IN THE MATTER OF

H. MYERSON SONS, ET AL.

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

Docket 8808. Complaint, Feb. 25, 1970—Decision, Feb. 25, 1971

Order requiring Philadelphia, Pa., importers, retailers and wholesalers of fabrics to cease misbranding its textile fiber products and wool products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act and the Wood 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 H. Myerson Sons, a partnership, and Windsor Fabrics, a partnership, and Morris Myerson and Isadore Myerson, individually and as copartners trading as H. Myerson Sons and as Windsor Fabrics, 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 H. Myerson Sons is a partnership with its office and principal place of business located at 770 South Fourth Street, Philadelphia, Pennsylvania.

Respondent Windsor Fabrics is a partnership with its office and principal place of business located at 405 Catherine Street, Philadelphia, Pennsylvania.

Respondents Morris Myerson and Isadore Myerson are individuals and copartners trading as H. Myerson Sons and Windsor Fabrics. They formulate, direct and control the acts, practices and policies of said respondent partnerships. Their addresses are the same as those of the said partnerships.

Respondents are importers, wholesalers and retailers of textile fiber products and wool products.

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 trans-

portation 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(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, with labels on or affixed thereto which represented the fiber content as "all silk" or "all rayon," whereas, in truth and in fact, said products contained different fibers and amounts of fibers than represented.

PAR. 4. Certain of the textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified to show each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

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

(1) To disclose the true percentage of the fibers present by weight; and

(2) To disclose the true generic name of the fibers present.

PAR. 5. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Fiber trademarks were used on labels in conjunction with the required information without the generic name of such fiber appearing in immediate conjunction therewith and in type or lettering of equal size and conspicuousness, in violation of Rule 17(a) of the aforesaid Rules and Regulations.

(b) Generic names and fiber trademarks were used on labels without a full and complete fiber content disclosure appearing on such labels, the first time the generic name or fiber trademark appears on the label in violation of Rule 17(b) of the aforesaid Rules and Regulations.

PAR. 6. Respondent Windsor Fabrics, a partnership, and individual respondents Morris Myerson and Isadore Myerson, individually and as copartners trading as Windsor Fabrics, furnished false guaranties under Section 10(b) of the Textile Fiber Products Identification Act with respect to certain of their textile fiber products by falsely representing in writing that said respondent Windsor Fabrics had a continuing guaranty on file with the Federal Trade Commission, when said respondent Windsor Fabrics did not, in fact, have such a guaranty on file.

PAR. 7. 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 or practices, in commerce, under the Federal Trade Commission Act.

PAR. 8. 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 the Wood Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 9. Certain of said wool products were misbranded by 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 certain wool products, namely fabrics, with labels on or affixed thereto which represented the fiber content as "all silk," whereas, in truth and in fact, said fabric contained different fibers and amounts of fibers than represented, including woolen fibers.

PAR. 10. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

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

PAR. 11. The acts and practices of the respondents as set forth in Paragraphs Nine and Ten were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. James G. Mills and *Mr. Frank W. Vanderheyden* supporting the complaint.

Mr. Frank Fogel, Philadelphia, Pa., for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

JUNE 24, 1970

PRELIMINARY STATEMENT

This proceeding deals with alleged mislabeling and failure to label textile products in violation of the Textile Fiber Products Identification Act and the Wool Products Labeling Act of 1939, and the rules and regulations issued under said acts.[1]

[1] The provisions of 4(a) and 4(b) of the Textile Fiber Products Identification Act (15 U.S.C.A. 70b) are as follows:

"Sec. 4. (a) Except as otherwise provided in this Act, 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) Except as otherwise provided in this Act, 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 per centum or more of the total fiber weight of the product, but nothing in this section shall be construed as prohibiting the use of a non-deceptive trademark in conjunction with a designated generic name: *Provided,* That exclusive of permissible ornamentation, any fiber or group of fibers present in an amount of 5 per centum or less by weight of the total fiber content shall not be designated by the generic name or the trademark of such fiber or fibers, but shall be designated only as 'other fiber' or 'other fibers' as the case may be, but nothing in this section shall be

The Pleadings

The complaint issued February 25, 1970, charges H. Myerson Sons, a partnership; Windsor Fabrics, a second partnership; and Morris Myerson and Isadore Myerson, as individuals and as partners, with misbranding textiles:

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construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount contained in such 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,* That, exclusive of permissible ornamentation, any fiber or group of fibers present in an amount of 5 per centum or less by weight of the total fiber content shall not be designated by the generic name or trademark of such fiber or fibers, but shall be designated only as 'other fiber' or 'other fibers' as the case may be, but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount stated: *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: *And provided 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.

(3) The name, or other identification issued and registered by the Commission, of the manufacturer of the product or one or more persons subject to section 3 with respect to such product.

(4) If it is an imported textile fiber product the name of the country where processed or manufactured."

Rule 17(a) and 17(b) by the Federal Trade Commission under said Act are as follows:

"(a) A non-deceptive fiber trademark may be used on a label in conjunction with the generic name of the fiber to which it relates. Where such a trademark is placed on a label in conjunction with the required information, the generic name of the fiber must appear in immediate conjunction therewith, and such trademark and generic name must appear in type or lettering of equal size and conspicuousness.

(b) Where a generic name or a fiber trademark is used on any label, whether required or non-required, a full and complete fiber content disclosure shall be made in accordance with the Act and Regulations the first time the generic name or fiber trademark appears on the label."

The provisions of 4(a)(1) and 4(a)(2) of the Wool Products Labeling Act (15 U.S.C.A. 68b) are as follows:

"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 5, 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 misbranded 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.

(B) the maximum percentage of the total weight of the wool product, of any nonfibrous loading, filling, or adulterating matter.

(1) By representing the fibers as all silk or all rayon when other fibers were represented (C. 3);[2]

(2) By failing to disclose the true percentage of fibers present by weight and by failing to use the true generic name of the fibers present (C. 4);

(3) Using trademarks without using the generic name in lettering of equal size or using generic names and trademarks without complete fiber content disclosure (C. 5);

(4) By the deceptive tagging of fabrics containing some wool fibers (C. 9); and

(5) Failing to label products containing wool fibers as required by the Wool Products Labeling Act by failing to disclose the percentage of total fibers by weight of each of the fibers as required by regulations thereunder (C. 10).

In addition, the complaint alleged that respondents falsely claimed to have filed a continuing guarantee with the Federal Trade Commission (C. 6). This charge was withdrawn during trial (Tr. 301–02).

Respondents' Answer to Complaint, filed May 4, 1970, admitted the allegations of the complaint that described the character and location of the partnerships (A. 1); but denied that the individuals had acted since July 1966 except as officers of a corporation, H. Myerson Sons, Inc., (A. 2) and denied all of the other allegations (A. 2–6, 7–11). The answer affimatively alleged that Windsor Fabrics had filed a continuing guarantee (A. 6).

Prehearing Conference

A non-public prehearing conference was held March 25, 1970, before Hon. Walter R. Johnson, the hearing examiner then assigned to this proceeding.[3] A prehearing order, filed March 26, 1970, set the date for the commencement of hearings and provided for the filing of trial briefs by the parties that would define and limit the proof and form the basis for the admission of the genuineness of documents.

(C) the name of the manufacturer of the wool product and/or the name of one or more persons subject to section 3 with respect to such wool product."

[2] The following abbreviations will hereinafter (sometimes) be used:

C.—Complaint followed by the paragraph number.

A.—Answer followed by the paragraph number.

CX—Complaint counsel's exhibit followed by the exhibit number.

RX—Respondents' exhibit followed by the exhibit number.

CF—Complaint counsel's proposed findings (including citations to record therein).

RF—Respondents' proposed findings (including citations to record therein).

Tr.—Transcript followed by the page number.

[3] Hearing Examiner Johnson requested that this matter be transferred. This was accomplished by order of Hon. Edward Creel dated May 7, 1970, appointing the undersigned hearing examiner.

The prehearing order was complied with. Trial briefs were filed by the parties, as directed; and the proof was limited, as required, except in a few instances where witnesses were substituted by consent and additional exhibits were offered also by consent.

Respondents, in their trial brief filed May 4, 1970, reiterated the claim that a corporation had succeeded to the business of the partnerships, admitted the results of the laboratory tests, insisted upon strict proof of the connection between the merchandise claimed to be misbranded and the respondents, and claimed that a continuing guarantee had been properly filed.

The Hearings

Hearings commenced at 2 p.m. on May 18, 1970, in the Federal Building, Philadelphia, Pennsylvania, and continued until May 10, 1970. Mr. Isadore Myerson was called as a witness and was recalled several times, and four representatives of the Bureau of Textiles and Furs of the Federal Trade Commission were also called. Forty-seven exhibits were offered by complaint counsel and forty-one received. Respondents offered two exhibits, and both were received.

It was stipulated that H. Myerson Sons, Inc., a Pennsylvania corporation was chartered July 1966 and that it does business at the address of the former partnerships (Tr. 21). The officers are the individual respondents, Isadore Myerson, president and treasurer; Morris Myerson, vice-president; and Teresa Myerson, Isadore Myerson's wife, secretary (Tr. 21, 22). It was also stipulated that the test reports on fabrics might be recieved without the necessity for calling as witnesses the technicians who made the tests (Tr. 20).

At the commencement of hearings, complaint counsel made a motion to amend the complaint to add the corporation, H. Myerson Sons, Inc., and the three officers thereof—Mrs. Myerson was also to be charged in her individual capacity. The hearing examiner immediately sustained respondents' objection to the inclusion of Mrs. Myerson as a party respondent (Tr. 25), and at a later point in the proceeding (Tr. 320), he sustained respondents' objection to the inclusion of the corporate entity as unnecessary, after hearing Mr. Isadore Myerson's testimony that he and his brother, the other individual respondent, controlled the policies of the corporation; and untimely, since complaint counsel had known of the existence of the corporation several weeks before the hearings (Tr. 320–21).

Almost 2 months after the hearings, complaint counsel filed on July 8, 1970, a paper entitled "Renewal of Motion to Amend Complaint." In this paper (page 3) complaint counsel failed to indicate

that one of the reasons for the refusal to amend was that it was unnecessary since an order against respondents', individually, would be adequate as the corporation was a true successor.[4] Respondents' counsel opposed the motion by letter dated July 15, 1970. The renewal motion is also denied for all the reasons originally stated.

The Evidentiary Problems and the Reasons for Their Resolution

During the course of the hearings, there was a continuing objection to the admission of any evidence following the incorporation of H. Myerson Sons, Inc. (Tr. 45). This objection was overruled for two reasons. First the corporation was a true successor to the business which had been conducted by the partnerships, and second, it was owned and controlled by the individual respondents and was, in effect, their agent for the conduct of the business.

There was also a problem of connecting the materials, tested by the Bureau of Textiles and Furs, with the respondents. In the case of Mr. Charles J. Taggart, a Commission investigator, the fabric was purchased directly from respondent Isadore Myerson at respondents' Philadelphia store. There was no testimony by any other purchaser. However, the following proof convinced the hearing examiner that it was more probable than not that the tested swatches were from fabrics sold by respondents. There was in each instance where the swatches were received in evidence either testimony or a record kept in the regular course of business that the fabric sample from which the swatch was taken was purchased at a department or fabric store that represented the fabric to be the same fabric sold to it by respondents. There was also in each instance a record of respondents that a sale had been made of some fabric to the fabric or department store. In each instance, respondent Isadore Myerson was unable to state what fabric was sold, and in each instance the salesperson who sold the fabric could not be produced as a practical matter. In the case of one purchase made by Commission attorney Paul Orloff, there was a description on a label that resembled that on the invoice (CX 38, 39, 41; Tr. 266).

While clearly such proof would be insufficient in a criminal proceeding, the rule of necessity and the lack of motive for a department store seller of the fabric to misrepresent its origin were deemed adequate (Tr. 247). Since the fabric purchased directly from respondent Isadore Myerson was improperly labeled, and since he himself testified that he relied on prior markings and other cir-

[4] See *P. F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261 (6th Cir. May 27, 1970) No. 19549 [8 S. & D. 1188].

cumstances to determine the fabric content (Tr. 315, *et seq.*), the action was deemed appropriate.

In one instance the investigator stated that the assistant buyer from whom he had purchased the fabric believed that the fabric sold was that purchased from respondents, but the buyer had to check with someone else (Tr. 291, 296); the offer of the fabric in evidence was rejected. In another instance the test report (CX 28) did not correspond with the label facsimile (CX 25). In both instances because of these circumstances, the proof was not considered by the hearing examiner in making his decision.

Difficulties with Transcript

Although the taking of testimony in this matter was completed on May 20, 1970, the transcript of the May 19, 1970, hearing was not delivered until June 19, 1970. When it was delivered, it was accompanied by a letter indicating that in eight instances there had been a failure of the electric recorder and that the transcript was not complete. This difficulty had been explained by the reporter on June 9, 1970; and after a telephone conference with both counsel, the hearing examiner issued Post Hearing Order No. 1 dated June 10, 1970. This order approved the expressed intention of the parties to attempt to stipulate those portions of the transcript that were incomplete and to extend each counsels' time to file proposed findings, conclusions, briefs, and a proposed order to June 26, 1970. It also provided for a motion to reopen the proceedings in the event of a failure of the parties to stipulate. This time was thereafter extended to July 13, 1970, by the hearing examiner to allow 2 weeks following the receipt of the transcript for counsel to prepare their proposals and a week thereafter to reply. Complaint counsels' proposed findings were filed on July 10, 1970, and respondents' on July 6, 1970. On July 15, 1970, respondents wrote a letter of reply, and on July 17, 1970, complaint counsel filed a reply.

The attorneys, by exchange of letters, stipulated how blank spaces in the transcript should be completed and also stipulated that such stipulation might be considered part of the record. These and other stipulated corrections are incorporated in an order dated July 20, 1970.

BASIS FOR DECISION

This decision is made on the basis of all the evidence in this proceeding. In conformity with Commission Rule 3.51(b), principal supporting items contain references to the evidence, but the citation

of these references in no way indicate that the evidence as a whole has not been considered. Consideration has also been given to the demeanor of the witnesses in weighing their credibility. Accordingly, the hearing examiner makes the following Findings of Fact, Conclusions, and Order. All proposed findings of fact and conclusions not incorporated in terms or in substance are denied as immaterial, irrelevant, or erroneous.

FINDINGS OF FACT

1. Respondent H. Myerson Sons is a partnership with its office and principal place of business located at 770 South Fourth Street, Philadelphia, Pennsylvania (C., A.).

2. Respondent Windsor Fabrics is a partnership with its office and principal place of business located at 405 Catherine Street, Philadelphia, Pennsylvania (C., A.).

3. Respondents Morris Myerson and Isadore Myerson are individuals and copartners trading as H. Myerson Sons and Windsor Fabrics. They formulate, direct and control the acts, practices and policies of said respondent partnerships. Their addresses are the same as those of the said partnerships (C., A.).

4. Respondents are importers, wholesalers and retailers of textile fiber products and wool products (C., A.).

5. On or about July 1966 the business theretofore conducted by the partnerships was incorporated under the laws of the State of Pennsylvania and the individual partners became officers and stockholders thereof (together with Teresa Myerson, the wife of Isadore Myerson, who became seretary). The said officers have continued to formulate and direct the acts and practices of said corporation (Tr. 21, 22, 34), but the business has been at all times after 1966 that of the corporation (Tr. 317–18).

6. The business conducted by the individual respondents was started about 1922 by Harry Myerson, the father of said respondents and their brother Benjamin Myerson (Tr. 36). It was started with a stand in front of the store and then property was accumulated (Tr. 32, 36). As the sons grew up, they were taken into the partnership. Ben Myerson was the policy maker after his father withdrew, and he continued in that guiding position until his death in 1962 (Tr. 35). Thereafter, the two individual respondents have been the policy makers. Both before and after the incorporation, the trade name, Windsor Fabrics, has been used and that trade name was registered in Harrisburg, Pennsylvania, and Philadelphia, Pennsylvania, by the corporation in 1966 (Tr. 28).

7. Respondents have conducted, as aforesaid, what is primarily a surplus fine-fabric retail and wholesale business. On the buying end, through their contacts with dress manufacturers, and in Europe also with textile mills, respondents buy "better goods, priced right" (Tr. 37). This is made possible through their willingness to pay promptly in cash for fabrics which dress manufacturers have overbought or mills have overproduced (Tr. 37–38, 42–43). On the selling side, respondents maintain a retail store in Philadelphia and also sell woolen and other textile fabrics to fabric stores and department stores outside the State of Pennsylvania. The buyers of both types of stores are knowledgeable people (Tr. 305). In making their interstate sales, respondents neither advertise their textiles nor utilize traveling salesmen (Tr. 39, 304–05, 307). Customers patronize them because they "have unusual things" and "good values" (Tr. 38). Their sales are about $700,000 a year (Tr. 33, 312) of which less than $100,000 of sales are of wool fabric (Tr. 313). Respondents' claim that their business is unique and that no one else "has his hands in every type of different textiles" (Tr. 306–07).

8. According to the testimony of Isadore Myerson, if a fabric comes with a manufacturer's label, the label is left on and the manufacturer's statement of fabric content is accepted (Tr. 315). If there is no label on the cloth, respondents put one on (Tr. 315). If the ticket is lost one "can generally look at the files of the kind of goods it was by another piece very similar to that, see" (sic) (Tr. 41). None of the unlabeled textile products or wool products are ever sent by respondents to a laboratory for analysis (Tr. 41). In most cases fabrics are labeled with their fiber content when received (Tr. 41), and, in rare cases, where the ticket has been lost, respondents attach a label "contents of fabric unknown" or some such terminology (Tr. 42).

Inspection at Respondents' Place of Business

9. In August 1966, Charles J. Taggart, an investigator for the Bureau of Textiles and Furs of the Federal Trade Commission, who had formerly been a detective sergeant with the Philadelphia Police Department (Tr. 87), made an inspection at respondents' premises (Tr. 89). A retail operation was being conducted there (Tr. 93). Mr. Taggart found that there were a number of bolts of fabric that had some foreign words describing their fiber content; that there were some bolts of fabric that had no fiber content tags; and that there were some fiber content tags without a generic name and also fiber trademarks in use (Tr. 91). When Mr. Taggart talked to Isadore

Myerson, Mr. Myerson told him that the business was a partnership conducted by his brother and himself and was established some 45 years previously (Tr. 94). Mr. Taggart drew the following deficiencies to Mr. Myersons' attention: the use of foreign words on some of the bolts of fabric; the use of fabric trademarks in lieu of generic names; and in some instances the bolts didn't have labels (Tr. 95). When questioned about how he could label fabric with the label missing, Mr. Myerson told Mr. Taggart that he had done the best he could. It was difficult because of the nature of his operation, and because he got fabric from so many different sources (Tr. 95). In one specific instance, Mr. Myerson told Mr. Taggart that he had labeled a fabric 100 percent wool because he always bought 100 percent wool from that particular supplier (Tr. 95, 98).

10. In July 1968, Mr. Taggart again visited respondents' place of business by direction of the Washington office (Tr. 100). On this occasion, he requested and obtained Isadore Myerson's permission to get sample swatches from various bolts of fabrics (Tr. 100). The swatches were then sent to Washington for testing (Tr. 100, 109).

11. The first swatch was part of an order invoiced from The Villager in Philadelphia (Tr. 104; CX 6). This swatch bore a label "70% Dacron, 30% wool" (CX 5–C). The test report (CX 7; Tr. 108) which corresponds to the swatch (Tr. 106–08) shows that the fabric consisted of 25–26 percent woolen fabrics, and 73–74 percent polyester (CX 7; Tr. 109).

12. The second swatch (CX 8–A) had a label (CX 8–B) on which no fiber content was stated. This fabric, which was invoiced from Charles Putnam & Co., Inc., of Worcester, Massachusetts (CX 9; Tr. 113), tested "all woolen fibers" (Tr. 117; CX 10).

13. On cross-examination it was brought out that there were seven items selected by Mr. Taggart. Only two were offered in evidence (Tr. 121). It was also elicited that the term Dacron is the Dupont trademark for polyester (Tr. 125).

Field Investigation at Houston, Texas

14. Records of the Federal Trade Commission in the form of field reports (CX 12, 13, 16, 23) made by Robert E. Suggs, deceased (Tr. 148), were identified by Robert C. Bledsoe, Jr., Assistant Chief to the Chief of the Division of Regulations, Bureau of Textiles and Furs of the FTC (Tr. 143). Mr. Bledsoe testified to facts which established that the reports were made in the regular course of the business of the FTC and that it was the duty of Mr. Suggs to make them (Tr. 143–150; CX 11).

15. One of Mr. Suggs' reports (CX 12) dated July 3, 1968 (received, Tr. 197), recited that he contacted Mr. Jerald V. Thomas, the fabric buyer at Joske's department store in Houston, and that he purchased one yard of fabric from each of four rolls identified by Mr. Thomas from order forms and invoices as having been purchased from Windsor Fabrics.

16. A statement by counsel supporting the complaint was made as to the impracticality of producing Mr. Thomas (Tr. 156). This was accepted by counsel for respondent without requiring counsel supporting the complaint to testify (Tr. 196).

17. Two pieces of fabric were marked for identification (CX 15 and CX 20). These bore identification tags signed by Investigator Suggs. They were transmitted to the Washington office by CX 16, a list of exhibits with an invoice (CX 18) and labels (CX 17 and 21). Isadore Myerson identified the labels as his, but he could not identify the handwriting on them that showed the fiber content (Tr. 190), nor could he state that his firm had sold the fabric under the invoice (CX 18) which admittedly showed a sale to Joske's of French Novelties (Tr. 189). Under these circumstances, the hearing examiner admitted the reports under the doctrines of probability and necessity (Tr. 196). The tests on the fabric (CX 19 and 22) were received in evidence without objection. The tests showed that one fabric (CX 15), labeled 51 percent Acrylic, 49 percent Cotton (CX 17), actually was all acrylic (CX 19); and the second fabric, labeled 55 percent Cotton, 45 percent Acetate (CX 21) actually was 46.0–46.3 percent acetate, 45.9–45.5 percent cotton, and 8.1–8.2 percent other fibers (CX 22).

18. A second report by Mr. Suggs (CX 13) dated January 4, 1967 (received, Tr. 247), recited that he contacted Milton L. Aucoin, Jr., of Joske's and secured four samples which Mr. Aucoin assured him had come from Windsor Fabrics although there were no identifying names or numbers. The samples were marked Aucoin Exhibits 1–4. An invoice (CX 26) was received without objection (Tr. 212) showing sales of various pieces of cloth by Windsor Fabrics to Joske's, November 1, 1966.

19. The sample of cloth bearing Mr. Suggs' signature on the label and a stamp designating it as Aucoin Exhibit 1, with the name Milton Aucoin in handwriting with a date "secured 1/4/67" was marked CX 24. A test report reciting that it related to Aucoin Exhibit 1 was received without objection as CX 29 (Tr. 217). This test report shows that the sample was made of silk and rayon. A drawing of three labels (CX 25; received, Tr. 247) bearing Mr. Suggs' sig-

nature, stamp, and identifying number for each label was identified by Mr. Bledsoe who testified that it was Mr. Suggs' duty to draw such labels and to send them to the FTC when labels on the fabric could not be obtained (Tr. 203). The first of these labels, taken from the swatch of cloth designated Aucoin Exhibit 1, indicates that the label on one side stated "Fabric Imported from India" and on the reverse side "All Silk Lot 5 20" (CX 25). The invoice, line 5, seems to read "6 Ps. 91–⅝ In. silk twist Lot #5 (CX 26).

20. Thus, the drawing of the label appears to relate to the Windsor Fabric invoice. Both indicate that the fabric sold was silk (CX 25, 26); whereas, in fact, the swatch was tested and found to contain silk and rayon (CX 29).

21. A second sample of cloth bearing Mr. Suggs' signature on the label and a stamp designating it as Aucoin Exhibit 3 and the name Milton Aucoin in handwriting with a date "secured 1/4/67" was marked CX 27. A test report reciting that it related to Aucoin Exhibit 3 shows that the content of the fabric was rayon and cotton (CX 28). The drawing of the label (CX 25) shows "Imported All Silk Yards 16⅝." This does *not* correspond with CX 28 which states that the product was represented to be all rayon and there is no internal evidence to connect this with respondents' invoice (CX 26). Hence, the sample here will not be attributed to respondent by reason of failure of the test report to correspond to the drawing of the label.

22. A third sample of cloth bearing Mr. Suggs' signature on the label and a stamp designating it Aucoin Exhibit 2 "secured 1/4/67" with the name Milton Aucoin in handwriting was marked CX 30. A test report, reciting that it related to Aucoin Exhibit 2, represented to be all silk, shows that the contents of the fabric was wool and silk (CX 31). The drawing of the label shows: "Imported all Silk Yards 15" (CX 25). It cannot be identified by internal evidence with respondents' invoice (CX 26).

23. A fourth sample of cloth marked Aucoin Exhibit 4 bears Mr. Suggs' signature and also the name Milton Aucoin in handwriting with the date "1/4/67" (CX 32). A test report stating that it related to Aucoin Exhibit 4 was received without objection as CX 33 (Tr. 228). A drawing of the label was offered (CX 35; Tr. 242). This shows "Made All Rayon L–7 in France Yards 18⁶⁰". There is no internal evidence to connect this with respondents' invoice (CX 26). The test report shows that Aucoin Exhibit 4, represented as "All Rayon," was rayon and cotton (CX 33).

24. Because Milton Aucoin was also unavailable (Tr. 241, 247)

and because Mr. Myerson could not state whether or not the swatches of cloth were his (Tr. 235), the records of Mr. Suggs were accepted (Tr. 247). From the analysis above we find that two of the four Aucoin samples were mislabeled, one labeled as "all silk" (CX 24, 25) was silk and rayon (CX 29); the second, Aucoin Exhibit 4, was labeled "All Rayon" (CX 35) and tested rayon and cotton (CX 33). Each of these samples was sold and shipped in interstate commerce (CX 26).

Field Investigation at Kansas City, Missouri

25. Paul G. Orloff, an investigator for the Bureau of Textiles and Furs of the FTC, conducted an inspection at Leiter's Fabrics store in Kansas City, Missouri, on January 10, 1967 (Tr. 251–56). During the course of that inspection he secured a piece of fabric (CX 36), which bore a label (CX 38) (Tr. 256–57). The label was marked "Made in France" and Mr. Orloff in ink made a note "PTD Tergol". This has been scratched out (Tr. 257). Mr. Orloff identified it in this fashion because the label was devoid of fabric content information (Tr. 257). An invoice (CX 39) showed a sale by Windsor Fabrics to Leiter's Fabrics, among other things, of three pieces of printed Tergol, Lot #5, on December 23, 1966 (Tr. 260). In making the sale of the sample of the cloth (CX 36), Mr. James C. Leiter, Jr., the president of Leiter's Fabrics (Tr. 256), said that he had just recieved the fabric from Windsor Fabrics (Tr. 260) and that it was the cloth invoiced as printed Tergol. The test report (CX 40) shows that the product was polyester for which the French name is Tergol. Since the generic name was not used, the product was mislabeled.

26. On the same day Mr. Orloff secured a second sample of fabric from Leiter's Fabrics (CX 41; Tr. 264–66). This fabric according to Mr. Orloff corresponds with that portion of the invoice reading textured French Faccone (Tr. 266; CX 39). The tube on which the fabric was wound had the information "97% cotton, 3% crylor" (Tr. 269; CX 42). Although on test, this fabric appeared to be as labeled (CX 43; Tr. 270), the generic name was not used. Thus it was mislabeled (Tr. 270–71).

Field Investigation at Cleveland, Ohio

27. Mr. Paul A. Misch, an investigator for the Bureau of Textiles and Furs of the FTC, secured a piece of fabric and a label (CX 1, 2) from the Higbee Company (Tr. 276–77), one of the largest department stores in Cleveland (Tr. 278). The buyer had only been

at the store for a month, so she asked the assistant buyer to identify the fabric from Windsor Fabrics that Mr. Misch requested (Tr. 279). Later neither the buyer nor the assistant buyer could be located (Tr. 281, 283). Miss Jacobson apparently was not certain what fabrics were from Windsor Fabrics because she checked with a former buyer (Tr. 286, 288–90) and in his report Mr. Misch stated Miss Jacobson believed the fabric was from Windsor Fabrics. Had she definitely identified the fabric, he testified, he believed he would have said so (Tr. 290). There were no labels or markings on the fabric, so identification depended on the assistant buyer (Tr. 292). The same testimony was deemed to have been given with regard to a second piece of fabric (CX 45; Tr. 297).

28. In light of the uncertainty of identification, the hearing examiner has given the information with regard to the fabric purchased in Cleveland no weight (CX 1 & 2, rejected, Tr. 296).

REASONS FOR DECISION

The first problem the hearing examiner considered was whether or not the proper party (*i.e.*, the corporation) was being sued.

It was clear to the hearing examiner from the testimony of Mr. Taggart and from that of Isadore Myerson, one of the individual respondents, that the business now conducted by H. Myerson Sons, Inc., was a true successor to the family business and was still operated by the same individuals who are respondents (see *P. F. Collier & Son Corp.* v. *FTC*, 427 F. 2d 261 (6th Cir. May 27, 1970) No. 19549 [8 S. & D. 1188]. Thus, the activities of the corporation controlled by the two individual respondents either directly or thru the trade name Windsor Fabrics were, in reality, the acts of the individual respondents. This impression was reinforced by Mr. Taggart's testimony—not denied by respondents—that after the corporation was formed, respondent Isadore Myerson told him the business was that of a family partnership. Under these circumstances, the corporate entity must be disregarded.[5]

Having determined that the acts of the corporation were binding on the individual respondents and that a decree against them would effectively prevent the corporation from again violating the Textile Fiber Products Identification Act or the Wool Products Labeling Act of 1939, the hearing examiner did not consider it necessary to join the corporation as a party respondent. This was particularly

[5] *Joseph A. Kaplan & Sons, Inc.* v. *FTC*, 347 F. 2d 785, 787 (D.C. Cir. 1965); *North American* v. *SEC*, 327 U.S. 686 (1946); *Labor Board* v. *Deena Artwear*, 361 U.S. 398, 403 (1960).

true since respondents in their answer relied on the incorporation as a defense and since complaint counsel deferred action until the date of the commencement of trial to endeavor to change the parties. To change the parties then would, it seemed to the hearing examiner, raise problems of fairness that are wholly unnecessary. We pass now to respondents' contentions.

As respondents' counsel ably argues in his brief, there is no evidence that customers complained to respondents that they were misled; and respondents could not have built up a business such as theirs except through a reputation for fair dealing. Nonetheless, respondents sold fabric in their establishment and shipped in interstate commerce fabrics purchased from them that bore marks and labels contrary to the applicable laws and regulations. These laws and regulations are designed to protect not only the knowledgeable purchaser from fabric stores or department stores but also the run-of-the-mill consumer.

In providing for them Congress determined that it would create a system of marking and labeling, which would prevent inadvertent as well as intentional mislabeling, and would supply to the ultimate consumer information on the fabric tag adequate to insure that the consumer knew what fabric he or she was purchasing.

Motive and intent are wholly immaterial in this type of violation as is lack of proof of actual harm to a particular consumer. It is likewise immaterial that respondents' sought to supply the FTC with some assurance of compliance less than accepting a full order. The Commission's decision in this regard cannot be reviewed or even considered by the hearing examiner. Once the Commission has determined what action it should take the hearing examiner is limited to a determination of whether or not a violation has taken place. In this case, it is in the public interest to carry out the Congressional mandate. This is particularly true in a situation such as this one where the regulations appear to authorize special treatment for a business such as respondents' business. The "odd lots" and "remnants" exceptions would seem to apply where it is impracticable to test fibers in situations in which the contents of particular pieces of goods is not known.[6] Clearly, respondents cannot take advantage of the "odd lots" and "remnants" exceptions and at the same time claim that the fabric sold is of known constituent

[6] See 16 CFR 303.13, 303.14; and *In the Matter of Michael M. Turin, an individual formerly trading as International Yard Fair,* Docket 8757, Initial Decision of Hon. Walter R. Johnson dated January 9, 1969, adopted by the Commission April 11, 1969 [75 F.T.C. 681].

fibers. If a representation is made, respondents must be responsible for it, just as any other wholesale or retail dealer subject to the Acts must be. We turn now to the merits.

On the merits, the proof was clear, and was not denied, that on two occasions, when an inspection was made at respondents' premises, mislabeling was observed. It was also conceded that sales in interstate commerce were made both to Leiter's Fabrics in Kansas City, Missouri, and to Joske's department store in Houston, Texas, by Windsor Fabrics, the trade name used in the business conducted by the respondents. There was some evidence identifying at least one piece of fabric with an invoice concededly representing a sale by respondents. But, and more important, it was impractical to secure any evidence, except evidence of declarations of the purchasers' personnel identifying the respondents' product with that described in respondents' invoice. The purchasers' agent could not be located, as a practical matter, and respondent Isadore Myerson could not identify the product tested nor could he state that it was not sold by him. Hence, the declaration was received as circumstantial evidence of the truth of the statement that the product was the same as that sold by respondents.

The evidence as a whole convinced the hearing examiner that respondents were less than meticulous in their labeling practices. Thus, it was determined, both on the basis of the purchasers' declarations and on respondents' practices, to be more probable than not that the fabrics tested and found to be mislabeled originated from respondents.

Concededly, the fabrics sold to the investigator were misbranded. Accordingly, the hearing examiner decided that a burden was placed on respondents to go forward in the presentation of an adequate explanation. This burden the respondents failed to meet.

Hence, a decision must be rendered in favor of counsel supporting the complaint.

CONCLUSIONS

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

2. The activities of the individual respondents as officers guiding the non-respondent corporation are binding on them in their individual capacities.

3. H. Myerson Sons, Inc., was a *de facto* and *de jure* successor to H. Myerson Sons, the partnership in which the respondents as a family had engaged in the purchase and sale of textiles since 1922.

And, since incorporation, the individual respondents have directed and controlled the acts and practices of said corporation.

4. Respondents are engaged in interstate and foreign commerce within the meaning of the Federal Trade Commission Act, the wool Products Labeling Act of 1939, and the Textile Fiber Products Identification Act.

5. The evidence established that certain fabric located in respondents' Philadelphia store was not labeled in accordance with the rules and regulations adopted pursuant to the Textile Fiber Products Identification Act, and that certain fabric shipped by respondents outside the State of Pennsylvania was also not labeled in accordance with said rules and regulations.

6. The evidence also established that certain fabric located in respondents' Philadelphia store was not labeled in accordance with the rules and regulations adopted pursuant to the wool Products Labeling Act of 1939 and that certain fabric shipped by respondents outside the State of Pennsylvania was also not labeled in accordance with said rules and regulations.

7. The charge that respondents had falsely claimed to have filed a continuing guarantee was withdrawn and no evidence was received with respect to the falsity of the claim of having filed a continuing guarantee.

8. The following order should be issued:

ORDER

It is ordered, That respondents Morris Myerson and Isadore Myerson, individually or trading under any other name or names, 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 textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising, or otherwise identifying any textile fiber product as to the name or amount of constituent fibers contained therein.

2. Failing to affix a stamp, tag, label or other means of identification to each such 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.

3. Using fiber trademarks on labels affixed to such textile fiber products without the generic name of the fiber appearing on the said label in immediate conjunction therewith and in type or lettering of equal size and conspicuousness.

4. Using generic names or fiber trademarks on any labels whether required or nonrequired, without making a full and complete fiber content disclosure in accordance with the Act and Regulations the first time such generic name or fiber trademark appears on the label.

It is further ordered, That respondents Morris Myerson and Isadore Myerson, individually or trading under any name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

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

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification correctly 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.

Final Order

This matter is before the Commission on the appeal of respondents from the initial decision of the hearing examiner. Upon examination of the record and after full consideration of the issues of fact and law presented, the Commission has concluded that the initial decision

should be adopted and issued as the decision of the Commission. Accordingly,

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

It is further ordered, That respondents, Morris Myerson and Isadore Myerson, individually or trading under any other name or names, shall, within sixty (60) days after service of this order 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

TRI-STATE HOME IMPROVEMENT COMPANY, INC., ET AL.

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

Docket C-1877. Complaint Mar. 1, 1971—Decision, Mar. 1, 1971

Consent order requiring Milwaukee, Wisc., sellers and distributors of home improvement products to cease misrepresenting that a prospective customer's home has been specially selected as a model home, that owners of such homes will be granted a discount or that any price is special or reduced, failing to maintain adequate records of its operations for a period of five years, misrepresenting that offers to sell are limited in time, that prize contests are being conducted, that respondents' siding material will last a lifetime, failing to disclose the nature and extent of its guarantees, failing to disclose orally at time of sale the required provisions of Regulation Z of the Truth in Lending Act, and failing to include on the face of all negotiable instruments a notice that all holders of the note are subject to all defense available in an action on a simple contract.

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 Tri-State Home Improvement Company, Inc., a corporation, and George Spector and Howard D. Spector, individually and as officers 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: