 24 had been picked up at Berkshire-Cerey on August 20, 1968 (RX 4 C; investigator's identification tag affixed to CX 24).

CX 24—whatever its label—was sold by respondents. The fact that there were imports and sales of Vienna fabrics represented as having the same fiber content as CX 24 does not, under the circumstances here, permit an inference that they were misbranded.

Despite some confusion, the testimony of complaint counsel's own witness, Mr. Gordon, warrants a finding that CX 24 was cut from a sample run of fabric, the labeling and content of which was not representative of any fabric sold by Berkshire-Cerey to customers on behalf of Datini; that the challenged representations as to the fiber content were not relied upon by customers, who, in fact, required that the fiber content be other than that indicated on the label; that the purpose of the sample was merely to give customers an idea of what the fabric would be like; and that all of the Vienna fabric actually sold to customers of Berkshire-Cerey had a different fiber content and was so labeled (Gordon 442-44; 450; CXs 25-31). Mr. Gordon's explanation that CX 24 was representative only of an experimental sample fabric is bolstered by the fact that although CX 24 was obtained during a "general inspection," emphasis was on "how the sample fabrics being used to effect or promote sales of products in commerce are being labeled. . . ." This was acknowledged by the investigator, but he had "no idea" whether the bolt of fabric from which he obtained CX 24 was used for sample purposes. (RX 4 A; Gevarter 431-32.)

Even if CX 24 did relate only to a sample fabric, complaint counsel still contend (CPF 37) that there was a violation, citing Rule 22 of the Rules and Regulations under the Wool Products Labeling Act, as follows:

Where samples, swatches or specimens of wool products subject to the act [are] used to promote or effect sales of such wool products in commerce, said samples, swatches and specimens, as well as the products themselves, shall be labeled or marked to show their respective fiber contents and other information required by law. (16 CFR § 300.22.)

Complaint counsel rely (CRB 8) on the case of *G. Sherman Corp.*, 56 F.T.C. 783 (1960), as precedent. But the instant case is clearly distinguishable. In the *Sherman case*, it was undisputed that "many" different sample swatches were misbranded. And, although the customers knew that the swatches were labeled only as to "probable" fiber content, it was not disputed that the swatches were used to promote or effect sales of *such* wool products (56 F.T.C. at 785). Here (while there may be basis for skepticism), the uncontradicted testimony of the Government's own witness was that the sample was not used for that purpose—that customers placed no reliance upon the labeled fiber content (*supra*, pp. 654-55).

Finally, although the record supports complaint counsel's contention that "[t]housands of yards" of the Vienna fabric were sold (CRB 8), it fails to connect such sales with CX 24. There has been a failure of proof here, just as in *Bon Dana Sportswear Co.*, 48 F.T.C. 1592, 1594-95 (1952), where the Commission found that it was "possible" but "not . . . proved" that there was a connection between a "few dozen" misbranded sample skirts and a large volume of sales. So here, it is possible but not proved that there was a connection between this one isolated sample (CX 24) and a large volume of the Vienna fabric. This is not enough to support a finding of violation.

Thus, except in the case of CX 24, there is *prima facie* proof of misstatements in labels and in invoices regarding the fiber content of wool products introduced and sold in commerce. However, respondents have presented several defenses in urging that the complaint be dismissed, and those defenses, as well as the application of the law to the practices found in this Section III, will be considered in the Summary, Analysis, and Conclusions (*infra*, p. 661). Meanwhile, findings are next presented respecting alleged violations of the Textile Fiber Products Identification Act.

B. Under the Textile Fiber Products Identification Act

Only two fabric samples were introduced purporting to show violations of the Textile Fiber Products Identification Act. One fabric, exemplified by CX 4, involves Lanificio Tuscania, while the other, exemplified by CX 32, relates to Datini. Respondents contend that "None of the purported violations relate to Verrazzano" (RML 3), but it has already been established that Verrazzano is the importer of record for all the fabrics involved in this proceeding (*supra*, p. 664). The salient facts respecting each of the challenged fabrics are set forth below.

CX 4

CX 4 is a sample of "Concerto" fabric obtained from Magic Sportswear, Inc., New York City, in July 1968 by a Commission investigator. The fabric had been imported through Verrazzano and sold on behalf of Lanificio Tuscania through Maylis Associates as selling agents after a backing had been attached by Lincoln Processing Corp. The fabric from which CX 4 was cut bore no fiber-content label, but Magic Sportswear personnel said that Maylis Associates had furnished a hang-tag (CX 8 A-B) to be attached to the fabric. (Rose 170-191; Coleman 192-98; Banci 561-63, 568; Kivor 616-22; 631-36; CXs 5-8, 10, 54-57.) The fiber-content in-

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formation on CX 8 A-B, bearing the name of Maylis Associates, is compared below with the fiber content of CX 4 as shown by testing:

	Percent—	
	Test a	Test b
Hang-tag and invoice (CXs 7, 8 A-B):		
Acrylic.....		75
Fur.....		15
Nylon.....		10
Test Report (CX 39):		
Acrylic.....	78.2	78.4
Fur fibers.....	8.1	8.3
Nylon.....	6.5	6.5
Other fibers.....	7.2	6.8

Respondents do not challenge the foregoing facts or the extensive documentation set forth by complaint counsel respecting CX 4 (CPF 41-43) but contend that because the prime seller is shown to be the Italian entity Lanificio Tuscania, CX 4 has not been properly connected to respondents (RML 4). This contention has already been essentially disposed of in the earlier findings relating to Verrazzano and respondent Walter Banci (*supra*, pp. 643-46). These findings also dispose of the further argument that Mr. Banci may not be held responsible as agent for acts or omissions of his principal, Lanificio Tuscania, which principal is not subject to the jurisdiction of the Commission (RML 37-39). Mr. Banci is more than an agent of Lanificio Tuscania and is subject to Commission jurisdiction as one exercising direction and control within the United States.

Respondents make the further argument that the questioned label (CX 8 A-B) bears only the name of Maylis Associates and that, although "Maylis is the selling agent for goods of Lanificio Tuscania, misbranding of these goods was certainly not within the scope of their authorized agency, and any such acts should not be attributed to Lanificio Tuscania, let alone to another agent, Walter Banci" (RML 39). This argument is also rejected. Maylis was the selling agent for both Verrazzano and Lanificio Tuscania and, realistically, for Walter Banci as well (*supra*, pp. 643-46). Thus, respondents Verrazzano and Walter Banci may properly be held accountable for the acts and practices of their selling agent.

The examiner thus finds that CX 4 has been sufficiently connected to respondents Verrazzano and Walter Banci.

A question arises, however, whether the labeling should be held to be a violation of the Textile Act. According to the test, the fabric contained a greater amount of its principal component, acrylic, than

represented on the label. Whereas the acrylic content was labeled as 75%, the tests showed more than 78% acrylic. The fur content was approximately half of that claimed on the label (8% actual as against 15% claimed); the nylon content was 3.5% under the 10% claimed in the label; and the fabric contained approximately 7% other fibers, the presence of which had not been disclosed on the label.

The misbranding of CX 4 appears to be a technical violation at worst. In view of the fact that the representation concerning the principal component was essentially correct; that some manufacturing variations are likely to occur in the blending of fur fibers and such man-made fibers as nylon; that a 3% tolerance is allowed; and that there is a reasonable possibility of testing variances, the labeling of CX 4, standing alone, should not be held to be a violation of the Textile Fiber Products Identification Act. (See RML 24-26.)⁸

CX 32

Respondents have raised no issue concerning the responsibility of Datini for the "Berk" fabric (exemplified by CX 32) that was sold through Berkshire-Cerey. The swatch was identified by a Commission investigator, together with invoices and related documents showing the seller as Datini (Gevarter 420-22; Gordon 439; CXs 33-35). The label attached to CX 32 shows the fiber content as 82% Acrylic and 18% Ramie.⁹ The tests initially relied on by complaint counsel (CX 38) showed the fiber content of CX 32 as follows:

Label and Invoices ¹⁰ :	Percent—	
	Test a	Test b
Acrylic.....		82
Ramie.....		18
Test Report (CX 38):		
Acrylic.....	74.7	74.6
Other fibers (mostly bast).....	25.3	25.4

However, complaint counsel joined in a stipulation to the effect that CX 32 was retested, using different techniques, and that these later tests showed the fiber content to be within 3 percent of the

⁸ In view of the disposition here being made of the charges under the Textile Act, it is unnecessary to discuss, with respect to that Act, the statistical and probability theories relied on by respondents in the cited pages. The examiner notes, however, that he is not relying on the indented Tanner quotation at the bottom of RML 24.

⁹ The term "Ramie" is not explained in the record, but the dictionary indicates that it is a linen-like fiber of an Asian plant (Webster's New International Dictionary, Second Edition), and two of the invoices show the fiber content as including 13% linen (CXs 34-35).

¹⁰ The label is attached to CX 32, and the invoices are CXs 33-35.

fiber content shown on the label (Tr. 665, 667), so that the label information is within the tolerance provided by the Act and by Rule 43 of the Commission's Rules and Regulations (*supra*, p. 648). The results of the later tests are in the record as CX 60.¹¹ Two of these tests, including one conducted according to specifications furnished by the United States Testing Company, showed the fiber content as 83.4% acrylic and 16.6% other fibers. Another test showed the fiber content as 80.4% acrylic and 19.6% other fibers, and a re-run of the original test method showed 79.9% acrylic and 20.1% other fibers.

Nevertheless, although complaint counsel conceded that CX 60 "placed the fiber content of CX 32 close to that set out on the fiber content label," they contend that "the only reasonable conclusion" that can be drawn "is that variations in the test results are due to lack of homogeneity in the fabric and therefore such fabrics could not produce consistent [test] results" (CPF 44-45). This contention is rejected as lacking any evidentiary basis, and the finding must be that CX 32 was labeled within the allowed tolerance, so that no violation has been proved with respect to it.

Conclusory Finding

Of the two fabrics allegedly labeled and invoiced in violation of the Textile Fiber Products Identification Act, one (CX 32) has been shown, on retesting, to have been labeled within the permissible tolerance, and the other (CX 4) to involve borderline misbranding—a technical violation. The record thus does not contain substantial evidence of violation sufficient to warrant the entry of an order to cease and desist.

IV. The Charges Under the Federal Trade Commission Act

Technically, the record affords basis for a finding that in the course and conduct of their business in commerce, respondents Verazzano and Walter Banci¹² have made statements on invoices to their customers misrepresenting the fiber content of certain of their products, as alleged in Paragraph Eight of the complaint. Such misrepresentations included statements as to the fiber content of CX 1 on CX 3 (*supra*, p. 650); of CX 11 on CX 13 A; of CX 12 on CX

¹¹ In the retesting of CX 32, the solvents used for cleaning and removal of the backing glue were changed, and a different reagent was also used in the chemical analysis. (Compare CX 60 with the Rosenberg testimony at Tr. 303-05, 308-11, 316-17; see CPF 44-45, RRB 13-15.)

¹² With CX 24 out of the picture (*supra*, pp. 654-55), there is no invoice involving Datini.

14 A (*supra*, pp. 650-53); and of CX 15 on CXs 22 A-C (*supra*, p. 653). In truth and in fact, the invoiced products contained substantially different amounts and types of fibers than represented.

As a matter of law, these acts and practices of the respondent were and are all to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. However, the question whether this warrants an order to cease and desist will be considered in the Summary, Analysis, and Conclusions that follow:

SUMMARY, ANALYSIS, AND CONCLUSIONS

In addition to questioning the sufficiency of the evidence connecting some of the fabrics or labels with respondents—a matter resolved by the findings in Section III (*supra*)—respondents have urged a 4-point defense, as follows:

1. Inaccurate label statements as to non-wool fibers contained in a part-wool product do not violate the Wool Products Labeling Act, nor does understatement of the wool content.

2. The deviations shown between label representations and actual fiber content are within reasonable tolerances, considering unavoidable variations in manufacture and the lack of precision in fabric testing.

3. The challenged fabrics do not constitute a representative sampling of respondents' goods.

4. Respondents should be allowed an opportunity to dispose of any labeling discrepancies on an informal non-adjudicatory basis.

These defenses will be considered in the summary and analysis that follow:

I. Wool Act Charges

The most troublesome question presented on this record is whether the failure to accurately list on labels the non-wool content of a part-wool product constitutes a violation of the Wool Products Labeling Act. A subsidiary or related question is whether an understatement in labeling of the wool content of a part-wool product and the consequent overstatement of the presence of non-wool fibers constitute a violation of the Act.

Were it not for the case of *Marcus v. FTC*, 354 F. 2d 85 (2d Cir. 1965), the examiner would have little doubt that the answer to both questions is yes. However, in the *Marcus* case, the Court clearly

held that "if the percentage of wool is correctly stated, the Act is not concerned with the accuracy of statements about other constituent fibers" and that, moreover, understatement of the wool content does not constitute a violation (354 F. 2d, at 87-88).

With all due deference to the Court, the examiner believes the language of the Wool Act, including the preamble and, more particularly §§ 4a(1) and (2) (15 U.S.C. § 68b (a) (1) and (2)), is so clear and unambiguous as to make resort to legislative history unnecessary and that, in any event, the legislative history is not such as to require the Court to hold as it did.

However, no petition for certiorari was filed on the Supreme Court, nor does it appear that the Commission or any court has taken a contrary view since the *Marcus* decision, except that the Commission has issued numerous consent orders containing the statutory language of § 4a (2), thus purporting to require the accurate disclosure of non-wool fibers in part-wool products.

Complaint counsel have cited two Commission cases that are in conflict with *Marcus* in holding that the Wool Act is not concerned merely with the correct labeling of *woolen* fibers, and, in this respect, only insofar as the amount of wool is not *overstated*, but that it requires a correct statement of the woolen fibers present in a wool product, does not allow understatement of the wool content, and requires a correct statement of the names and percentages of all non-woolen fibers present in amounts of 55% or more: *Vikingo, Ltd.*, 63 F.T.C. 152, 158 (1963), and *Sacks Woolen Co., Inc.*, 61, F.T.C. 1226, 1231-33, 1236 (1962). However, it will be noted that both of these cases antedate the *Marcus* decision. They were cited to the *Marcus* Court, as was their rationale, but the Court squarely rejected the Commission's interpretation.

The examiner recognizes the anomaly that whereas the Textile Fiber Products Identification Act requires the accurate labeling of the fiber content of textile products generally, it specifically exempts products subject to the Wool Products Labeling Act (15 U.S.C. § 370(h)). In other words, there would be no specific regulation of fibers other than wool once the product contained some wool and was therefore subject to the provisions of the Wool Act and not of the Textile Act. The possibility of such a statutory hiatus was not mentioned in the Commission's brief, nor did the Court discuss it. However, the brief did cite the *Vikingo* case (*supra*), where the hearing examiner specifically called attention to this anomaly (63 F.T.C. at 1558). At any rate, the Court commented in *Marcus*: "There are, of course, other acts, for example, § 5(a)(1)

of the Federal Trade Commission Act, under which deceptive practices as to constituent fibers can be controlled" (354 F. 2d, at 88, n. 4).

In the circumstances outlined, in a case where respondents are within the jurisdiction of the Second Circuit, the examiner is constrained to view the *Marcus* case as a controlling precedent by which he must be bound.

This means, then that CX 1, CX 11, CX 12, and CX 15 are not misbranded under the Wool Act by reason of misstatements of their non-wool content, nor is CX 1 misbranded by reason of the understatement of its wool content.

There remains the question whether the misstatements of the wool content at CX 11, CX 12, and CX 15 are actionable.

The wool content of CX 11, as shown by testing, was within 2.7% of the represented wool content of 87%. This can hardly be held to constitute actionable misbranding. Such a deviation is excusable as due to unavoidable manufacturing variations or as within the margin of testing error (*Marcus v. FTC*, 354 F. 2d 85, 89 (2d Cir. 1965); *Beacon Manufacturing Co.*, 46 F.T.C. 1073, 1075-77; see *Striar* 127, *Grimwade* 207; CX 36 F-G).

CX 15, which was labeled as containing 70% wool, 15% fur, 10% nylon, and 5% other fibers, contained 4.3% less wool and fur combined than the 85% represented by the label. However, the test failed to show the percentage of wool content separately, so that there is no proof that it did not contain the stated 70%.

This leaves only one clear case of misbranding—CX 12 which was labeled as containing 70% wool, but actually contained only 46.2% wool, or 23.8% less than stated. Here again, the *Marcus* case is controlling. One instance of misbranding does not provide a substantial basis for the issuance of an order to cease and desist (*Marcus v. FTC*, 354 F. 2d 85, 89 (2d Cir. 1965)).

In view of this determination respecting the misbranding charge, the charge of furnishing false guarantees must necessarily fail too.

II. Textile Act Charges

The charges of misbranding and false invoicing under the Textile Fiber Products Identification Act must be dismissed for lack of substantial proof of violation (*supra*, pp. 657-60).

III. Federal Trade Commission Act Charges

With the proof of violation of both the Wool Act and the Textile Act having been found insufficient, on the facts and on the law,

the next question is whether an order should be entered against false invoicing under the Federal Trade Commission Act. The examiner is of the opinion that, as a matter of discretion, it would be incongruous to enter such an order in the circumstances presented by this record.

The main thrust of this proceeding involved alleged violations of the Wool Act and of the Textile Act; and the Federal Trade Commission Act charge of false invoicing was concededly auxiliary to the Wool Act allegations. With the principal thrust blunted by the facts and the law, there is at least some question whether the auxiliary charge should stand.

It is true that respondents have misrepresented the fiber content of their products, and the dismissal of the Wool Act charges is partly on technical grounds. Nevertheless, an attitude here that half a loaf is better than none would have a dog-in-the-manger aspect that the examiner finds inappropriate on this record.

The circumstances that have led the examiner to this conclusion include the following:

With perhaps one or two exceptions, the misrepresentations are not flagrant and may be accounted for, at least in part, by unavoidable manufacturing variations, by isolated error,¹³ or by the margin of error involved in testing.¹⁴

Regarding the Wool Act defense of unavoidable manufacturing variations, which may be applied to the related charge of false invoicing under the Federal Trade Commission Act, the examiner assumes, without deciding, that deviations of up to 5 percent are within the exculpatory provision of Section 4(a)(2) of the Wool Act, as interpreted by the *Marcus* decision. In *Marcus*, the Court seemed to read into the proviso a virtually automatic tolerance of at least 5 percent. (*Marcus v. FTC*, 354 F. 2d 85, at 89; compare Hearing Examiner's Initial Decision (June 9, 1964) in the *Marcus* case, *sub. nom. Stanton Blanket Co.*, D. 8610, slip opinion, p. 10; Final Order, December 18, 1964 [66 F.T.C. 1290]; see *Beacon Manufacturing Co.*, 46 F.T.C. 1073, 1075 (1949); *cf. Alscap, Inc.*, 60 F.T.C. 275 (1962), and *Milwaukee Allied Mills, Inc.*, 55 F.T.C. 1530, 1540 (1959); see, in this record, *Striar* 127; *Grimwade* 207.)

The testimony of Mr. Banci and respondents' expert Professor Rota (Tr. 746, *et seq.*; 787 *et seq.*; 998-1935) indicates that Mr. Banci's mill and other mills in Prato, Italy, have experienced dif-

¹³ For example, CX 11; see Banci 780 E-H, 806. Compare *Becon Manufacturing Co.*, 46 F.T.C. 1073, 1075 (1949).

¹⁴ See CX 36-G.

difficulties in achieving homogeneity of fabrics, particularly in multiple-component blends involving reprocessed and reused wool, fur fibers, and synthetic fibers, and that efforts are being made to find solutions to such problems. But on the basis of their testimony and in the light of the testimony of the American manufacturers, as well as Dr. Golub, there might be doubt, absent the *Marcus* ruling, that the difficulties of achieving a product of such homogeneity that it may be properly labeled are due to unavoidable manufacturing variations. Mr. Banci's mill has elected to use large high-speed machinery to achieve greater production, and such size and speed have been blamed for the lack of homogeneity in certain fabrics. Although the Italian manufacturers may face certain problems to which the American manufacturers are not subject, the record indicates that there are machines and processes available, or that the existing Italian machines and processes may be modified, so as to achieve sufficient homogeneity that acceptable labeling may be achieved. However, it does appear that respondents are endeavoring to overcome these difficulties and that they exercise due care (*id.*).

The fabrics involved in this proceeding do not constitute a representative random sampling,¹⁵ and there is evidence that many other samples were tested by the Government and apparently found acceptable (Rose 186-88-A; Moody 370; Shea 693). The examiner does not mean to suggest that respondents may be excused from misrepresentation of some fabrics because others are properly represented. But the evidence here falls far short of permitting any inference that respondents have engaged in deliberate misrepresentation or in actionably careless misrepresentation.¹⁶

On the basis of the evidence and from his observation of respondent Walter Banci as a witness, the examiner is convinced of the good faith of the respondents.

The record indicates that Mr. Banci declined to sign a consent order in the spring of 1968 (Tr. 665) on the basis that he was not

¹⁵ In the view taken by the examiner, it is unnecessary to consider the statistical and probability concepts developed on this record regarding the adequacy or the fairness of the product sampling involved here (Terzuoli 860 *et seq.*; Tanner 1112 *et seq.*). Without any criticism of the witness intended, it may be noted that the testimony of Mr. Tanner loses much of its force by virtue of the fact that some of his assumptions were not well-founded. In any event, the examiner rejects respondents' contentions regarding the extent of sampling required. The law does not require such a degree of scientific sampling as to prove that a substantial portion of a respondent's goods is misrepresented. It is sufficient if the evidence shows some pattern of violation, ruling out some aberrant discrepancy produced and caught by chance.

¹⁶ Of course, the absence of such factors does not constitute any legal defense (*Smith-line Coats*, 45 F.T.C. 79, 87 (1949)), but it is relevant to the question whether the public interest requires entry of an order.

aware of any misbranding on the part of respondents and that he was unable to ascertain with any exactitude the basis of the Commission's belief that respondents had violated the law. There is record support for the contention of respondents that at the time of the consent negotiations, the Commission's staff did not have substantial evidence of actionable violations requiring formal complaint proceedings rather than the voluntary and cooperative compliance procedures customary in such instances. It appears that at the time of the consent negotiations, the only examples of alleged violations consisted of matters that complaint counsel considered unworthy of introduction in this record.¹⁷

Moreover, Mr. Banci testified (Tr. 782-83), without contradiction or challenge, that he volunteered to cooperate with the Commission in any reasonable way designed to assure proper labeling of respondents' imported goods, even to the point of paying for Commission inspections of his factory in Italy.

Respondents, in their submittals at the close of this case, continue to express a willingness to cooperate in voluntary enforcement procedures. They state:

Respondents stand ready to fully cooperate with the Commission and will, as they have done throughout this proceeding, reveal any information and take any steps which may be reasonably required by the Commission. (RML 5-6.)

Respondents are anxious to avoid future difficulties under the Textile Act as well as under the Wool Act. Respondents will cooperate in a voluntary enforcement procedure but are anxious to avoid the stigma of a formal Commission order. (RML 42.)

In view of these considerations, it appears to the examiner that the public interest would be served by dismissing the invoicing charges under the Federal Trade Commission Act on condition that respondents Verrazzano and Walter Banci engage in cooperative compliance procedures with the Commission's staff. (See *R. H. Macy & Co., Inc.*, D. 8650 Final Order, Nov. 29, 1967) [72 F.T.C. 894.]

¹⁷ Banci 781-86; see Rose 186-88. The test reports relied on by complaint counsel (CXs 36-39), as well as other test reports relating to the fabrics in this case (RXs 1-3) were dated subsequent to the consent negotiations.

At the outset of this proceeding, in response to an order for a more definite statement, complaint counsel listed four fabrics as illustrative of the misbranding of products labeled as 70% reprocessed wool, 20% linen, 5% nylon, 5% other fibers, as alleged in Paragraph Three of the complaint. (See "Answer in Response to Respondents' Motion for a More Definite Statement . . ." filed December 9, 1969, subparagraphs 1-3 of Paragraph One.) However, none of these samples or test reports were offered in evidence by complaint counsel. Three of the test reports relating to these samples are in the record as RXs 10-12 (see also Appendix A of respondents' Memorandum of Law). Apparently complaint counsel did not consider the minor discrepancies shown as constituting violations since, as noted by the laboratory report on two of the fabrics, testing had shown them to be "approx. as labeled" (RXs 11-12).

If, however, the Commission should disagree and should conclude that an order is warranted, the examiner respectfully suggests that the proposed order be modified so that it does not purport to cover labeling.

The order proposed by complaint counsel (CPF 47) and the proposed order attached to the complaint would require respondents to "cease and desist from misrepresenting the character or amount of the constituent fibers contained in such products on invoices or shipping memoranda applicable thereto, or in any other manner."

Literally read, the last phrase of this order would prohibit *any* misrepresentation of the character or amount of the fiber content, including that set forth in labeling.

However, misrepresentation in labeling was charged as a violation of the Wool Products Labeling Act, and that charge has been dismissed by the examiner. If the examiner's dismissal of the Wool Act charges as to labeling is upheld, it is submitted that the Federal Trade Commission Act order—if entered—should not purport to run against labeling.

IV. Conclusions

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.
2. At all times relevant to this proceeding, respondents have been engaged in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, the Textile Fiber Products Identification Act, and the Federal Trade Commission Act. They have imported, introduced into commerce, offered for sale, and sold wool products and textile fiber products, as those terms are defined in the Wool Act and the Textile Act.
3. The complaint herein states a cause of action, but, under applicable law and precedent, the record lacks substantial evidence that respondents violated either the Wool Products Labeling Act of 1939 or the Textile Fiber Products Identification Act.
4. The charge of violating the Federal Trade Commission Act should be dismissed as to respondent Francesco Datini, Inc., for failure of proof.
5. As a matter of law, the invoicing practices of Verrazzano Trading Corporation and Walter Banci constituted unfair methods of competition and unfair and deceptive acts and practices, within the meaning of the Federal Trade Commission Act, but the public interest does not require the entry of an order to cease and desist in this respect. The charges under the Federal Trade Commission

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Act should be dismissed on condition that respondents Verrazzano and Walter Banci engage in cooperative compliance procedures with the Commission's staff.

ORDER

It is ordered, That the complaint herein, insofar as it charges violations of the Wool Products Labeling Act of 1939 and of the Textile Fiber Products Identification Act, be, and it hereby is, dismissed as to all respondents.

It is further ordered, That the invoicing charge under the Federal Trade Commission Act be, and it hereby is, dismissed as to Francesco Datini, Inc., for failure of proof.

It is further ordered, That the charge of false invoicing under the Federal Trade Commission Act be, and it hereby is, dismissed as to Verrazzano Trading Corporation and Walter Banci; *on condition, however,* that such respondents engage in cooperative compliance procedures with the Commission's staff.

It is further ordered, That Verrazzano Trading Corporation, a corporation, trading under its own name, or as Lan Etruria, or under any other name, and Walter Banci, individually, or as agent for Verrazzano Trading Corporation, for Lanificio Tuscania, or for any other entity, corporate or otherwise, shall, within sixty (60) days after the effective date of this order, file with the Commission a report in writing, signed by the respondents named in this order, setting forth in detail the manner and form in which the provisions of this order relating to cooperative compliance have been complied with and the manner in which such informal enforcement procedures will ensure compliance with the provisions of Section 5(a)(1) of the Federal Trade Commission Act.

OPINION OF THE COMMISSION

APRIL 13, 1971

BY DENNISON, *Commissioner*:

This is an appeal by complaint counsel from the decision of the hearing examiner dismissing the complaint.

The relationship between the various respondents and the agencies which act on their behalf is set forth in detail in the initial decision. Suffice it to say here that the whole complex of the corporations and related entities amounts to an integrated family-owned business designed to sell in the United States fabrics manufactured in a mill located in Prato, Italy, which is owned by respondent Walter Banci,

who also controls the Verrazzano Trading Corporation which imports these fabrics into this country. According to the complaint, labels and invoices as to certain of these imported fabrics did not disclose the true percentage of fibers by weight. The complaint charges respondents with violations of misbranding under Sections 4(a)(1) and (2) of the Wool Products Labeling Act, 15 U.S.C. 68b, and Sections 4(a) and (b) of the Textile Fiber Products Identification Act, 15 U.S.C. 70b. Respondents are also charged with providing false guarantees in violation of these Acts and supplying false invoices in violation of the Federal Trade Commission Act.

Respondents denied the charges and further asserted that any violations were the result of unavoidable manufacturing variations and were of *de minimis* proportions in view of the total amount of sales of respondents.

I. Allegations of Misbranding under the Wool Products Labeling Act

Labels that had been attached to five fabrics subject to the Wool Act were placed in the record, together with evidence that the labels did not represent the true fiber content as disclosed by a later testing of samples of the fabric. The examiner held that as a matter of law the evidence as to three of these five fabrics did not constitute violations of the Wool Act because, although there was a variance between the label and the actual fiber content, the wool content was not less than that stated on the labels or was otherwise within permissible tolerances.

Thus physical exhibit CX 1 was labeled "70% reprocessed wool, 15% fur fibers, 10% nylon and 5% other fibers", whereas according to the tests it contained 82.9% wool, 11.0% fur, 5.3% nylon, and 0.8% other fibers.

CX 15 was labeled "70% reprocessed wool, 15% fur fibers, 10% nylon and 5% other fibers", although according to a laboratory test it contained 80.6% woolen fibers and fur, 8.0% nylon, and 11.4% other fibers.

The label on the third fabric, CX 11, represents it to contain "87% wool, 13% silk", although according to a test report this overstated the correct amount of wool by 2.7%.¹ The remaining fiber content consisted of 12.9% nylon and 2.8% other fiber.

¹ Other tests placed in the record by respondents place the overstatement as low as 1.6%. The Commission has recognized, as allowable, deviations up to 5% when such deviations are due from unavoidable variations in manufacture despite the exercise of due care by the manufacturer. See *Alscap, Inc.*, 60 F.T.C. 275, 283 (1962); *Beacon Manufacturing Co.*, 46 F.T.C. 1073 (1949).

The examiner rejected these exhibits as constituting evidence of misbranding under the Wool Act. Although expressing his belief that a substantial understatement of wool content should be deemed a violation of the Act, if for no other reason than that the remaining constituent fibers would consequently be overstated, the examiner ruled that he was bound by the decision in *Marcus v. Federal Trade Commission*, 354 F. 2d 85 (2d Cir. 1965). The court held in that case that an *excess* of wool content as compared to that listed on the label does not constitute a violation of the Wool Act. The court further held that "if the percentage of wool is correctly stated, the Act is not concerned with the accuracy of statements about other constituent fibers." (354 F. 2d at 87-88.)

Despite this clear ruling of the Court of Appeals for the Second Circuit, complaint counsel urge that we overrule the examiner on this point. They contend that such a construction of the Wool Act is contrary to the express wording of the statute, pointing out that Section 4(a)(2) of the Act provides that a wool product "shall be misbranded" if a stamp, tag, or label is not affixed to the wool product and does not show—

(A) 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 (1) wool; (2) reprocessed wool; (3) reused wool; (4) *each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; and* (5) *the aggregate of all other fibers . . .* (emphasis added).²

Complaint counsel note that under the *Marcus* rule there would be no violation of the Wool Act if, *e.g.*, a fabric tag reads "70% wool, 30% silk" but the item actually contains 70% wool and some other fiber that is cheaper than silk. A consumer might desire or need to know which non-wool ingredient is actually present and in what amount, not only to determine the quality of the product, but for other reasons such as for the purpose of dry cleaning or washing the fabric in a proper manner. Such misbranding if it occurred on a non-wool textile item would be amenable to corrective action under the Textile Fiber Products Identification Act passed in 1958. But "textile products" as defined for purposes of labeling requirements under that Act "[do] not include a product required to be labeled under the Wool Products Labeling Act of 1939." See 15 U.S.C.

² The above-quoted statutory text is immediately followed with a proviso that deviation in percentages shall not be misbranding under that section if the person charged with misbranding proves such deviation "resulted from unavoidable variations in manufacture and despite the exercise of due care to make accurate the statements on such stamp, tag, etc." In addition to relying on *Marcus*, respondents assert that the deviations here were unavoidable variations in manufacture within the meaning of this proviso. In light of our disposition of this case we do not reach this issue.

70(h). Complaint counsel persuasively argue that in enacting the Textile Fiber Products Identification Act, Congress presumed that the Wool Products Labeling Act required not only that wool fibers, but all constituent fibers constituting 5% or more of the fabric, be shown correctly on items subject to the Wool Act. Thus the *Marcus* ruling creates the anomalous situation that there would be no regulation of fibers other than wool if the product contains any wool, but there is regulation of such fibers if the product does not contain wool.

Nevertheless, these considerations were available to and presumably passed upon by the court in the *Marcus* case.³ Respondents do considerable business within the Second Circuit, and can therefore appeal any order in this case to the Court of Appeals, for that Circuit. Although we disagree with that court's holding in *Marcus*, upon the record in this case the doctrine of *stare decisis* persuades us to dismiss the charges in the complaint insofar as they are based on instances where the wool content of fabrics was understated.⁴

This is not to say that this agency is powerless to protect consumers from false labeling practices which, although technically not actionable under the Wool Act because of the *Marcus* rule, are nevertheless shown to be misleading to buyers in a material way. The court in *Marcus* indicated that the Commission could proceed under the Federal Trade Commission Act if statements as to the other constituent fibers result in "deception."⁵ However, the instant case was tried on the theory that the fabrics were "misabeled" in the sense that the labels were *per se* violations of Section 4 of the Wool Act, just as the Commission's order in the *Marcus* case rested on what were thought to be the technical requirements of that Act.

In addition to the above three fabrics rejected as evidence of misbranding under the Wool Act, complaint counsel rely on two

³ Complaint counsel state that the Commission's brief to the court in the *Marcus* case failed to point out that the construction urged by *Marcus* would create an incongruous discrepancy in many instances between labeling requirements for fabrics containing wool and fabrics not containing wool. Although the court did not refer to this point in its opinion and it may be true this consideration was not presented to it, the doctrine of *stare decisis* still is applicable since the argument clearly could have been made to it. Although the Commission requested the Solicitor General of the United States to file a petition for certiorari in the Supreme Court, this request was denied.

⁴ Whether an agency having nationwide jurisdiction is invariably obligated to follow a court precedent in a case which may be reviewed by the same court does not appear completely settled. Compare *W. T. Smith Lumber Co. v. NLRB*, 246 F. 2d 129 (5th Cir. 1957) with *Stacy Mfg. Co. v. Commissioner*, 237 F. 2d 605 (6th Cir. 1956.) But clearly this is the general rule and we do not view the instant case as a suitable vehicle to ask the Second Circuit to reconsider its *Marcus* decision.

⁵ The court observed (354 F. 2d at 88n.4):

"There are, of course, other acts, for example § 5(a)(1) of the Federal Trade Commission Act, under which deceptive practices as to constituent fibers can be controlled."

additional samples of fabrics which, in contrast to the foregoing, the wool content was not as great as stated on the label. The first of these is CX 24, a swatch taken from a "sample" fabric to which was attached a tag representing the fiber content to be "40% wool, 20% nylon, 20% linen, and 20% cotton." The test report shows substantial deviation from this as it indicates the presence of 25.6% wool, 26.6% nylon, 23.8% flax, 6.5% cotton, and 17.5% other fibers (chiefly acrylic and polyester).

Respondents argue that they were not responsible for the particular label found on this exhibit, and that in any event it was taken from a short sample run of a fabric which itself was never sold in commerce but was used to demonstrate to buyers the style of a similar but different material. The examiner agreed with the latter argument, finding that the challenged representations as to fiber content were not relied upon by customers. This is supported by testimony of complaint counsel's own witness, the president of one of respondents' sales agencies (Tr. 444). There is also evidence, accepted by the examiner, that the fabric sold as a result of this sample had a different fiber content and was so labeled, and that in fact the customers required that the fiber content be other than that indicated on the label of this sample (Tr. 444).⁶

It is true, as complaint counsel point out, that the sample itself was "introduced" and "transported" in commerce and is therefore technically subject to the Act (see 15 U.S.C. 68a) and that Rule 22 of the Rules and Regulations under the Wool Act provides:

Where samples, swatches or specimens of wool products subject to the act were used to promote or effect sales of such wool products in commerce, said samples, swatches and specimens, as well as the products themselves, shall be labeled or marked to show their respective fiber contents and other information required by law.

However, that Rule was obviously designed with the object of preventing mislabeling of sample swatches which are used to promote or effect sales of the same fabric. Where it affirmatively appears that the sample was used to demonstrate only the style of a different fabric which is separately and properly labeled, and where there is no connection shown between such sample and any mislabeled fabric actually sold in commerce, we think the public interest has not been affected in a way that would justify an order to cease and desist. See *Dana Sportswear Co.*, 48 F.T.C. 1592, 1594-95 (1952), dismissing charges under the Wool Act on similar considerations.

⁶ There is also evidence that a sample or pilot run of fabric, as this fabric was, is more likely to vary greatly in composition.

The last remaining fabric relied upon by complaint counsel to support the Wool Act charge of misbranding is CX 12. This fabric was labeled as containing 70% wool, but actually contained only 46.2% wool—clearly a substantial deviation. Respondent Walter Banci in testimony denied that this fabric was manufactured by his mill and expressed the opinion that it was made by a competitor in Prato, Italy. Respondents contend that, in any case, one example of a misbranded fabric is insufficient to warrant issuance of an order. The examiner, although finding the fabric to be Banci's, dismissed the charge on the latter ground, again relying on *Marcus v. Federal Trade Commission, supra*.

In the *Marcus* case, five blankets manufactured by Marcus were in the record. Two contained more wool than the petitioner had claimed on labels. Two others had less wool than was indicated on the label, but the variation was deemed minimal by the court. In the case of only one blanket did the overstatement of wool show a substantial variation (a discrepancy of 14.2% to 14.3%). Although it was entirely possible that that blanket was one among a large number of blankets made from the same material and similarly mislabeled, the court laid down the rule that "a deficiency of one of five blankets tested does not constitute substantial evidence of misbranding" (354 F. 2d at 87).⁷

The court, in ruling that a deficiency in one of five blankets tested did not constitute an actionable violation, noted that the sampling was small in view of the fact that Marcus had sold over one million blankets during the years under investigation. Similarly, in the instant case the examiner found that between 1965 and 1969 Walter Banci has exported to the United States approximately 20 million yards of various fabrics with sales in the millions of dollars. Complaint counsel argue that although CX 12 is a sample of one fabric, that fabric may have been produced in substantial quantities and widely distributed in a mislabeled condition. Nevertheless our attention has not been drawn to any evidence indicating the amount of the CX 12 fabric that was manufactured or sold. Also, as the examiner found, there is no evidence permitting an inference that respondents have engaged in deliberate misrepresentation. In the absence of such evidence, or evidence of violations of the Act as to more than one fabric, we think that the single instance of mis-

⁷ Later in the opinion, the court in a similar vein ruled that the single false invoice did not provide substantial evidence of "deceptive acts or practices" under Section 5 of the Federal Trade Commission Act (354 F. 2d at 89-90).

branding represented by CX 12 is not sufficient to meet the quantum of proof required under *Marcus*. See also *Stanrich Mills Corp.*, 50 F.T.C. 1120 (1954).

In view of the failure of proof as to the misbranding charges, we agree with the examiner that the charges of furnishing false guarantees must fail too.

II. Allegations of Misbranding under the Textile Fiber Products Identification Act

Two fabric samples were introduced to prove violations of the Textile Fiber Products Identification Act. The examiner held that these samples did not constitute substantial evidence of a violation of that Act.

CX 4 was labeled as containing "75% acrylic, 15% fur, 10% nylon." Two tests were run on this sample. One showed the presence of 78.2% acrylic, 8.1% fur fibers, 6.5% nylon, and 7.2% other fibers; the other was quite close to these figures. The examiner held: "In view of the fact that the representation concerning the principal component was essentially correct; that some manufacturing variations are likely to occur in the blending of fur fibers and such man-made fibers as nylon; that a 3% tolerance is allowed; and that there is a reasonable possibility of testing variances, the labeling of CX 4, standing alone, should not be held to be a violation of the Textile Fiber Products Identification Act." We find no reason to disagree with this conclusion.

Although initial tests of the other fabric, CX 32, indicated this fabric was mislabeled, subsequent tests using somewhat different techniques (not challenged by complaint counsel) showed the fiber content to be within 3% of the fiber content shown on the label, so that the label information is within the tolerance allowed by the Act and the regulations issued thereunder. 15 U.S.C. 70b(b)(2); 16 C.F.R. 303.43(a).

Since one of the two fabrics under consideration was found upon retesting to be within the permissible tolerance and the other to involve only a borderline case of misbranding, the record does not contain substantial evidence of an actionable violation of the Act.

In view of the failure of proof as to the labeling charges in this case, we agree with the examiner that the entry of an order as to the alleged false invoice practices of respondents is not warranted and that these charges as to respondents Verrazzano and Walter

Banci should be dismissed on the condition that they endeavor to engage in cooperative compliance procedures with the Commission's staff, a condition to which their counsel has stipulated.

III. Motion to Reopen

Subsequent to the oral argument before the Commission in this matter, complaint counsel filed a motion on March 26, 1971, to reopen the record in this case pursuant to Section 3.71 of the Commission's Rules of Practice on the ground of newly discovered evidence. In view of the fact that considerable effort has been expended by the respondents in defending against the evidence already relied upon by complaint counsel, that an initial decision containing an exhaustive analysis of the record has been filed by the examiner, and that any such newly discovered evidence can be used in any new administrative proceeding that may be warranted, the motion to reopen will be denied.

An appropriate order accompanies this opinion, in which Commissioner MacIntyre does not concur.

FINAL ORDER

This matter is before the Commission upon appeal of complaint counsel from the hearing examiner's initial decision dismissing the complaint herein; and

The Commission having considered the record and the briefs and oral arguments of the parties, and having determined for the reasons set forth in the accompanying opinion that the initial decision should be affirmed,

It is ordered, That complaint counsel's appeal be, and it hereby is, denied.

It is further ordered, That complaint counsel's motion to reopen the record in this proceeding to present new evidence pursuant to Section 3.71 of the Commission's Rules of Practice, which motion was filed on March 26, 1971, subsequent to the oral argument in this matter, be, and it hereby is, denied without prejudice to the right to use such evidence in any future proceeding that may be warranted.

It is further ordered, That the initial decision and order of the hearing examiner be, and they hereby are, adopted as the decision and order of the Commission.

Commissioner MacIntyre not concurring.

Complaint

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IN THE MATTER OF

BELL & HOWELL COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
TRUTH IN LENDING AND THE FEDERAL TRADE COMMISSION ACTS

Docket C-1902. Complaint, Apr. 20, 1971—Decision, Apr. 20, 1971

Consent order requiring a Chicago, Ill., seller of motion picture equipment to cease violating the Truth in Lending Act by failing to make all disclosures required by Regulation Z of said Act on one side of a page of the instrument, failing to disclose the "total of payments," and failing to state in required terms the cash price, the down payment, the number and due dates of the payments, the amount of the finance charge and the deferred payment price.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Bell & Howell Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and implementing regulation, 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 in that respect as follows:

PARAGRAPH 1. Respondent Bell & Howell Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 7100 McCormick Road, Chicago, Illinois.

PAR. 2. Respondent, by and through its division known as the Robert Maxwell Company, is now, and for some time has been, engaged in the advertising, offering for sale and sale of motion picture equipment to the public.

PAR. 3. In the ordinary course of its aforesaid business, respondent, by and through its division the Robert Maxwell Company, regularly extends consumer credit, as "consumer credit" is defined in Regulation 2, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of its aforesaid business, and in connection with its credit sales, as "credit sale" is defined in Regulation Z, respondent, by and through the

Robert Maxwell Company, has caused its customers to enter into contracts for the sale of respondent's goods and services. Respondent has furnished customers with disclosure statements, hereinafter referred to as "the statement," containing credit cost information. Respondent did not provide to customers on any document other than the statement the credit cost disclosures which are required by Section 226.8 of Regulation Z.

By and through use of the statement, respondent:

1. Failed to make all disclosures required to be made by Regulation Z prior to consummation of the transaction, as required by Section 226.8(a) of Regulation Z.

2. Failed to disclose, as required by Sections 226.8(a)(1) and (2) of Regulation Z, together, either on an instrument evidencing the obligation on the same side of the page or on one side of a separate statement which identifies the transaction, all disclosures required by Sections 226.8(b) and (c).

3. Failed to disclose accurately the sum of the payments scheduled to repay the indebtedness, and to describe that sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

PAR. 5. In the ordinary course of its aforesaid business, respondent, by and through the Robert Maxwell Company, caused to be published advertisement of its goods and services, as "advertisement" is defined in Regulation Z. These advertisements aided, promoted, or assisted directly or indirectly extensions of consumer credit. Through these advertisements, respondent stated the amount and period of installment payments which could be arranged in connection with a consumer credit transaction and, by stating "Send No Money," stated directly or indirectly that no downpayment was required in connection with a consumer credit transaction, without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

1. The cash price;
2. The number of periodic payments scheduled to repay the indebtedness if the credit is extended;
3. The amount of the finance charge expressed as an annual percentage rate; and
4. The deferred payment price.

PAR. 6. Pursuant to Section 103(k) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constituted violations of that Act and, pursuant to Section 108, respondent thereby violated the Federal Trade Commission Act.

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 Bureau of Consumer Protection 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, the Truth in Lending Act and the implementing Regulation promulgated thereunder; and

The respondent 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 that it had reason to believe that the respondent has violated the said Acts, 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 thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Bell & Howell Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its offices and principal place of business located at 7100 McCormick Road, Chicago, Illinois.

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

ORDER

It is ordered, That respondent Bell & Howell Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with any extension of consumer credit or any advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit as "consumer credit" and "advertisement" are defined in Reg-

ulation Z (12 CFR Part 226) of the Truth in Lending Act (Public Law 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to make all disclosures required to be made by the Regulation Z prior to consummation of the transaction, as required by Section 226.8(a) of Regulation Z.

2. Failing to disclose together, either on an instrument evidencing the obligation on the same side of the page or on one side of a separate statement which identifies the transaction, all disclosures required by Sections 226.8(b) and (c), as required by Sections 226.8(a)(1) and (2) of Regulation Z.

3. Failing, in any consumer credit transaction, to disclose accurately the sum of the payments scheduled to repay the indebtedness, and to describe that sum as the "Total of Payments," as required by Section 226.8(b)(3) of Regulation Z.

4. Stating, in any advertisement, the amount of the downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit unless it states all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) The cash price;

(b) The amount of the downpayment required or that no downpayment is required, as applicable;

(c) The number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(d) The amount of the finance charge expressed as an annual percentage rate; and

(e) The deferred payment price.

5. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Section 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Section 226.6, 226.7, 226.8 and 226.10 of Regulation Z, the implementing Regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the consummation of any consumer credit transaction

or in any aspect of preparation, creation, or placing of advertising as relates to any consumer credit transaction, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

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 resultant in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

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

IN THE MATTER OF

RHODES PHARMACAL COMPANY, INC., ET AL.

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

Docket C-1903. Complaint, Apr. 21, 1971—Decision, Apr. 21, 1971

Consent order requiring a Chicago, Ill., seller and distributor of cosmetic and beauty aid products to cease misrepresenting that tests or experiments are proof of any feature of its beauty aid products or using such misrepresentations to induce purchase of respondents' products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Rhodes Pharmacal Company, Inc., a corporation, and J. Sanford Rose, individually and as officer of said corporation, and Elan Corporation, a corporation, and James S. Rose, individually and as officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, 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 in that respect as follows:

PARAGRAPH 1. Respondent Rhodes Pharmacal Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and

place of business located at 200 East Ontario Street, in the city of Chicago, in the State of Illinois.

Respondent J. Sanford Rose is an individual and an officer of the aforementioned corporate respondent. He formulates, directs and controls the acts and practices of the aforementioned corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the aforementioned corporate respondent.

Respondent Elan Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal office and place of business located at 200 East Ontario Street, in the city of Chicago, in the State of Illinois.

Respondent James S. Rose is an individual and an officer of the aforementioned corporate respondent. He formulates, directs and controls the acts and practices of the aforementioned corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the aforementioned corporate respondent.

PAR. 2. Respondents Rhodes Pharmacal Company, Inc., and J. Sanford Rose now, and for some time last past, have been engaged in the sale and distribution of beauty aid products including a skin preparation advertised and distributed under the trade name "Donnatelli" Honey and Egg Creme Facial, containing ingredients which come within the classification of cosmetics as the term "cosmetics" is defined in the Federal Trade Commission Act.

Respondents Elan Corporation, and James S. Rose now, and for some time last past, have been engaged in the sale and distribution of beauty aid products including a skin preparation, of identical composition and properties as the aforementioned skin preparation, advertised and distributed under the trade name "Renascene" Honey and Egg Creme Facial, and in addition, respondents Elan Corporation and James S. Rose now, and for some time last past have been engaged in the sale and distribution of a beauty aid product described as Couvert Make-Up, which beauty aid products contain ingredients which come within the classification of cosmetics as the term "cosmetics" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents now and for some time last past, have been engaged in the sale and distribution of the aforementioned beauty aid products, which, when sold, are shipped to purchasers located in various States of the United States. Thus respondents maintain, and at all times mentioned herein have maintained a substantial

course of trade in said beauty aid products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents at all times mentioned herein have been and now are in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of beauty aid products of the same general kind and nature as those sold by respondents.

PAR. 5. In the course and conduct of their businesses, as aforesaid, respondents have disseminated and caused the dissemination of, certain advertisements concerning the said beauty aid products by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertising inserted in newspapers, magazines and other advertising media, and by means of television broadcasts transmitted by television stations located in various States of the United States, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said cosmetic products, and have disseminated, and caused the dissemination of, advertisements concerning said cosmetic products by various means, including but not limited to the aforementioned media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said cosmetic products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Respondents' major advertising theme consists of so-called "before and after" demonstrations in which two photographs of a woman's face are placed side by side as evidence of the efficacy of the products.

PAR. 7. By and through the use of the aforesaid pictorial demonstrations and statements used in connection therewith, respondents represent, directly or by implication that such demonstration is evidence of how "Donnatelli" and "Renascene" Honey and Egg Creme Facials will tighten loose sagging skin on the chin and throat, firm up puffiness under the eyes, make lines and wrinkles vanish from sight, and provide a more youthful appearance to the user.

By and through the use of the aforesaid pictorial demonstrations and statements used in connection therewith, respondents Elan Corporation, and James S. Rose represent, directly or by implication that such demonstration is evidence of how Couvert Make-Up conceals facial lines, wrinkles, deeply etched furrows, dark circles and other facial flaws.

PAR. 8. In truth and in fact, the "before and after" demonstrations are not evidence of the efficacy of said beauty aid products in that the photographic lighting used in connection with the "before" pictures differs from the photographic lighting used in connection with the "after" pictures; and in addition, with further respect to "Donnatelli" and "Renascene" Honey and Egg Creme Facials, said demonstrations are not evidence of the efficacy of said skin preparation in that the "after" photographs depict women wearing facial make-up which differs in quantity and application from facial make-up worn on women depicted in "before" photographs, and furthermore, that such facial make-up has been applied by a professional make-up artist which fact is not known to the viewer of said advertisements.

Therefore, the advertisements referred to in Paragraphs Six and Seven were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive representation, and the dissemination by the respondents of the false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents 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 respondents 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 that they had reason to believe that the respondents have violated the said Act, and that complaint should issue stating their charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of their Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Rhodes Pharmacal Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 200 East Ontario Street, in the city of Chicago, in the State of Illinois.

Respondent J. Sanford Rose is an individual and an officer of the aforementioned corporate respondent. He formulates, directs and controls the acts and practices of the aforementioned corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the aforementioned corporate respondent.

Respondent Elan Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal office and place of business located at 200 East Ontario Street, in the city of Chicago, in the State of Illinois.

Respondent James S. Rose is an individual and an officer of the aforementioned corporate respondent. He formulates, directs and controls the acts and practices of the aforementioned corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the aforementioned corporate respondent.

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

ORDER

It is ordered, That respondents Rhodes Pharmacal Company, Inc., a corporation, and its officers and J. Sanford Rose, individually and as officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution,

of "Donnatelli" Honey and Egg Creme Facial, or other beauty aid products do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents directly or by implication:

(a) That tests, experiments or demonstrations, or the results thereof, presented either alone or accompanied by oral or written statements, or any other evidence, are proof of any fact or product feature of any such beauty aid products, when in fact such tests, experiments, or demonstrations, or the results thereof, or other evidence do not constitute actual proof of such fact or product feature.

2. Disseminating, or causing the dissemination of any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondents' preparation, the commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations prohibited in Paragraph 1 hereof.

II

It is ordered, That respondent Elan Corporation, a corporation and its officers, and James S. Rose, individually, and as officer of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution, of "Renascene" Honey and Egg Creme Facial, and Couvert Make-Up, or other beauty aid products, do forthwith cease and desist from directly or indirectly.

1. Disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act which represents directly or by implication:

(a) That tests, experiments or demonstrations, or the results thereof, presented either alone or accompanied by oral or written statements, or any other evidence, are proof of any fact or product feature of any such beauty aid products, when in fact such tests, experiments or demonstrations or the results thereof, or other evidence do not constitute actual proof of such fact or product feature.

2. Disseminating, or causing the dissemination of any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of re-

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spondents' preparation, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations prohibited in Paragraph 1 hereof.

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

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate 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 corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

BORDEN, INC.

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

Docket C-1904. Complaint, Apr. 21, 1971—Decision, Apr. 21, 1971

Consent order requiring a New York City seller and distributor of an instant coffee designated "Kava Instant Coffee" to cease misrepresenting that its depictions or demonstrations of any food product are actual proof of the quality of that product, or using such misrepresentation to induce the purchase of such product.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Borden, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, 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 in that respect as follows:

PARAGRAPH 1. Respondent Borden, Inc., is a corporation, organized, existing and doing business, under and by virtue of the laws of the State of New Jersey, with its principal office and place of

business located at 350 Madison Avenue, in the city of New York, State of New York.

PAR. 2. Respondent Borden, Inc., is now, and for some time last past has been, engaged in the manufacture, advertising and offering for sale, sale and distribution of an instant coffee designated "Kava Instant Coffee" and other food products to distributors and to retailers for resale to the public, which products come within the classification of food as the term "food" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its business, respondent Borden, Inc., now causes, and for some time last past has caused, the said "Kava Instant Coffee," when sold, to be shipped from its factories and plants in the various States of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Borden, Inc., has been, and is now, in substantial competition in commerce, with other corporations in the sale of coffee of the same general kind and nature as that sold by said respondent.

PAR. 5. In the further course and conduct of its business, as aforesaid, respondent has disseminated and caused the dissemination of, certain advertisements concerning the said food product by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, and by means of television broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said instant coffee, and have disseminated, and caused the dissemination of, advertisements concerning said food product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said instant coffee in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Respondent, by means of advertisements disseminated, as aforesaid, depicting a pH meter in operation measuring the acidity

of "Kava Instant Coffee" as compared to the acidity of other unnamed brands of coffee, represents, and has represented directly or by implication, that when measuring the acidity of "Kava Instant Coffee" the needle of the pH meter face swings to the extreme right of center; and that when measuring the other brands of coffee, the needle on the pH meter face swings to the extreme left of center.

PAR. 7. In truth and in fact, the aforementioned advertisements depict a so-called "expanded scale" of the pH meter, that is, a 2 pH unit segment of the standard pH meter scale face is expanded to cover the entire 14 unit pH scale face, which exaggerates or misrepresents the disparity between the acidity of Kava Instant Coffee and the acidity of competing unnamed brands of coffee.

Therefore, the advertisements referred to in Paragraph Six were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive representation, and the dissemination by the respondents of the false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondent's, competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

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 the draft of complaint which the Bureau of Consumer Protection propose 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; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all 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 that 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 thirty (30) days, now in further conformity with the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Borden, Inc., is a corporation organized, existing, and doing business, under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 350 Madison Avenue, in the city of New York, State of New York.

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

ORDER

It is ordered, That Borden, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of Kava coffee or any other coffee product or non-dairy food product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents directly or by implication:

That tests, experiments or demonstrations, presented either alone or accompanied by oral or written statements, purport to be actual proof of the product's quality or merits, when in fact such tests, experiments or demonstrations contain distortions or exaggerations and do not constitute actual proof thereof.

2. Disseminating, or causing the dissemination of any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondent's product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations prohibited in Paragraph 1 hereof.

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondent shall within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with the order.

Complaint

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IN THE MATTER OF

MR. TONY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-1905. Complaint, Apr. 22, 1971—Decision, Apr. 22, 1971

Consent order requiring a New York City manufacturer and seller of men's suits to cease misbranding its wool products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mr. Tony, Inc., a corporation, formerly trading under its own name and as Mr. Tony of Park Avenue, Inc., Mr. Tony Contracting, Inc., Mr. Tony of Madison Avenue, Inc., Mr. Tony of Third Avenue, Inc., Mr. Tony of Second Avenue, Inc., Mr. Tony of Fifth Avenue, Inc., and Mr. Tony of First Avenue, Inc., and Irving Lieberman, David Leboni and Richard W. Baker, individually and as officers of the said corporation, and Ann Lieberman, individually and as a former officer of the aforesaid corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 in that respect as follows:

PARAGRAPH 1. Respondent Mr. Tony Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 130 Fifth Avenue, New York, New York.

Corporate respondent, Mr. Tony, Inc., is a successor corporation to several corporations, namely Mr. Tony of Park Avenue, Inc., Mr. Tony Contracting, Inc., Mr. Tony of Madison Avenue, Inc., Mr. Tony of Third Avenue, Inc., Mr. Tony of Second Avenue, Inc., Mr. Tony of Fifth Avenue, Inc., and Mr. Tony of First Avenue, Inc.

Individual respondents Irving Lieberman, Richard W. Baker and David Leboni are officers of the corporate respondent. Richard W. Baker, David Leboni and Ann Lieberman were officers of the predecessor corporations and Irving Lieberman was the general manager

of the predecessor corporations. The individual respondents formulate, direct and control the acts, practices and policies of the said corporation and their address is the same as that of the said corporate respondent.

Respondents are engaged in the manufacture and sale of men's suits.

PAR. 2. Respondents now, and for some time last past, have manufactured 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. 3. Certain of said wool products were 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 men's suits, 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 not exceeding 5 percent of the 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 percent or more; and (5) the aggregate of all other fibers.

PAR. 4. The acts and practices of the respondents as set forth above, 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 or practices in commerce within the meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mr. Tony, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 130 Fifth Avenue, New York, New York.

Corporate respondent, Mr. Tony, Inc., is a successor corporation to several corporations, namely Mr. Tony of Park Avenue, Inc., Mr. Tony Contracting, Inc., Mr. Tony of Madison Avenue, Inc., Mr. Tony of Third Avenue, Inc., Mr. Tony of Second Avenue, Inc., Mr. Tony of Fifth Avenue, Inc., and Mr. Tony of First Avenue, Inc.

Individual respondents Irving Lieberman, Richard W. Baker and David Leboni are officers of the corporate respondent. Richard W. Baker, David Leboni and Ann Lieberman were officers of the predecessor corporations and Irving Lieberman was the general manager of the predecessor corporations. The individual respondents formulate, direct and control the acts, practices and policies of the said corporation and their address is the same as that of the said corporate respondent.

Respondents are engaged in the manufacture and sale of men's suits.

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

ORDER

It is ordered, That respondents Mr. Tony, Inc., a corporation, and its officers, formerly trading as Mr. Tony of Park Avenue, Inc., Mr.

Tony Contracting, Inc., Mr. Tony of Madison Avenue, Inc., Mr. Tony of Third Avenue, Inc., Mr. Tony of Second Avenue, Inc., Mr. Tony of Fifth Avenue, Inc., and Mr. Tony of First Avenue, Inc., and Irving Lieberman, Richard W. Baker and David Leboni, individually and as officers of the said corporation, and Ann Lieberman, individually and as a former officer of the aforesaid corporations, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction, manufacture for 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 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 notify the Commission at least 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 or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the 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.

IN THE MATTER OF

THE COSTUMER TRADING AS TRAVILA, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-1906. Complaint, Apr. 23, 1971—Decision, Apr. 23, 1971

Consent order requiring a Los Angeles, Calif., manufacturer and distributor of women's apparel, including ladies dresses, to cease violating the Flammable Fabrics Act by importing or selling any fabric which fails to conform to the standards of said Act.

Complaint

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that The Costumer, a corporation, trading as Travilla, and William J. Travilla and William V. Sarris, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics Act, as amended, 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 in that respect as follows:

PARAGRAPH 1. Respondent The Costumer, a corporation, trading as Travilla, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Its address is 122 East Seventh Street, Los Angeles, California.

Respondents William J. Travilla and William V. Sarris are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth and their address is the same as that of the corporate respondent.

Respondents are engaged in the manufacture, sale and distribution of women's apparel, including, but not limited to, ladies' dresses.

PAR. 2. Respondents are now and for some time last past have been engaged in the manufacture for sale, the sale and offering for sale, in commerce, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, products; and have manufactured, sold, and offered for sale products made of fabrics or related materials which have been shipped or received in commerce, as the term "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which products fail to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove were ladies' dresses.

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, and consti-

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tuted, and now 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.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Division of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 that it had reason to believe that the respondents have violated the said Acts, 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, and Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Costumer, trading as Travilla, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

Individual respondents are William J. Travilla and William V. Sarris. They formulate, direct and control the acts, practices and policies of said corporate respondent.

Respondents are engaged in the manufacture, sale and distribution of women's wearing apparel, including, but not limited thereto, ladies' dresses with their office and principal place of business located at 122 East Seventh Street, Los Angeles, California.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That the respondents The Costumer, a corporation, trading as Travilla, and its officers and William J. Sarris, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from manufacturing for sale, selling, or offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce or selling or delivering after sale or shipment, in commerce, any product, fabric or related material; or manufacturing for sale, selling or offering for sale, any product made of fabric or related material which has been shipped or received in commerce as "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric or related material fails to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the aforesaid Act.

It is further ordered, That respondents notify all of their customers who have purchased or to whom have been delivered the products which gave rise to this complaint of the flammable nature of said products and effect the recall of said products from such customers.

It is further ordered, That the respondents herein either process the products which gave rise to the complaint so as to bring them into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products.

It is further ordered, That respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission a special report in writing setting forth the respondents' intentions as to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the products which gave rise to the complaint, (2) the number of said products in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said products and effect the recall of said products from customers, and of the results thereof, (4) any disposition of said products since April, 1970, and (5) any action taken or proposed to be taken to bring said products into conformance with the

applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products, and the results of such action. Such report shall further inform the Commission as to whether or not respondents have in inventory any product, fabric, or related material having a plain surface and made of paper, silk, rayon and acetate, nylon and acetate, rayon, cotton or any other material or combinations thereof in a weight of two ounces or less per square yard, or any product, fabric or related material having a raised fiber surface. Respondents shall submit samples of not less than one square yard in size of any such product, fabric, or related material with this report.

It is further ordered, That respondents notify the Commission at least 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 or dissolution of subsidiaries of any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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.

IN THE MATTER OF

KASTORIAN FUR CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1907. Complaint, Apr. 26, 1971—Decision, Apr. 26, 1971

Consent order requiring a New York City manufacturer of fur garments to cease misbranding and falsely invoicing its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Kastorian Fur Corp., a corporation, and Tom

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Papastavros, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, 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 in that respect as follows:

PARAGRAPH 1. Respondent Kastorian Fur Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Tom Papastavros is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporate respondent including those hereinafter set forth.

Respondents are manufacturers of fur products with their office and principal place of business located at 247 West 30th Street, New York, New York.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce" "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as re-

quired by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored when such was the fact.

PAR. 6. Certain of such fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when in fact such fur was pointed, dyed, tip-dyed or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Division of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 that it had reason to believe that the respondents have violated the said Acts, 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 thirty (30) days, now in further conformity

with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Kastorian Fur Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 247 West 30th Street, New York, New York.

Respondent Tom Papastavros is an officer of the corporate respondent. He formulates, directs and controls the acts, practices and policies of said corporate respondent.

Respondents are manufacturers of fur products.

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

ORDER

It is ordered, That respondent Kastorian Fur Corp., a corporation, and its officers and Tom Papastavros, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding any fur product by:

1. Representing directly or by implication on a label that the fur contained in such fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

2. Failing to affix a label to such fur product showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

B. Falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information re-

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quired to be disclosed by each of the subsections of Section 5(b) (1) of the Fur Products Labeling Act.

2. Representing, directly or by implication, on an invoice that the fur contained in such fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

It is further ordered, That respondents notify the Commission at least 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 or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the 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.

 IN THE MATTER OF

LANZ OF CALIFORNIA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-1908. Complaint, Apr. 26, 1971—Decision, Apr. 26, 1971

Consent order requiring a Los Angeles, Calif., importer and distributor of textile fiber products, including silk scarves, to cease violating the Flammable Fabrics Act by importing or selling any fabric which fails to conform to the standards of said Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Lanz of California, Inc., a corporation, and The House of a Thousand Fabrics, a corporation, and Kurt Scharff, Frank Neustatter, Joseph Basch, Werner Scharff, Margarete Rand and Emanuel Rand, individually and as officers of

said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts, and the Rules and Regulations promulgated under the Flammable Fabrics Act, as amended, 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 in that respect as follows:

PARAGRAPH 1. Respondent Lanz of California, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

Respondents Kurt Scharff, Frank Neustatter, Joseph Basch, and Werner Scharff are officers of said Lanz of California, Inc., and they formulate, direct and control the acts, practices and policies of said corporate respondent.

Respondent The House of a Thousand Fabrics is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

Respondents Margarete Rand, Kurt Scharff, Werner Scharff, and Emanuel Rand are officers of said The House of a Thousand Fabrics, and they formulate, direct and control the acts, practices and policies of said corporate respondent.

Respondents are engaged in the importation, sale and distribution of textile fiber products including, but not limited to, silk scarves. The office and principal place of business of Lanz of California, Inc., is located at 6150 Wilshire Boulevard, Los Angeles, California. The office and principal place of business of The House of a Thousand Fabrics is located at 611 South Fairfax Avenue, Los Angeles, California.

PAR. 2. Respondents are now and for some time last past have been engaged in the sale or offering for sale, in commerce, and have imported into the United States, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, products, as "commerce" and "product" are defined in the Flammable Fabrics Act, as amended, which products failed to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove were silk scarves.

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, and as such constituted, and now 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.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Division of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 that it had reason to believe that the respondents have violated the said Acts, 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 thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Lanz of California, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

Respondents Kurt Scharff, Frank Neustatter, Joseph Basch and Werner Scharff are officers of said Lanz of California, Inc., and they formulate, direct and control the acts, practices and policies of said corporate respondent.

Respondent The House of a Thousand Fabrics is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

Respondents Margarete Rand, Kurt Scharff, Werner Scharff, and Emanuel Rand are officers of said The House of a Thousand Fab-

rics, and they formulate, direct and control the acts, practices and policies of said corporate respondent.

Respondents are engaged in the importation, sale and distribution of textile fiber products, including but not limited to, silk scarves. The office and principal place of business of Lanz of California, Inc., is located at 6150 Wilshire Boulevard, Los Angeles, California. The office and principal place of business of The House of a Thousand Fabrics is located at 611 South Fairfax Avenue, Los Angeles, California.

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

ORDER

It is ordered, That respondents Lanz of California, Inc., a corporation, and its officers, and The House of a Thousand Fabrics, a corporation, and its officers, and Kurt Scharff, Frank Neustatter, Joseph Basch, Werner Scharff, Margarete Rand, and Emanuel Rand, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from manufacturing for sale, selling, or offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any product, fabric or related material; or manufacturing for sale, selling or offering for sale products made of fabric or related material which has been shipped and received in commerce, as "commerce," "product," "fabric" or "related materials" are defined in the Flammable Fabrics Act, as amended, which product, fabric or related material fails to conform to any applicable standard or regulation continued in effect, issued or amended under the provisions of the aforesaid Act.

It is further ordered, That respondents notify all of their customers who have purchased or to whom have been delivered the products which gave rise to this complaint of the flammable nature of such products and effect the recall of such products from customers.

It is further ordered, That the respondents herein either process

the products which gave rise to the complaint so as to bring them within the applicable flammability standards of the Flammable Fabrics Act, as amended, or destroy said products.

It is further ordered, That the respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission a special report in writing setting forth the respondents' intentions as to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the products which gave rise to the complaint, (2) the number of said products in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said products and effect the recall of said products from customers, and of the results thereof, (4) any disposition of said products since July 15, 1969, and (5) any action taken or proposed to be taken to bring said products into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products, and the results of such action. Such report shall further inform the Commission as to whether or not respondents have in inventory any product, fabric or related material having a plain surface and made of paper, silk, rayon and acetate, nylon and acetate, rayon, cotton or any other material or combinations thereof in a weight of two ounces or less per square yard, or any product, fabric or related material having a raised fiber surface. Respondents shall submit samples of not less than one square yard in size of any such product, fabric, or related material with this report.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate 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 the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That the 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.

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IN THE MATTER OF

**J.E.M. IMPORTS, INC., DOING BUSINESS AS J. E. MAMIYE
IMPORT COMPANY, ET AL.**

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER IDENTIFICATION
ACTS

Docket C-1909. Complaint, Apr. 26, 1971—Decision, Apr. 26, 1971

Consent order requiring a San Francisco, Calif., importer and distributor of textile fiber products, including bedspreads to cease misbranding such textile fiber products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act 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 J.E.M. Imports, Inc., a corporation, also doing business as J. E. Mamiye Import Company, and Jack E. Mamiye, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act, 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 in that respect as follows:

PARAGRAPH 1. Respondent J.E.M. Imports, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. The respondent corporation maintains its office principal place of business at 1122 Howard Street, San Francisco, California.

Respondent Jack E. Mamiye is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of the corporate respondent including those hereinafter referred to. His address is the same as that of the corporate respondent.

Respondents are engaged in the importation and distribution of textile fiber products including but not limited to bedspreads.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction, delivery for 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, either in their original state or contained in other 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(e) 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 textile fiber products, bedspreads, which contained substantially different amounts and types of fibers than as represented.

PAR. 4. Certain of said 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 to disclose the true percentages of such fibers by weight.

PAR. 5. The acts and practices of respondents as set forth 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 and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge

respondents with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents 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 respondents 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 that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent J.E.M. Imports, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Its office and principal place of business is located at 1122 Howard Street, San Francisco, California.

Respondent Jack E. Mamiye is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of said corporation.

Respondents are engaged in the importation and distribution of textile fiber products, namely bed spreads.

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

ORDER

It is ordered, That respondents J.E.M. Imports, Inc., a corporation, also doing business as J. E. Mamiye Import Company, and its officers, and Jack E. Mamiye, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for 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 whether in its original state or contained in other textile fiber products, 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 the 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 notify the Commission at least 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 or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of the order to each of its operating divisions.

It is further ordered, That the 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.

IN THE MATTER OF

MATHER HEARING AID DISTRIBUTORS, INC., ET AL.

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

Docket 8791. Complaint, July 16, 1969—Decision, Apr. 29, 1971

Order requiring three sellers of hearing aid "devices," two located in Spokane, Wash., and one in Great Falls, Mont., to cease misrepresenting that their hearing aids involved a new scientific principle, would be helpful regardless

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of the hearing disability, prevent deafness, transform high tones to lower tones, were invisible when worn, fit entirely within the ear canal, needed no batteries, and that hearing aids for both ears were more beneficial than for one; respondents also misrepresented that their sales personnel had medical or scientific training, and made other false and misleading representations.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mather Hearing Aid Distributors, Inc., a corporation, United Hearing Centers, Inc., a corporation, Washington Hearing Center, Inc., a corporation, and Marion Spreeuw, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, 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 in that respect as follows:

PARAGRAPH 1. Respondent Mather Hearing Aid Distributors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at North 12 Howard Street, in the city of Spokane, State of Washington.

Respondent United Hearing Centers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Montana, with its principal office and place of business located at 22 Fourth Street North, in the city of Great Falls, State of Montana.

Respondent Washington Hearing Center, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at North 12 Howard Street, in the city of Spokane, State of Washington.

Respondent Marion Spreeuw is an individual and an officer of the corporate respondents. She formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Her address is 4631 NW Boulevard, in the city of Spokane, State of Washington.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribu-

tion of hearing aids which come within the classification of "device" as the term "device" is defined in the Federal Trade Commission Act. Respondents do not manufacture said devices but purchase them from one or more manufacturers.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said devices when sold, to be shipped from their place of business in the State of Washington to purchasers thereof 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 devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of hearing aids of the same general kind and nature as that sold by respondents.

PAR. 5. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and other advertising media for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices; and have disseminated, and caused the dissemination of, advertisements concerning said devices by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

UNITED HEARING CENTERS, INC., 22 Fourth Street North, Great Falls, Montana 59401.

HEARING INFORMATION SERVICE, 22 Fourth Street North, Great Falls, Montana 59401.

Hearing Information Service, 318 Rookery Building, Spokane, Washington 99201.

WESTERN HEARING INSTITUTE, North 12 Howard Street, Spokane, Washington 99201.

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FOR YOU . . . A Marvelous New Invention!
A MODERN MIRACLE! THE TRANSISTOR.

It's a brand new hearing aid that nobody—not even your closest friend—realizes you're wearing. It has no cords, no ear buttons, and no blobs. There's nothing at all behind your ear, in your hair, or in your clothing. . . . Defies detection from front, back and sides, on both men and women. . . .

YOU can own an AMAZING HEARING INVENTION THAT DEFIES DETECTION.

Fits Into Your Ear Canal.

* * * And because it is so tiny that you wear it in the ear canal, you won't be conspicuous as with external type hearing aids * * *

How To Hear Better Without A Hearing Aid.

Tell Me How To Hear Without A Hearing Aid.

NO B BATTERIES.

No Batteries to Change.

Just Slip It In Your Ear and Hear Again as Nature Intended. Do you hear but do not understand? Audibel is offering these true life-size replicas, that you can wear in the privacy of your home, absolutely FREE. It is yours to keep.

PLEASE TELL ME HOW TO HEAR AND UNDERSTAND—IN BOTH EARS.

HEAR WITH BOTH EARS * * * Slip a Personal Amplifier into each ear. Allows you to know where sound is coming from.

A FREE OFFER * * * TODAY FOR YOU * * * Complete Information Fully Illustrated. HEAR in Both Ears * * * DETACH AND MAIL POSTAGE-PAID REPLY CARD TODAY for your FREE Fully Illustrated Brochure.

* * * EXPERT SERVICE * * * Factory Technician * * *

* * * Complete Hearing Aid Overhaul * * *

Representative and illustrative, albeit neither verbatim nor all inclusive, of oral statements and representations made to prospective purchasers by respondents and their salesmen, representatives, and agents, are the following:

Our sales personnel are experts or have medical background in the hearing disability field.

This (hearing aid) works similar to a computer—it automatically takes the high tones, which you don't hear, and throws them into lower tones that you do hear and understand.

Our sales personnel will visit you after the sale to observe your progress, and to check and adjust your hearing aid.

The "word test" or "word test chart" is a reliable standard by which to measure hearing disabilities or hearing improvement.

Use of a hearing aid will always prove beneficial.

Use of a hearing aid will restore or improve an individual's natural or nerve hearing, or will prevent an individual from becoming totally deaf.

Use of a hearing aid will help one to distinguish and understand sounds in group situations or when background noise is present.

PAR. 6. By and through the use of said advertisements, and others of similar import and meaning but not expressly set out herein, and by oral statements and representations of their salesmen and representatives, the respondents have represented, and are now representing, directly or by implication, that:

1. They maintain an office or place of business in Great Falls, Montana.
2. Their primary activity is the dissemination of free information or that they are other than a profit-making organization, through the use of the assumed names, Hearing Information Service and Western Hearing Institute.
3. They merchandise a hearing aid which is a new invention or involves a new mechanical or scientific principle.
4. Their hearing aids are invisible or undiscernible when worn.
5. They merchandise a hearing aid which will fit entirely into the ear canal.
6. They render a service or merchandise a device, not a hearing aid, which will improve an individual's hearing.
7. Certain of their hearing aids do not require batteries.
8. They will supply upon request to those who answer their advertisements a free replica or model of their advertised hearing aid, the use of which will improve an individual's hearing.
9. Use of two of their hearing aids, one in each ear, for those suffering from a hearing disability of both ears, will be more beneficial than use of one.
10. They employ individuals who are experts in the repairing or servicing of hearing aids.
11. Their repair facilities will properly clean, repair or service any hearing aid, including types other than those sold by respondents.
12. Their sales personnel have had medical or scientific education or training which enables them to diagnose hearing disabilities or to prescribe the proper hearing aid for an individual with a hearing disability.
13. They merchandise a hearing aid which will automatically transform high tones, which cannot be heard, into lower tones which can be heard and understood.
14. Their sales personnel will visit the home of a purchaser of

one of respondents' devices to observe the progress of said purchaser in his use of the device, and to adjust and regulate said device, when necessary.

15. The "word test" or "word test chart" is a reliable standard by which to measure hearing disabilities or hearing improvements.

16. Their hearing aids will be beneficial regardless of an individual's type of hearing disability.

17. Use of their hearing aids will restore or improve an individual's natural hearing, or will prevent an individual from becoming totally deaf.

18. Their hearing aids will enable a purchaser to distinguish and understand sounds in group situations or when background noise is present.

PAR. 7. In truth and in fact:

1. Until recently, they did not maintain an office or place of business in any town or city other than Spokane, Washington.

2. Their primary activity is not the dissemination of free information, but is that of a profit-making organization engaged in obtaining the names of potential purchasers, offering for sale, and sale and distribution of hearing aids to the public.

3. The hearing aids they merchandise are not new inventions nor do they involve new mechanical or scientific principles.

4. The hearing aids they merchandise are not invisible or undiscernible when worn.

5. The hearing aids they merchandise will not fit entirely into the ear canal.

6. They do not render a service or merchandise devices other than hearing aids, which will in any way improve an individual's hearing.

7. The hearing aids advertised do require batteries.

8. Use of respondents' hearing aid replicas or models will not improve the hearing of the user.

9. Use of two of their hearing aids, one in each ear, for those suffering from a hearing disability of both ears, will not, in most instances, be more beneficial than the use of one.

11. The individuals they employ are not experts in the repairing or servicing of hearing aids.

11. Seldom do respondents attempt to clean, repair or service hearing aids brought to them for that purpose.

12. Their sales personnel have not had medical or scientific education or training which will enable them to properly diagnose hearing disabilities or to prescribe the proper hearing aid for an individual with a hearing disability.

Complaint

13. The hearing aids they merchandise do not transform high tones, which cannot be heard, into lower tones which can be heard and understood by the wearer.

14. Seldom, if ever, are purchasers of respondents' devices visited by representatives of respondents, nor are the said devices adjusted or regulated by respondents' personnel in the homes of said purchasers.

15. The "word test" or "word test chart" is not a reliable standard by which to measure hearing disabilities or hearing improvement.

16. Their hearing aids will not prove beneficial to all persons with a hearing disability.

17. Use of respondents' hearing aids will not restore or improve an individual's natural hearing, nor will said devices prevent an individual from becoming totally deaf.

18. Their hearing aids in most instances, will not enable an individual with a hearing disability to distinguish and understand sounds in group situations or when background noise is present.

Therefore, the advertisements referred to in Paragraphs Five and Six were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act; and the aforesaid statements and representations referred to in Paragraphs Five and Six were and are false, misleading and deceptive.

PAR. 8. In the course and conduct of their business respondents by use of advertising mailers, including reply cards attached thereto, invite the addressees to return the reply cards with their addresses to respondents in order to receive helpful information relative to improving their hearing. Respondents also insert advertisements and announcements in newspapers of general circulation which inform the public that hearing aids may be brought to a certain address for cleaning, repairing and servicing. Said advertisements and announcements do not restrict or limit the make or type of hearing aid for which such service is offered.

Respondents represent through the use of the aforesaid advertising mailers, and the reply cards attached hereto, that they are making a bona fide offer to furnish free of charge helpful information to those handicapped by deafness; and respondents represent through the aforesaid newspaper advertisements and announcements that they are engaged in a bona fide business of cleaning, repairing and servicing hearing aids.

In truth and in fact the respondents' aforesaid representations

were not and are not bona fide offers to furnish free helpful information as aforesaid, nor are respondents in the bona fide business of cleaning and servicing hearing aids; but to the contrary, said representations were, and are, made by respondents, for the purpose of developing leads to prospective purchasers of respondents' devices.

In numerous instances persons sending in respondents' reply cards for "free" information were visited in their homes by respondents' salesmen for the purpose of selling respondents' devices, and said salesmen have attempted to and often succeeded in selling such persons respondents' hearing aids. Numerous persons who have visited the places designated in respondents' advertising announcements as hearing aid "clinics," have found that respondents' representatives and salesmen disparaged the hearing aids brought in for cleaning, repairing and servicing, and attempted to sell, and often sold, the persons so visiting such "clinics," one or more of respondents' hearing aids.

PAR. 9. The dissemination by respondents of the aforesaid false advertisements and the use of the aforesaid false, misleading and deceptive statements, representations and practices have had, and now have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said advertisements and representations were and are true and into the purchase of substantial quantities of respondents' devices by reason of said erroneous and mistaken beliefs.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of false advertisements as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Mr. Garland S. Ferguson and Mr. William A. Fawcett supporting the complaint.

Erickson & Worthington by Mr. Ross Worthington, Spokane, Wash., for the respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

APRIL 9, 1970

The Federal Trade Commission issued its complaint against the respondents herein on July 16, 1969, charging them with the dissem-

ination of false advertisements and the use of false, misleading, and deceptive statements, representations, and practices that constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. It was charged that such violations occurred in the course of their business of selling and distributing hearing aids which are devices to enable hard-of-hearing people to hear more clearly. The respondents filed their answer which denied most of the allegations of the complaint. Following a prehearing conference, hearings were held at which testimony was adduced and the record was closed on December 5, 1969.

At the close of the case-in-chief, counsel for respondents moved to dismiss the complaint and the hearing examiner reserved his ruling on this motion until his initial decision. Accordingly, the motion to dismiss the complaint is hereby denied for the reasons which appear in the following findings as to the facts and conclusions.

The parties have filed their proposed findings and the proceeding is before the hearing examiner for final consideration. Consideration has been given to the proposed findings of fact and conclusions submitted by all parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected; and the hearing examiner, having considered the entire record herein, makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

1. Respondent Mather Hearing Aid Distributors, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at North 12 Howard Street, in the city of Spokane, State of Washington.

Respondent United Hearing Centers, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its principal office and place of business located at 22 Fourth Street North, in the city of Great Falls, State of Montana. Approximately one year ago, the name of this corporation was changed to United Hearing Aid Center, Inc.

Respondent Washington Hearing Center, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at North 12 Howard Street, in the city of Spo-

kane, State of Washington. Approximately one year ago, the name of this corporation was changed to Washington Hearing Aid Center, Inc.

Respondent Marion Spreeuw is an individual and an officer of the corporate respondents. She formulates, directs, and controls the acts and practices of the corporate respondents. Her address is 4631 Northwest Boulevard, in the city of Spokane, State of Washington.

The aforementioned respondents cooperate and act together in the formulation of policy and acts and practices of the corporate and individual respondents herein.

2. The respondents are now, and for some time last past have been, engaged in advertising, offering for sale, sale, and distribution of hearing aids, which come within the classification of "device" as the term "device" is defined in the Federal Trade Commission Act. Respondents do not manufacture said devices, but purchase them from one or more manufacturers, principal of which at the time of these hearings was The Qualitone Hearing Aid Company, Minneapolis, Minnesota.

The respondents, in the course of their business, sell hearing devices in interstate commerce in the States of Montana, Washington, Idaho, and several counties in Wyoming, immediately south of Billings, Montana. (Tr. 853.)

3. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been and now are, in substantial competition, in commerce, with corporations, firms, and individuals in the sale of hearing aids of the same general kind and nature as that sold by respondents. (Answer; Prehearing Conf., p. 14.)

4. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and other advertising media for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices; and have disseminated, and caused the dissemination of, advertisements concerning said devices by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

UNITED HEARING CENTERS, INC., 22 Fourth Street North, Great Falls, Montana 59401.

HEARING INFORMATION SERVICE, 22 Fourth Street North, Great Falls, Montana 59401.

Hearing Information Service, 318 Rookery Building, Spokane, Washington 99201.

WESTERN HEARING INSTITUTE, North 12 Howard Street, Spokane, Washington 99201.

FOR YOU. . . . A Marvelous New Invention!

A MODERN MIRACLE! THE TRANSISTOR.

It's a brand new hearing aid that nobody—not even your closest friend—realizes you're wearing. It has no cords, no ear buttons, and no blobs. There's nothing at all behind your ear, in your hair, or in your clothing. . . . Defies detection from front, back and sides, on both men and women. . . .

YOU can own an AMAZING HEARING INVENTION THAT DEFIES DETECTION.

Fits Into Your Ear Canal.

. . . . And because it is so tiny that you wear it in the ear canal, you won't be conspicuous as with external type hearing aids. . . .

How To Hear Better Without A Hearing Aid.

Tell Me How To Hear Without A Hearing Aid.

NO B BATTERIES.

No Batteries To Change.

Just Slip It in Your Ear and Hear Again as Nature Intended. Do you hear but do not understand? Audibel is offering these true life-size replicas, that you can wear in the privacy of your home, absolutely FREE. It is yours to keep.

PLEASE TELL ME HOW TO HEAR AND UNDERSTAND—IN BOTH EARS.

HEAR WITH BOTH EARS. . . . Slip a Personal Amplifier into each ear. Allows you to know where sound is coming from.

A FREE OFFER. . . . TODAY FOR YOU. . . . Complete Information Fully Illustrated. HEAR in Both Ears. . . . DETACH AND MAIL POSTAGE-PAID REPLY CARD TODAY for your FREE Fully Illustrated Brochure.

. . . . EXPERT SERVICE. . . . Factory Technician. . . .

. . . . Complete Hearing Aid Overhaul. . . .

Representative and illustrative, albeit neither verbatim nor all inclusive, of oral and written statements and representations made to prospective purchasers by respondents and their salesmen, representatives, and agents, are the following:

Our sales personnel are experts or have medical background in the hearing disability field.

This (hearing aid) works similar to a computer—it automatically takes the high tones, which you don't hear, and throws them into lower tones that you do hear and understand.

Our sales personnel will visit you after the sale to observe your progress, and to check and adjust your hearing aid.

The "word test" or "word test chart" is a reliable standard by which to measure hearing disabilities or hearing improvement.

Use of a hearing aid will always prove beneficial.

Use of a hearing aid will restore or improve an individual's natural or nerve hearing, or will prevent an individual from becoming totally deaf.

Use of a hearing aid will help one to distinguish and understand sounds in group situations or when background noise is present.

(Answer; Prehearing Conf., pp. 15-16).

5. In this paragraph, the representations are discussed separately under numbered subparagraphs.

(1) Respondents represented that they maintained an office or place of business in Great Falls, Montana. They did maintain an office there except for a period of about one year (Tr. 846). It is not shown that they represented that they had this office during that period of time.

(2) Through the use of the names "Hearing Information Service" and "Western Hearing Institute" respondents imply that they are something other than a commercial enterprise. It is correct, as respondents contend, that their representatives clearly stated that they were selling hearing aids, but the names had the capacity to mislead prospective customers. The respondents do not contest this conclusion.

(3) By representing

**FOR YOU . . . A Marvelous New Invention!
A MODERN MIRACLE! THE TRANSISTOR.
and**

It's a brand new hearing aid that nobody—not even your closest friend—realizes you're wearing. It has no cords, no ear buttons, and no blobs. There's nothing at all behind your ear, in your hair, or in your clothing. . . . Defies detection from front, back and sides, on both men and women.

Respondents contend that they sell a hearing aid which is a new invention and involves a new and different kind of hearing aid. The evidence shows that the "automatic volume control" which was represented as new was in use in the mid-1940's (Tr. 116) and that the contact amplifier represented as new was sold in the 1950's. (Tr. 119.) For several years respondents have represented all of the devices they sell as being new. It seems clear that to continue representing these products as being new was misleading. No cases were cited by the parties and none have been found that are directly in point, but the Commission's Advisory Opinion Digest of June 1, 1962, to December 31, 1968, which was cited by complaint counsel, in discussing this subject, states:

Assuming that a particular product could truthfully be described as "new" in the first instance, the opinion noted that there is little precedent for determining how long an advertiser may truthfully continue to describe it as "new." The Commission stated it was aware, of course, that the word has been frequently abused and that it is in the interest of all advertisers to have established ground rules for its use. However, the time period during which a particular product may be called "new" will depend upon the circumstances and is not subject to precise limitations; any selection of a fixed period of time or a rigid cut-off date would have to be arbitrary in nature. Further, any such attempt would not only fence in all advertisers without regard to the circumstances, but would fence in the Commission as well, and deprive it of all flexibility in dealing with individual situations.

Instead, the Commission felt it would be preferable, considering the absence of precedents, to establish a tentative outer limit for use of the claim, while leaving itself free to take into consideration unusual situations which may arise. Thus, the Commission's position was that until such a time as later developments may show the need for a different rule, it would be inclined to question use of any claim that a product is "new" for a period of time longer than six months. This general rule would apply unless exceptional circumstances warranting a period either shorter or longer than six months were shown to exist. (Advisory Opinion Digest No. 120, Released April 15, 1967 [71 F.T.C. 1729].)

As the Commission stated, "any selection of a fixed period of time or a rigid cut-off date would have to be arbitrary in nature" and it would seem that circumstances such as the length of time between major changes in the product should be considered. Usually a good many years elapse before any significant changes are made in hearing aids, and it would appear that in this industry the cut-off date should not be less than one year. The order herein limits the use of the representation "new" to one year.

(4) Respondents have represented that their hearing aids are invisible, that they defy detection when worn, and that they fit entirely into the ear canal. All of the witnesses on this subject agreed that the hearing aids could be seen unless covered by hair and that they do not fit entirely into the ear canal. (Tr. 21, 143, 188, 254.) Respondents do not contest this conclusion.

(5) Respondents have represented that they render a service or merchandise devices, other than hearing aids, which will improve an individual's hearing. The services offered were related to hearing aids, and the devices offered were hearing aids. One device was not referred to by the factory as a hearing aid because it was not worn upon the body but was attached to a handle and held to the ear by the occasional user. (Tr. 690.) While this distinction would have been apparent to a prospective purchaser when the device was shown to him, it would not have been apparent when the prospect

replied to the advertisement. All of these devices were, in fact, hearing aids.

(6) Respondents represented that certain of their hearing aids did not require batteries. All of these hearing aids do require batteries and the respondents do not contest this conclusion.

(7) Respondents have represented that they will supply a free replica or model of a hearing aid. The advertisement states:

Just Slip It in Your Ear and Hear Again as Nature Intended. Do you hear but do not understand? Audibel is offering these true-life size replicas, that you can wear in the privacy of your home, absolutely FREE. It is yours to keep.

It may be argued that the advertisement does not clearly state that the replicas will improve hearing, but such a conclusion is easily drawn from the entire ad. Since it is capable of being construed as offering a free model of an actual hearing aid, which it was not, prospects could be misled by the use of this representation.

(8) Respondents have represented that the use of two hearing aids, one in each ear, for those suffering from hearing disabilities in both ears, will be more beneficial than the use of one hearing aid. This representation was made in advertising and in instructions to salesmen to relate this same recommendation to prospective customers. While there is some dispute between counsel regarding the conclusions to be drawn from the evidence, all of the evidence shows that hearing aids in both ears are not recommended for all patients who have hearing difficulties in both ears. (Tr. 27, 52, 53, 140, 159, 190, 697, 736.) The order proposed by complaint counsel would only prohibit a representation that the use of a hearing aid in each ear will be more beneficial than one unless it is disclosed that many persons suffering from a hearing disability in both ears will not receive greater benefits from two hearing aids rather than one. This prohibition is warranted by the medical testimony.

(9) Respondents have represented that they employ individuals who are experts in repairing and servicing hearing aids and that they maintain repair facilities that will properly clean, repair, or service any hearing aids. Respondents advertise and set up temporary offices for a day or two at a time in many communities throughout the territory in which they sell, at which time they service the hearing aids brought to them by cleaning and adjusting them and by replacing the batteries and the plastic tubes. (Tr. 897, 904.) For major repairs the instruments are sent to the manufacturer or to the Shelby Instrument Co. and an instrument is loaned to the user for temporary use (Tr. 904-907, 955-56). In addition, respond-

ents' representatives upon special request make service trips to the homes of users (Tr. 903, 915).

Respondents' representatives have had some training that enables them to perform the kind of services above described, but they are not factory technicians, do not perform a "Complete Hearing Aid Overhaul," and do not make major repairs on hearing aids. (Tr. 835, 837, 871, 1081.)

(10) Respondents have represented that their sales personnel have had medical or scientific education or training which enables them to diagnose hearing disabilities or to prescribe the proper hearing aid for an individual with a hearing disability. In their answer respondents admitted making such representations but none of their sales personnel have had any medical or scientific education or training. They have had some training in testing hearing by use of the audiometer and in giving word tests to prospective customers. (Tr. 835, 837, 871, 1081.)

(11) Complaint counsel contend that the wearing of white coats by salesmen in the service centers or "clinics," the wearing of an appliance used in testing hearing aids that has the appearance of a stethoscope, the use of tongue depressors in mixing certain preparations, and the use of terms, such as "medical science," create an impression of medical or scientific training. To the extent that these practices when used in combination constitute a representation of expertise beyond that which the salesmen actually possess, such practices are deceptive. The instrument that appears similar to a stethoscope has a practical purpose, the tongue depressors have a practical purpose, and the wearing of white coats may have a practical purpose, but all of these things used together do create an impression of professionalism that does not exist. While it does not constitute a defense to the charge, respondents beginning on June 26, 1968, advised their sales representatives:

This directive is sent to state the company's position relative to the demonstrating and sale of hearing aids.

It is not permissible to state:

1. That a representative is a medical technician or is possessed of medical expertise or is a factory trained technician (unless this latter is the case). White coats and jackets cannot be used or any other device or artifice used to create such an impression. The word "clinic" is not to be used in connection with our service and sales centers held in locations throughout our area.

2. That the wearing of a hearing aid will prevent deafness.

3. That the wearing of a hearing aid will improve an individual's natural hearing, or will affect the natural course of an individual's loss of hearing.

4. That the hearing aid will improve or affect any other physical defect. (RX 1421-Y.)

Complaint counsel do not urge an order specifically prohibiting the use of the accouterment mentioned. None appears necessary and may not even be warranted by the evidence.

(12) Respondents have represented that they merchandise a hearing aid which will automatically transform high tones which cannot be heard into lower tones which can be heard and understood. The expert testimony is that no hearing aids presently marketed could make this transformation (Tr. 29, 117) and there was no contravening evidence. It is therefore concluded that the representation is misleading.

(13) Respondents have represented that their salesmen would visit the homes of purchasers to observe the progress made in the use of the hearing aids and to adjust and regulate them. It was not the policy of respondents to require or request their salesmen to make such visits (Tr. 207, 279, 466, 505, 623, 921). There were occasions, however, when such calls were made at the specific request of a customer (Tr. 623, 915).

(14) Respondents have represented that their "word test" or "word test chart" was a reliable standard by which to measure hearing disabilities or hearing improvement. In testing hearing, respondents have used word lists which have been described by expert witnesses as non-standard (Tr. 59, 134, 180). More recently, they have substituted what are generally considered to be more reliable standardized word lists (Tr. 871, 890). The more recently used word lists are more reliable than the earlier ones, but it is not found that the earlier ones were wholly unreliable and without value.

(15) It is alleged that respondents have represented that their hearing aids will be beneficial regardless of an individual's type of hearing disability. There is considerable medical evidence to the effect that respondents' hearing aids will not be beneficial to all persons who have a hearing disability and that they will not be beneficial for every type of hearing loss. (Tr. 29, 118, 140, 184, 229, 255.) Respondents' position is simply that no such representation was ever made, and the individual respondent testified that she did not instruct dealer representatives to sell a hearing aid regardless of the hearing disability. (Tr. 921) Many of the exhibits make general representations that respondents' hearing aids will be beneficial for hearing disabilities (CX 3-9, 14-25), and one advertisement (CX 51A-D), sent to prospective customers by respondents, represents that their hearing aids will be beneficial for nerve deafness and for conduction deafness, which would appear to cover virtually all cases of deafness.

(16) The complaint alleges that respondents represented the use of a hearing aid will prevent an individual from becoming totally deaf. Respondents concede that this representation is false, and indeed, all the medical evidence on this subject shows that it is false. (Tr. 31, 116, 142, 187.) Since it is shown that the use of a hearing aid will not prevent an individual from becoming totally deaf, the only issue is whether respondents made such representation. The exhibits cited by complaint counsel to support a finding that this representation was made do not support it, and a review of the exhibits does not disclose that this specific representation was made. It appears from the evidence, however, that some of the customers were told that a hearing aid would prevent them from becoming totally deaf, but it seems fair to assume that when respondents learned that their representatives were making such a representation, they instructed them not to do so. In Respondents' Exhibit 1421A-Y (see p. 723 *supra*) there is an instruction that they are not permitted to make this representation. Therefore, it cannot be found that respondents were responsible for its having been made. It is considered that respondents' admission regarding this representation was inadvertent.

In any event this is merely an aggravation of the representations discussed in the immediately preceding and next succeeding paragraphs, and a prohibition relating to them would prohibit a representation that respondents' hearing aids would prevent one from becoming deaf. By definition, the term "deafness" includes total deafness.

(17) It is alleged that respondents have represented that a hearing aid will restore or improve an individual's natural or nerve hearing. Respondents do not contest a finding that this representation is false, but they do deny having made such representation. There are statements in some exhibits couched in somewhat different language that make this representation, and in Commission's Exhibit 51C, there are the phrases—

Similarly, the Hearing Nerve may weaken through disuse. It needs stimulation to maintain alertness and efficiency. That's why a hearing problem shouldn't be neglected. . . . The use of a hearing aid exercises and stimulates the hearing nerve. . . . The use of a hearing aid puts the hearing center back to work, and it does not lie dormant. Usually, this improves one's ability to understand clear, distinct messages. These are only a few of the many benefits derived from using hearing aids.

Thus, it is shown that this representation was made.

(18) It is alleged that respondents represent that the use of a hearing aid will enable a purchaser to distinguish and understand

sounds in group situations or when background noise is present. Respondents' answer admits that they made such a representation but denies that they have represented, directly or by implication, that in all instances their hearing aids will enable a purchaser to distinguish and understand sounds in group situations.

The use of one of respondents' hearing aids provides no absolute assurance that the wearer will be able to consistently distinguish and understand sounds in group situations or when background noise is present. Several qualified physicians testified to this effect (Tr. 31, 142, 536), and a number of purchasers also testified that they had difficulty hearing in group situations or when background noise was present (Tr. 420-25, 429-32, 606-14). Complaint counsel do not contend that respondents' hearing aids will not provide assistance for some people in group situations or when background noise is present, and in their proposed order, the representation is not prohibited outright but is only prohibited if there is not in immediate conjunction therewith a disclosure that many individuals will not receive such benefits. The prohibition proposed is warranted by the evidence.

(19) In the course of their business respondents have sent out many advertising mailers, including reply cards, inviting the addressees to return them with their addresses in order to receive helpful information relative to improving their hearing, and respondents have also advertised in newspapers, stating that hearing aids may be brought to specific addresses for cleaning, repairing, and servicing. These advertisements do not restrict the make of hearing aid for which such service is offered. Complaint counsel contend that through the use of these representations respondents make offers which are misleading. It is true that the advertising mailers are sent primarily for the purpose of obtaining leads to people having hearing problems and that such leads are generally followed by visits of salesmen, and it is likewise correct that the advertisements offering to clean, repair, and service hearing aids at particular addresses are also made for the primary purpose of making sales to people who come to those addresses.

People who reply to the mailers do receive information regarding hearing problems, and those who bring hearing aids to the addresses advertised are prospects for new hearing aids; but they do, in fact, receive service on their old hearing aids, and if major repairs are required the hearing aids are forwarded to experts who make such repairs.

The hearing examiner cannot find that these practices are un-

fair as a matter of law, even though many of the salesmen are primarily concerned with selling new hearing aids and their proficiency in fitting the proper hearing aid is not as accurate as that of a qualified physician. It is also true that many people do receive hearing benefits from these hearing aids, and it is believed that many of these probably would not receive benefits from any other source. The fitting of hearing aids is not an exact science (Tr. 741), and while the salesmen do not conduct their tests in a soundproof room, which is the most desirable place for testing, and while they have in the past used non-standard word lists and may not be expert in operating an audiometer; nevertheless, they do attain a degree of expertise.

CONCLUSIONS

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

The dissemination and use by respondents of the aforesaid false, misleading, and deceptive statements, representations, and practices have had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations were true and into the purchase of substantial quantities of respondents' devices by reason of said erroneous and mistaken belief.

The acts and practices of respondents, found above, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

It is believed that the following order will prohibit the unfair acts and practices found and is sufficiently broad to prohibit similar acts and practices.

ORDER

PART I

It is ordered, That respondents Mather Hearing Aid Distributors, Inc., a corporation, United Hearing Aid Center, Inc., a corporation, Washington Hearing Aid Center, Inc., a corporation, and their officers, and Marion Spreeuw, individually and as an officer of said corporations, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of hearing aids, do forthwith cease and desist from:

1. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents directly or by implication that:

(a) They merchandise a hearing aid which is a new invention or involves a new mechanical or scientific principle when such product or one involving such principle has been marketed in the same area for more than one year.

(b) Their hearing aids are either invisible or indiscernible when worn.

(c) They merchandise a hearing aid which will fit entirely into the ear canal.

(d) They render a service or merchandise a replica, model, or device, not a hearing aid, which will improve an individual's hearing.

(e) A particular model or type of hearing aid does not require batteries, when, in fact, said model or type does require batteries.

(f) Use of two hearing aids, one in each ear, for those suffering from a hearing disability of both ears, will be more beneficial than use of one, unless in immediate conjunction therewith it is clearly and conspicuously disclosed that many individuals suffering from a hearing disability of both ears will not receive greater benefits from use of two hearing aids than from use of one.

(g) They will clean, repair, or service hearing aids, or that they provide service centers where all types of hearing aids may be cleaned, repaired, or serviced, unless in all instances respondents:

(1) Make a bona fide attempt to clean, make minor repairs, or service hearing aids brought to them for that purpose, and

(2) Clearly and conspicuously disclose that they do not themselves perform major repairs, but if such is the fact, they will forward the hearing aids elsewhere for such repairs.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of hearing aids in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1, Part I of this order.

PART II

It is further ordered, That respondents Mather Hearing Aid Distributors, Inc., a corporation, United Hearing Aid Center, Inc., a corporation, Washington Hearing Aid Center, Inc., a corporation, and their officers, and Marion Spreeuw, individually and as an officer of said corporations, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of hearing aids in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Their sales personnel have had medical or scientific education or training.

(b) They merchandise a hearing aid which will transform high tones into lower tones.

(c) Purchasers of hearing aids, sold by respondents, will, after purchase, be routinely visited in their homes by representatives of respondents for the purpose of observing the progress of such purchasers in the use of the devices, or to adjust or regulate said devices when necessary.

(d) Their hearing aids will be beneficial to individuals with hearing problems unless in immediate conjunction therewith it is clearly and conspicuously disclosed that not all individuals suffering a hearing disability will benefit from the use of a hearing aid.

(e) Use of their hearing aids will restore an individual's "natural" or "normal" hearing, will prevent deterioration of an individual's hearing, will prevent an individual from becoming deaf, or will physiologically improve or correct a sensory neural hearing disability.

(f) Use of their hearing aids will enable an individual with a hearing disability to distinguish and understand sounds in group situations or when background noise is present, unless in immediate conjunction therewith it is clearly and conspicuously disclosed that many individuals with a hearing disability will not receive such benefits from the use of a hearing aid.

(g) Their business is other than selling hearing aids to the public for a profit.

2. Misrepresenting in any manner:

(a) The nature or purpose of their business.

(b) The education or training of their sales personnel.

(c) The efficacy of their hearing aids.

3. Failing to deliver a copy of this order to cease and desist to all operating divisions of the corporate respondents and to all officers, managers, and salesmen, both present and future, and any other person now engaged or who becomes engaged in the sale of hearing aids as respondents' agent, representative, or employee; and failing to secure a signed statement from each of said persons acknowledging receipt of a copy thereof.

4. Failing to notify the Commission at least thirty days prior to any proposed change in the corporate 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 that may affect compliance obligations arising out of the order.

OPINION OF THE COMMISSION

APRIL 29, 1971

By DENNISON, *Commissioner*:

I

This case comes before the Commission on the cross-appeals of the respondents and counsel supporting the complaint from the initial decision of the hearing examiner. The proceeding involves alleged violations by the respondents of Sections 5 and 12 of the Federal Trade Commission Act ("the Act") in that they engaged in unfair methods of competition, unfair and deceptive acts and practices, and false advertising of devices, as that term is defined in Section 15(d) of the Act. The complaint was issued on July 16, 1969, and respondents, on August 23, filed their answer denying the allegations in the complaint.¹ After full evidentiary hearings in Seattle and Spokane, Washington, and at Washington, D.C., the hearing examiner issued his initial decision on April 9, 1970, in which he found the major allegations of the complaint to be true.

II

The facts are adequately set forth in the initial decision and, to the extent such facts are not inconsistent with the findings herein, they are hereby adopted by the Commission.

The respondents, Mather Hearing Aid Distributors, Inc., and Washington Hearing Center, Inc.,² are organized and doing business

¹ One answer was filed on behalf of all respondents.

² The corporate name was changed during the course of these proceedings to Washington Hearing Aid Center, Inc.

under the laws of the State of Washington. The respondent, United Hearing Center, Inc.,³ is organized and doing business under the laws of the State of Montana. The individual respondent, Marion Spreuw, is a major stockholder and is an officer of the corporate respondents; as such, she formulates, directs, and controls their acts and practices.

Respondents are, and have been for some time, engaged in the business of selling hearing aids which they purchased from one or more manufacturers. In the furtherance of said business, respondents have caused their products to be advertised, offered for sale, sold, and distributed in commerce, as that term is defined in the Act. Hearing aids are "devices," as that term is defined in the Act. See, e.g., *Forrest A. Jones, d/b/a Oregon Hearing Center, et al.*, 52 F.T.C. 1192 (1956); *Audivox, Inc.*, 56 F.T.C. 215 (1959).

Specifically, the complaint alleges that respondents falsely represented or advertised that:

(a) They maintain an office at their place of business in Great Falls, Montana.

(b) Their primary activity was the dissemination of free information and that they were an organization engaged in nonprofit-making activities.

(c) Their hearing aids involve a new invention of novel mechanical or scientific principles.

(d) Their hearing aids are invisible and undiscernible when worn.

(e) Their hearing aids fit entirely within the ear canal.

(f) They render a service or merchandise a device other than the hearing aid which would improve an individual's hearing.

(g) Their hearing aids would transform high tones into lower tones.

(h) Their hearing aids were beneficial regardless of an individual's type of hearing disability.

(i) Their hearing aid would restore or improve an individual's natural hearing or prevent an individual from becoming totally deaf.

(j) Their hearing aids would enable an individual to distinguish and understand sounds in group situations or where background noise was present.

(k) Their hearing aid does not require batteries.

(l) They would supply a replica or model which would improve hearing to individuals responding to their advertisements.

³ The corporate name was changed during the course of these proceedings to the United Hearing Aid Center, Inc.

(m) "Word tests" and "word test charts" used by respondents were reliable standards to measure hearing disabilities or hearing improvement.

(n) They employed personnel who were experts in repairing and servicing hearing aids.

(o) Their sales personnel had medical or scientific education or training to diagnose and prescribe proper hearing aids for the hard-of-hearing.

(p) Their sales personnel would visit the homes of purchasers, observe the latter's progress, and adjust or regulate the hearing aid when necessary.

(q) Their repair facilities would properly clean, repair or service any hearing aid including types other than those sold by respondents.

Respondents, in their answer, denied the substantive allegations contained in the complaint. From the facts placed in evidence before the hearing examiner, the examiner found the respondents misled the public by misrepresenting or falsely advertising much of the material set forth above.

Based upon the testimony and exhibits, the examiner found that the respondents have falsely advertised and misrepresented that:

1. Their primary activity is something other than a commercial enterprise.
2. Their device involved a new mechanical or scientific principle.
3. Their hearing aid would be beneficial regardless of the nature of the hearing disability and would prevent deafness.
4. Their hearing aid would enable the wearer to distinguish and make understandable sounds in group situations or where background noise was present and would transform high tones to lower tones.
5. The hearing aids respondents sold, or some models of such hearing aids, were:
 - a. Invisible when worn.
 - b. Fit entirely within the ear canal.
 - c. Needed no batteries.
6. Binaural hearing aids (one in each ear) were more beneficial than one.
7. Respondents employ sales personnel having medical or scientific education or training to diagnose or treat the hard-of-hearing.
8. Respondents employ sales personnel who are experts at repairing and servicing hearing aids.
9. A model of the hearing aid which would improve hearing would be supplied free to those responding to respondents' advertisements.

Counsel supporting the complaint appealed from the hearing examiner's order; basing error upon the hearing examiner's failure to:

(a) Find respondents falsely represented they conduct a bona fide business for the dissemination of free material and information for the hard-of-hearing and conduct a business of repairing and servicing hearing aids and to require in the order the affirmative disclosure that a salesman will call.

(b) Find respondents misrepresented their "word test" or "word test chart" as a reliable standard for measuring hearing ability.

(c) Find respondents falsely represented their hearing aid would prevent total deafness.

(d) Find respondents falsely represented they maintained an office in Great Falls, Montana.

(e) State affirmative reasons to hold Marion Spreeuw, in her individual capacity, subject to the order.

(f) Rule on respondents' affirmative defense of noncontrol of independent contractors.

(g) Order a more limited period for the use of the term "new" in respondents' advertising and representations.

The respondents, in their cross-appeal, alleged error in the findings and order of the hearing examiner in the following respects:

1. His order respecting advertising of the beneficial effects of binaural hearing aids.

2. His order prohibiting representations that the hearing aids sold by respondents would transform high tones into lower tones and enable an individual to distinguish and understand sounds in group situations or when background noise is present.

3. His order requiring a copy of the order be distributed to salesmen and others.

After reviewing the record, we find it replete with evidence amply justifying the examiner's findings listed above. Complaint counsel called 25 witnesses, including 9 experts in the field of audiology and otolaryngology and 13 customers of the respondents. These witnesses substantiated the allegations of the complaint. In addition, counsel supporting the complaint called two of respondents' salesmen (one of whom is no longer with the company). Their testimony likewise tends to substantiate many of the allegations of the complaint.

Respondents' counsel called 29 witnesses, including 2 expert witnesses and 2 representatives of the manufacturer of the hearing aids respondents sold. Twenty-one customers also testified on the benefit of respondents' products and their service.

No one can deny the importance of the hearing aid industry. Through its efforts millions of Americans have compensated for hearing disabilities. However, such importance demands the highest degree of responsibility and fairness, particularly where the market is composed of the infirm, usually elderly, consumers who are often credulous and naive. These people are particularly susceptible to overstated advertising promises and misrepresented product claims.

Notwithstanding this obvious caveat for fairness and responsibility, respondents have consistently abused the requirement for fair dealing. For example, in their "procedure for representative" (CX 42), they instructed their salesmen in the use of the audiometer (a hearing testing device) as follows:

1. Look serious when encountering loss.
2. Look worried.
3. Use this sentence . . . "Are you *sure* you don't hear this?" (Emphasis in original.)

In the instructions on use of the word test:

Cover lips or turn back and continue word test, repeating and saying no or shake head, when word is missed. (This gives and shows genuine effort to help them. Understand with facial and body expression.)

In the instructions for completing the questionnaire:

You are aware, Mr. Jones, that your hearing is getting worse? (Very affirmative.)

Again:

DO use the word "Patient," not customer.

Respondents' former salesman, Donald Kirschner, testified that when respondents advertised a hearing clinic for repair and cleaning of any make of hearing aid, if people "came in with a hearing aid that was not clean, if there was wax in the tube, we were instructed not to take the wax out, in that it would not result in a sale." (Tr. 619.) Respondents in their proposed findings of fact contend that the witness Kirschner's testimony is unreliable since he was discharged from his position.

In reviewing the pleadings, evidence and briefs of counsel, the Commission finds no substantial dispute between the parties with respect to most of the findings and order of the hearing examiner. Reviewing the facts as a whole, the prevalent practices of respondents and the abuses to be corrected, the parties' bases for appeal lie primarily in minor and often technical points found in the hearing examiner's initial decision and order.

With respect to the complaint counsel's objection to the finding

relative to respondents maintaining an office in Great Falls, Montana, this matter is subject to such speculation and is of such minor consequence that the finding of the hearing examiner is adopted.

The record discloses that respondents represented that they conducted a business of dispensing free, helpful information to the hard-of-hearing and conducted a business for servicing and repairing hearing aids.⁴ Evidence further discloses that such representations were not wholly untrue. Respondents do supply information to that segment of the public with hearing difficulties and will do minor repairs and servicing of hearing aids, *albeit* with a view toward selling their product. The order of the hearing examiner is sufficiently protective in this regard and, except for the addition noted hereafter, is adopted without modification.

The hearing examiner declined to find the use of soliciting reply cards for "free" information or material as a method of obtaining leads for salesmen as being unfair. This conclusion is unwarranted. Recipients of the "free" information solicitations are entitled to know what strings are attached; that a salesman may call; that they will be subjected to a sales pitch. Our findings and corrective action will be discussed, *infra*. However, the examiner found that respondents' use of "Hearing Information Service" and "Western Hearing Institute" as trade names implied that respondents were something other than a commercial enterprise, and that this would have the capacity to mislead prospective customers. This finding is supported by the evidence and adopted by the Commission.

With respect to the use of the word "new" in advertising, and hearing examiner determined that respondents could, without misrepresentation or deception, advertise or represent their hearing aid as a new invention or involving a new mechanical or scientific principle, provided that such representation is limited to a period of one year from the date the product is introduced to the marketing area.

His order is based on a liberal construction of our advisory opinion⁵ which limits the advertising of "newness" to a period of six months after introduction of the product unless circumstances dictate a different period. In view of the infrequent developments of the technology and advancements in the use of transistors and miniaturization of electronic components and the related impact on the hearing aid industry, it would appear that the hearing examiner's order as to the time limitation on the use of the term "new" is ap-

⁴ CX 16A, 18A, 18B, 19A, 19B and 31-34.

⁵ Advisory Opinion Digest No. 120, released April 15, 1967 [71 F.T.C. 1729].

appropriate and follows Advisory Opinions Nos. 120 and 146 (April 15 [71 F.T.C. 1729] and October 24, [72 F.T.C. 1049]).

However, under the examiner's order, if a product is "new" in a marketing area but not known in another, a company can presumably advertise the product as "new" in the latter area for a period of one year after its arrival. This construction on the concept of "newness" is strained. In advertising "newness" the implication is that the product is new, *i.e.*, "recently invented, discovered or developed," not that it is new to the marketing area. This latter construction is wholly unfounded and an order reflecting this construction retards full market disclosure of new products, thereby denying some consumers the prompt benefits of innovations. Therefore, the permitting of the use of the term "new" in advertising for one year after introduction in a marketing area is not appropriate and, to that extent, the hearing examiner's order is modified.

Complaint counsel objects to the finding that respondents did not misrepresent their "word test" or "word test chart" as a reliable standard to measure hearing disability. The respondents furnished their sales representatives with word test charts containing words chosen to demonstrate hearing problems. Testimony indicates that there is no finite list nor any "approval" or "standardized" list in the industry. The one used by respondents was not shown to be unreliable for the purpose to which it was used. We therefore, adopt the hearing examiner's findings.

Counsel supporting the complaint also contend that the examiner failed to find the respondents falsely represented their hearing aids would prevent total deafness. It appears that respondents' instruction manual inspired the sales representatives to make this representation and witnesses supporting the complaint testified that such representations were made (CX 43c). Customers testified that they were told by respondents that the hearing aids would restore normal hearing⁶ and that they would be deaf in six months if they didn't have a hearing aid.⁷ Respondents concede these representations were false.⁸ We find that respondents falsely represented that their product would restore normal hearing or prevent deafness. The order, as proposed by the hearing examiner, adequately proscribes this form of representation in the future.

Complaint counsel's argument regarding the role of the individual respondent, Marion Spreuw, eludes the Commission. Based on the

⁶ Testimony of Joseph F. Mahoney, Tr. 544.

⁷ Testimony of Eldon D. Schwoek, Tr. 521.

⁸ P. 121, Initial Decision.

evidence, it would appear that adequate findings were made concerning her participation and activity and an appropriate order was rendered. *The Vollrath Company*, Docket No. 8698 [73 F.T.C. 728], is applicable to demonstrate the quantity of proof required to support the finding of the hearing examiner. In this case, the complaint counsel proffered sufficient proof to establish the fact that the individual respondent should be subject to the order and the hearing examiner so found.

The hearing examiner in his decision is required to reach findings relative to affirmative defenses as well as those touching on matters alleged in the complaint. In this instance the hearing examiner failed to meet and deal with respondents' affirmative defense of non-accountability for the acts of independent contractors. The evidence is clear that the agents, employees and salesmen of the respondents were within their control in all matters raised by this complaint and to such extent the respondents are responsible for their acts and representations. Notwithstanding the fact respondents never authorized "the offending conduct of the salesmen [or whether such conduct was] . . . condemned or discouraged by their superiors, it still was conduct which subjects the employers to the jurisdiction of the Commission and to its cease and desist order." *Parke, Austin Lipscomb, Inc. v. F.T.C.*, 142 F. 2d 437, cert. den., 323 U.S. 753 (2d Cir. 1944). No one can seriously question the fact that the respondents are responsible and accountable for the acts of their salesmen. *International Art Co. v. F.T.C.* 109 F. 2d 393 (7th Cir. 1940), cert. den., 310 U.S. 632 (1950). The respondents do not challenge the authority.

Complaint counsel's next argument in his appeal relates to the unlimited extent to which the examiner found that the respondents represented themselves as something other than a commercial enterprise engaged in the business of selling hearing aids. The testimony and exhibits establish that respondents represented and advertised themselves as hearing aid service centers and offerors of free hearing information. Because of the medical nature of hearing problems and the fact that many eleemosynary, social and governmental agencies do offer free services and advice in the health field, the respondents' advertising may create an impression that they are something other than a profit-making organization. *Aronberg v. F.T.C.*, 132 F. 2d 165 (7th Cir. 1942). This advertising is calculated to lead people to respondents for reasons other than buying a hearing aid, although some may have the need. This covert design is obvious when viewing the respondents' activities as a whole. *United*

States Retail Credit Association, Inc. v. F.T.C. 300 F. 2d 212 4th Cir. 1962).

Complaint counsel would have the order require the respondents to affirmatively set out in all advertising not only the fact that they are a profit-making organization but that if a prospect returns a "lead" card a salesman will call. As will be discussed, *infra*, the respondents' business practices lead us to conclude that the most effective way to protect the consumer is to require an affirmative disclosure of respondents' profit-oriented designs. Only by this method may the true motive behind respondents' offers of information, advice and service be made known.

Respondents' appeal questions the examiner's findings as to (1) the efficacy of binaural hearing aids [hearing aid in each ear], and (2) respondents' representation that their hearing aid will transform high tones into lower tones and enable an individual to distinguish and understand sounds in group situations or when background noise is present. Respondents' contention as to the use of binaural hearing aids is that the initial order is at variance with the evidence and that the order requires a disclosure that *many* individuals do not have better hearing with two hearing aids. The evidence clearly established that the respondents have blatantly overstated the value of binaural hearing aids. The issue is whether the modifying terminology in the order over-reacts to the misrepresentation. In reviewing the expert testimony it is clear that *many* people are not benefited by binaural hearing aids and the qualifying language of the initial order is appropriate. We therefore concur in the hearing examiner's findings in this regard and adopt his order as it relates to the representations of the respondents, *viz-a-viz* the binaural hearing aids.

As to the examiner's findings that respondents falsely represented their device to transform high tones into lower ones, there is some conflict as to whether the respondents admitted they engaged in this practice. Even if they did not admit this allegation, the record nevertheless establishes that respondents' advertising left this impression in the minds of potential customers.⁹ *Rhodes Pharmacal Co. v. F.T.C.* 208 F. 2d 382 (7th Cir. 1953). The examiner found respondents represented their device would aid wearers to make sound discriminations in group situations.¹⁰ There was ample evidence introduced indicating respondents made this representation. The

⁹ See CX 51.

¹⁰ Initial Decision, finding 18.

examiner also found this representation to be false and that *many* people were not so benefited by respondents' device. Respondents object to the form of the examiner's order requiring them to qualify their representation to show that *many* wearers are unable to make such sound discriminations in group situations.¹¹ It is respondents' contention that, absent a showing of exact figures or percentages,¹² the Commission cannot prohibit or qualify advertising where the record shows only that the representation is false as it relates to *many people*. This conclusion is untenable and results from a misreading and application of the *Williams* case. The evidence disclosed that *many* people were not helped by respondents' device in discrimination situations and, ergo, the order appropriately requires respondents to indicate this fact to the public. We, therefore, adopt the findings of fact and order of the hearing examiner in this regard.

Finally, respondents object to the requirement that the order be served on present and future personnel. Many of the acts of the respondents were perpetrated by its salesmen in the field. To insure against future violations of the order, such personnel must be advised of the prohibitions contained therein. The required service of a copy of the order is the assurance that respondents' subordinates will be informed of the illegal acts and practices. The order must be broadly circulated to inform as many of respondents' representatives as possible of the prohibited acts. *FTC v Colgate Palmolive Company*, 384 U.S. 374 (1968). This requirement also serves as some protection to the respondents, for should the order not be circulated and a subordinate ignorantly violates the prohibitions therein then, of course, the respondents are liable for civil penalties. While respondents are still accountable for the acts of their salesmen, wide circulation of the order will tend to lessen the risk of inadvertent activity by an overly zealous salesman. *Niresk Industries v. FTC*, 287 F. 2d 337, *cert. den.*, 364 U.S. 883 (1960). Regarding the requirement that the order be served on future subordinates, this again protects respondents from an employee's ignorant act. We find the provision in the hearing examiner's order requiring respondents to notify all present and future personnel of the contents of this order to be appropriate. If, at some future point, it appears the order is no longer appropriate, meaningful or desirable, respondents may petition the Commission for its modification or setting aside. Federal Trade Commission Act, Section 5(b), as amended.

¹¹ Part II-1-(F) of Initial Order.

¹² *J. B. Williams Co. v. FTC*, 381 F. 2d 884 (6th Cir. 1967).

III

In formulating our order, the hearing examiner's order has been modified not only to render it fully consistent with our conclusion, but also to frame it in a context which will be more likely to assure correction of the evils found to exist. *FTC v. Colgate Palmolive Company, supra*.

The representations and advertisements of the respondents blatantly violate the Trade Practice Rules¹³ which have been widely published and followed by many in the industry. For example, Rule 10 defines the representation of a profit organization as nonprofit through the use of such trade names as "Hearing Center," "Hearing Institute," or similar names as an unfair trade practice. Also it is an unfair trade practice to represent deceptively the novelty of the device (Rule 9). Individual respondent, Marion Spreeuw, is acutely aware of our responsibility and interest in this industry and of those practices deemed unfair, false and deceptive. She was an employee of the Oregon Hearing Center at the time a prior investigation by this Commission was being conducted.¹⁴

Respondents, through the use of advertising in newspapers and by direct mail, have given promise and hope to many, many people in the far Northwestern States who have hearing difficulties. From the evidence, many of these people, in responding to this advertising, thought they were obtaining free information or help from a public service institution or similar eleemosynary body. Our order will: (1) prohibit respondents from misrepresenting the nature or purpose of their business, and (2) require the respondents to state in all advertising the fact that they are in the business of selling hearing aids and should a person respond to their advertising a salesman may call for that purpose. This affirmative disclosure does not require the respondents to call upon every prospect, but does require that all are put on notice that there may be a solicitation by the respondents. The nature of the respondents' product and the age and susceptibility of their prospective customers make such an affirmative disclosure necessary to assure that future deceptions do not occur. *FTC v. Ruberoid Company*, 343 U.S. 370 (1952). The fact that other hearing aid distributors are not similarly restricted does not detract from the propriety of this order. *P. F. Collier & Sons Corp., et al. v. FTC*, 427 F. 2d 261 (6th Cir. 1970), *cert. den.*, 400 U.S. 926 (1970).

¹³ Trade Practice Rules, Hearing Aid Industry, 16 CFR 214 (September 6, 1953), as amended.

¹⁴ She was this organization's sales manager. The investigation culminated in an order being issued. *Forrest A. Jones d/b/a Oregon Hearing Center*, 52 F.T.C. 1192 (1956).

Our order, like that of the examiner's seeks a balance between the "reasonable relationship" of the remedy to the unlawful acts (*FTC v. Ruberoid Company, supra*) and the appropriate "fencing in" to prevent future violations of the law. *FTC v. National Lead Company*, 352 U.S. 419 (1957).

FINAL ORDER

Respondents and counsel supporting the complaint having filed cross-appeals from the initial decision of the hearing examiner, and the matter having been heard upon briefs and oral argument; and

The Commission having rendered its decision determining that the initial decision issued by the examiner should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision be modified by striking the order to cease and desist issued by the examiner and substituting therefor the following:

ORDER

PART I

It is ordered, That respondents Mather Hearing Aid Distributors, Inc., a corporation, United Hearing Aid Centers, Inc., a corporation, Washington Hearing Aid Center, Inc., a corporation, or any substitute or successor organization, and their officers, and Marion Spreeuw, individually and as an officer of said corporations, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hearing aids, do forthwith cease and desist from:

1. Disseminating, or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that:

(a) They merchandise a hearing aid which is a new invention, or involves a new mechanical or scientific principle when such product or one involving such principle has been on a market in the United States for more than one year.

(b) Their hearing aids are either invisible or undiscernible when worn.

(c) They merchandise a hearing aid which will fit entirely into the ear canal.

(d) They render a service or merchandise a device, not a hearing aid, which will improve an individual's hearing.

(e) A particular model or type of hearing aid does not require batteries, when, in fact, said model or type does require batteries.

(f) They employ expertly trained individuals to repair or service hearing aids.

(g) They will clean, repair or service hearing aids, or that they provide service centers where all types of hearing aids may be cleaned, repaired or serviced, unless in all instances respondents:

(1) Make a bona fide attempt to clean, repair or service hearing aids brought to them for that purpose, and

(2) Clearly and conspicuously disclose in immediate conjunction therewith that they do not perform major repairs and that they do not perform major service upon hearing aids.

(h) Use of two hearing aids, one in each ear, for those suffering from a hearing disability of both ears, will be more beneficial than use of one, unless in immediate conjunction therewith it is clearly and conspicuously disclosed that many individuals suffering from a hearing disability of both ears will not receive greater benefits from use of two hearing aids than from the use of one.

2. Disseminating, or causing the dissemination of any advertisement by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which fails to clearly and conspicuously disclose that:

(a) The business of respondents is the sale of hearing aids.

(b) Persons replying to respondents' advertisements may be contacted by salesmen, or otherwise, for the purpose of inducing them to purchase a hearing aid sold by respondents.

3. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of hearing aids in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1, Part I of this order, or fails to

comply with the affirmative requirements of Paragraph 2 of Part I thereof.

PART II

It is further ordered, That respondents Mather Hearing Aid Distributors, Inc., a corporation, United Hearing Aid Centers, Inc., a corporation, Washington Hearing Aid Center, Inc., a corporation, or any substitute or successor corporation and their officers, and Marion Spreew, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hearing aids in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Their sales personnel have had medical or scientific education or training which enables them to diagnose hearing disabilities or to prescribe the proper hearing aid for an individual with a hearing disability.

(b) They merchandise a hearing aid which will transform high tones into lower tones.

(c) Purchasers of hearing aids, sold by respondents, will after purchase be routinely visited in their homes by representatives of respondents for the purpose of observing the progress of such purchasers in the use of the devices, or to adjust or regulate said devices when necessary.

(d) Their hearing aids will be beneficial to individuals with hearing problems unless in immediate conjunction therewith it is clearly and conspicuously disclosed that not all individuals suffering a hearing disability will benefit from use of a hearing aid.

(e) Use of their hearing aids will restore an individual's "natural" or "normal" hearing, will prevent deterioration of an individual's hearing, will prevent an individual from becoming deaf, will physiologically improve or correct a sensorineural hearing disability.

(f) Use of their hearing aids will enable an individual with a hearing disability to distinguish and understand sounds in group situations or when background noise is present, unless in immediate conjunction therewith it is clearly and conspicuously disclosed that many individuals with a hearing disability will not receive such benefits from use of a hearing aid.

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(g) Their business is other than selling hearing aids to the public for a profit.

2. Misrepresenting in any manner:

- (a) The nature or purpose of their business.
- (b) The education or training of their sales personnel.
- (c) The efficacy of their hearing aids.

3. Failing to deliver a copy of this order to cease and desist to all operating divisions of the corporate respondents and to all officers, managers and salesmen, both present and future, and any other person now engaged or who becomes engaged in the sale of hearing aids as respondents' agent, representative or employee; and failing to secure a signed statement from each of said persons acknowledging receipt of a copy thereof.

4. Failing to notify the Commission at least thirty (30) days prior to any proposed change in the corporate 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 the initial decision, as modified by the accompanying opinion, and as above modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents 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.

IN THE MATTER OF

KENNECOTT COPPER CORPORATION

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7
OF THE CLAYTON ACT

Docket 8765. Complaint, Aug. 5, 1968—Decision, May 5, 1971

Order requiring the nation's largest copper mining corporation with headquarters in New York City to divest itself within six months of the largest coal producer in the United States with headquarters in St. Louis, Mo., and not to make further acquisitions in the coal industry for the next ten years without prior Federal Trade Commission approval.

COMPLAINT

The Federal Trade Commission has reason to believe that Kennecott Copper Corporation, a corporation, has acquired the business