

IN THE MATTER OF
PILLSBURY MILLS, INC.

Docket 6000. Order and opinion, June 30, 1954

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. L. E. Creel, Jr., Mr. J. Wallace Adair and Mr. Brockman Horne for the Commission.

Hogan & Hartson and Mr. E. Barrett Prettyman, Jr., of Washington, D. C., and Mr. Terrance Hanold, of Minneapolis, Minn., for respondent.

ORDER DISPOSING OF MOTION AND AMENDING AND SUPPLEMENTING
COMPLAINT

This matter having come on to be heard upon a motion, filed by counsel in support of the complaint, requesting that the complaint herein be amended and supplemented to join Duff Baking Mix Corporation as a party respondent in this proceeding, and to aid certain factual allegations pertaining to the transfer by Pillsbury Mills, Inc., to Duff Baking Mix Corporation of a portion of the assets acquired by Pillsbury from American Home Foods, Inc.; and

The Commission being of the view that Duff Baking Mix Corporation should not be joined as a party respondent, but that a recitation in the complaint of the relevant facts pertaining to Pillsbury's transfer of the assets acquired by it from American Home Foods, Inc., would be of material value in the trial and disposition of the issues involved in this case:

It is ordered, That the request contained in counsel's motion that the complaint be amended to join Duff Baking Mix Corporation as a party respondent in this proceeding be, and it hereby is, denied.

It is further ordered, That to the extent the motion requests that the complaint be amended and supplemented to recite the relevant facts pertaining to the transfer by respondent Pillsbury Mills, Inc., to Duff Baking Mix Corporation of certain of the assets acquired by Pillsbury from American Home Foods, Inc., said motion is hereby granted. A copy of the complaint as so amended and supplements which shall forthwith issued and served upon respondent Pillsbury Mills, Inc., attached hereto.

It is further ordered, That the testimony and other evidence heretofore introduced in support of and in opposition to the allegations in the original complaint shall have the same force and effect as though received at hearings held under the complaint as amended and supplemented.

It is further ordered, That a copy of this order, together with a copy of the special concurring opinion by Commissioner Carretta and a copy of the attached complaint, shall be served upon Duff Baking Mix Corporation, to which corporation leave to request intervention is granted if it so desires.

SPECIAL CONCURRING OPINION BY COMMISSIONER CARRETTA

This matter is before the Commission upon a motion filed by counsel supporting the complaint in which they request the Commission to amend and supplement the complaint originally issued herein by naming Duff Baking Mix Corporation as a party to this proceeding, and in other respects set forth in the proposed draft of amended and supplemental complaint filed with their motion. Counsel for the respondent, Pillsbury Mills, Inc., have filed their reply in opposition to said motion.

This proceeding was originally instituted by the Commission on June 16, 1952, upon issuance of a complaint charging the respondent Pillsbury Mills, Inc., with violation of Section 7 of the Clayton Act, as amended, by reason of its acquisition of the assets of two of its competitors, one of which was Duff's Baking Mix Division of American Home Foods, Inc. After answer had been filed by respondent, considerable testimony was taken in support of the complaint. Respondent then moved the Hearing Examiner to dismiss the complaint for the reason that the Commission had failed to prove that the acquisition involved had been effected in violation of Section 7 of the Clayton Act, as amended. After extensive briefs were filed, and after oral argument was heard by the Hearing Examiner, he ultimately granted respondent's motion to dismiss the complaint on the grounds that the allegations of the complaint had not been supported by reliable, probative, and substantial evidence in the record.

Counsel supporting the complaint then filed an appeal with the Commission from the initial decision of the Hearing Examiner. Briefs were filed by both sides, and oral argument was heard by the Commission. On December 21, 1953, the Commission ordered that the initial decision of the Hearing Examiner be set aside, and remanded the matter to the Hearing Examiner for further appropriate proceedings in accordance with the order issued by the Commission.

It appears now from the motion filed by counsel supporting the complaint to amend and supplement the complaint, and from the answer filed by respondent, that on December 21, 1953, the respondent sold a portion of the assets acquired from American Home Foods, Inc., to Duff Baking Mix Corporation, a corporation organized on Decem-

ber 11, 1953, which assets, the motion reports, were acquired by the latter with notice that they were a part of those representing the subject matter of this then pending proceeding.

The amendatory language as proposed in the subject motion seeks to join Duff Baking Mix Corporation only as a nominal party respondent and does not expressly charge that its acquiring of such assets as a successor to and assignee of respondent Pillsbury Mills, Inc., constituted a violation of law at the outset by Duff Baking Mix Corporation. In my opinion, complaints may be issued by the Commission only when the factual matters presented to it give the Commission reason to believe that the person, partnership, or corporation charged is violating or has violated any of the provisions of an Act administered by the Commission. In the light of this statutory requirement pertaining to the issuance of complaints, and in view of the fact that the amendatory language as proposed in the subject motion does not give the Commission reason to believe that the Duff Baking Mix Corporation has violated any provision of a statute administered by the Commission, the request for amendment joining Duff Baking Mix Corporation as a party respondent should accordingly be denied.

The circumstances that a transfer of the assets in question has occurred during the course of these proceedings does not now appear to render moot the issues currently in the course of trial and should not frustrate the legislative intent expressed in the amended statute under which this proceeding was instituted. Upon final determination of this matter upon its merits, should the greater weight of the evidence show that the acquisitions by respondent Pillsbury Mills, Inc., are or have been in violation of Section 7 of the Act, such relief should be directed as may be necessary to restore competition as contemplated by the Act, including divestiture of all stocks, assets, or other interest secured by respondent from Ballard and American, whether such assets be then in the possession of the respondent or of its successors in interest or assigns, including Duff Baking Mix Corporation.

The "Motion to Amend and Supplement the Complaint," filed by counsel supporting the complaint herein, sets forth in great detail the relevant facts concerning the respondent's recent transfer of assets to Duff Baking Mix Corporation. Being of the opinion that such relevant facts may be of material value in the trial and disposition of the issues involved in this case, and that such facts should not be left open to conjecture, I believe that the public interest requires that the complaint be amended to recite such relevant facts.

Because of the interest which Duff Baking Mix Corporation will necessarily have in any further proceedings in this matter, it appears

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necessary to me that Duff Baking Mix Corporation should be served with a copy of the amended and supplemental complaint being issued herein, and should be advised that the Commission would look with favor upon any application made by it to intervene in this proceeding.

Commissioner Mason concurs in the above opinion.

Chairman Howrey and Commissioner Mead and Commissioner Gwynne do not join in that portion of the opinion which holds that the statute does not permit Duff Baking Mix Corporation to be joined as a party respondent. In cases involving transfer of interest, they expressly leave open the question whether an action may be maintained against the party to whom the interest has been transferred.

AMENDED AND SUPPLEMENTAL COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act (U. S. C. Title 15, Sec. 18) as amended and approved December 29, 1950, hereby issues its amended and supplemental complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Pillsbury Mills, Inc., hereinafter referred to as "Pillsbury," is a corporation organized in 1935 as Pillsbury Flour Mills Co. (present name assumed in 1944) and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located in the Pillsbury Building, 608 Second Avenue South, Minneapolis 2, Minnesota.

Pillsbury, the second largest flour milling company in the United States, operates a number of flour mills located throughout the several States of the United States, and is engaged in the business of milling family and bakery flour. Pillsbury is also engaged in the manufacture of packaged food products having a grain base, including prepared flour-base mixes such as piecrust, hot-roll, cake, and pancake mixes; millfeeds and commercial (or mixed) feeds for livestock and poultry, and dog food; various other food products; products from processed soybeans; and paper and paper bags. Prior to June 12, 1951, Pillsbury's daily flour milling capacity was approximately 82,000 hundredweight, its daily capacity for manufacturing packaged food products was approximately 1,400,000 pounds, and for manufacturing commercial feeds, approximately 2,500 tons. During a twelve-month period in 1949-50, Pillsbury made approximately 9.4% of the total industry sales (in hundredweights) of family flour, 8.2% of bakery flour, 16% of prepared flour-base mixes, and ranked among the

first fifteen companies engaged in the sale of commercial feeds. Pillsbury is also engaged in the buying, selling, and storing of grain, and has a total grain storage capacity of approximately 26,000,000 bushels.

The original business of Pillsbury was established in 1869 under the name of C. A. Pillsbury & Co. and in 1889 was consolidated with Washburn Mill Co., forming the Pillsbury-Washburn Flour Mills Co., Ltd. In 1909 the Pillsbury Flour Mills Co. of Minnesota was established and incorporated, acquiring the quick assets of said Pillsbury-Washburn Flour Mills Co., Ltd., and taking over the operation of its business (later acquiring its remaining assets). When the present corporation was formed in 1935, it acquired the assets of Pillsbury Flour Mills, Inc., a holding company, and said Pillsbury Flour Mills Co. of Minnesota, an operating company, along with the latter's three subsidiaries which had been previously acquired by said operating company.

During the ten-year period, from May 31, 1940 to May 31, 1950, Pillsbury acquired some or all of the assets of six companies. Said acquisition included flour and feed mills, a soybean processing plant, and grain elevators in several States of the United States, thereby substantially increasing Pillsbury's flour milling, feed manufacturing, soybean processing, and grain storage capacities. On or about January 31, 1952, Pillsbury acquired an additional grain elevator of substantial capacity.

During the same ten-year period, Pillsbury's net sales grew from approximately \$47,000,000 to approximately \$201,000,000, its total assets grew from approximately \$30,000,000 to approximately \$59,000,000 and its net worth grew from approximately \$23,000,000 to approximately \$41,000,000.

Pillsbury purchases its grain and other materials used in the manufacture of its various products in commerce, as "commerce" is defined in the Clayton Act, and offers to sell, sells, and ships said products in said commerce throughout the several States of the United States and the District of Columbia. Pillsbury maintains sales offices in twenty-four States and sells its products, primarily through its sales force, to wholesalers, bakeries, retailers, feeders of livestock and poultry, and others, many of whom are located in that part of the United States generally lying east of the Mississippi River and south of the Ohio and Potomac Rivers, hereinafter referred to as the "Southeast."

PAR. 2. Ballard and Ballard Company, hereinafter referred to as "Ballard," was, prior to June 12, 1951, a corporation organized in 1909 as a successor to a partnership of the same name established in 1880, and was doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at 912

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East Broadway, Louisville, Kentucky. Ballard had one wholly owned subsidiary which it had acquired in 1940.

Ballard was engaged in the milling of family and bakery flour and in the manufacture of packaged food products, including prepared flour-base mixes, such as pie-crust, hot-roll, cake and pancake mixes; prepared dough products; millfeeds and commercial (or mixed) feeds for livestock and poultry, and dog food; various other food products; and cloth sacks.

Ballard had a daily flour milling capacity of approximately 5,500 hundredweight, a daily capacity for manufacturing commercial feeds of approximately 1,000 tons (which it used to manufacture a substantial part of the commercial feeds sold in the Southeast), and a total grain storage capacity of approximately 2,000,000 bushels. In order to meet its market requirements, Ballard purchased approximately 250,000 hundredweight of flour annually from other sources.

During the ten-year period, from June 30, 1940 to June 30, 1950, Ballard's net sales grew from approximately \$8,000,000 to approximately \$30,000,000, its total assets grew from approximately \$2,600,000 to approximately \$11,300,000, and its net worth grew from approximately \$2,400,000 to approximately \$5,800,000.

Ballard purchased its grain and other materials used in the manufacture of its various products in commerce, as "commerce" is defined in the Clayton Act, and offered to sell, sold, and shipped its prepared dough products in said commerce throughout the several States of the United States and the District of Columbia. Ballard offered to sell, sold, and shipped its other products in said commerce throughout the several States of the Southeast through its sales force and marketing system, which included warehouses located in from twenty to thirty cities, to wholesalers, bakeries, retailers, feeders of livestock and poultry, and others.

PAR. 3. American Home Products Corporation, a corporation organized and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 22 East 40th Street, New York, New York, wholly controls the voting stock of its corporate subsidiary, American Home Foods, Inc., hereinafter referred to as "American."

Prior to March 10, 1952, American, doing business as Duff's Baking Mix Division, which business it acquired in 1944 from P. Duff's & Sons, Inc., was engaged in the manufacture of packaged food products including prepared flourbase mixes, such as gingerbread, waffle, hot-roll, muffin, and cake mixes. Said products were sold under the brand name of "Duff's."

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American purchased its materials used in the manufacture of its various products in commerce, as "commerce" is defined in the Clayton Act, and offered to sell, sold, and shipped said products in said commerce, throughout the several States of the United States and the District of Columbia.

PAR. 4. On or about June 12, 1951, Pillsbury acquired all or substantially all of the assets of Ballard and presently operates the former business of Ballard as a division of Pillsbury.

On or about March 10, 1952, Pillsbury acquired all or substantially all of the assets of American which were utilized in conducting the business of its Duff's Baking Mix Division, including the property, equipment, and inventory of a mix manufacturing and packaging plant located at Hamilton, Ohio.

PAR. 5. Both Pillsbury and American were, prior to March 10, 1952, leaders throughout the United States in the sale of prepared flour-base mixes. During a twelve-month period in 1949-50, Pillsbury ranked second nationally with sales of approximately 1,219,000 hundredweight which were approximately 16% of the national market, and American ranked fourth nationally with sales of approximately 453,000 hundredweight which were approximately 6% of the national market.

Both Pillsbury and Ballard were, prior to June 12, 1951, leaders in the Southeast in the sale of family and bakery flour and prepared flour-base mixes. In the year 1950 the approximate positions of Pillsbury, Ballard, and American in the sale of family and bakery flour and prepared flour-base mixes in the Southeast were as follows:

	Rank in southeast sales	Amount sold (in round cwts.)	Percent of total southeast sales
Family Flour:			
Pillsbury.....	5th.....	732, 000	3. 66
Ballard.....	3rd.....	930, 000	4. 65
Total.....		1, 662, 000	8. 31
Bakery Flour:			
Pillsbury.....	3rd.....	680, 000	4. 93
Ballard.....	9th.....	500, 000	3. 62
Total.....		1, 180, 000	8. 55
Prepared flour-base mixes:			
Pillsbury.....	1st.....	151, 000	22. 7
Ballard.....	3rd.....	80, 000	12. 0
American (Duff's).....	5th.....	68, 000	10. 2
Total.....		299, 000	44. 9

For many years prior to June 12, 1951, substantial competition, or potential substantial competition, existed between Pillsbury and Ballard, and between each of them and others, and substantial competition, or potential substantial competition, exists and has existed since on or about June 12, 1951, between Pillsbury and others in the offering to purchase and purchasing in interstate commerce of materials used in the milling of flour and in the manufacture of prepared flour-base mixes, feeds, and other products and in the offering to sell and selling of said products in interstate commerce.

For many years prior to March 10, 1952, substantial competition, or potential substantial competition, existed between Pillsbury and American and between each of them and others in the offering to purchase and purchasing in interstate commerce of materials used in the manufacture of prepared flour-base mixes, and in the offering to sell and selling of said products in interstate commerce.

Pillsbury's previous acquisitions of flour-milling companies and the aforesaid acquisition of Ballard are typical of the mergers which have contributed to the present concentration of ownership and control in the flour-milling industry. From 1945 to 1950 the aggregate capacities of the nine largest flour-milling companies, including Pillsbury, grew from approximately 32.7% of total industry capacity to approximately 38.1% thereof. Although wheat flour and its products constitute a substantial and important part of the American diet, in recent years consumer demand for family flour has decreased and during the same period of time said demand for prepared flour-base mixes, which are relatively new products, has rapidly increased. Ownership and control in the prepared flour-base mix industry is already becoming concentrated in a few companies which distribute and advertise prepared flour-base mixes nationally. During a twelve-month period in 1949-50, seven of these companies, including Pillsbury and American, made approximately 70% of the total sales in said industry.

Prior to the acquisitions of Ballard and American, Pillsbury possessed sufficient economic power to enable it to engage in the granting of price discriminations, and it did in fact exercise and abuse such power by that and other methods, thereby diverting trade from its competitors to itself. Said acquisitions have added substantially to such power and have enabled Pillsbury to further divert trade from its remaining competitors with even more damaging results.

PAR. 6. The effect of the aforesaid acquisitions by Pillsbury of all or substantially all of the assets of Ballard and the Duff's Baking Mix Division of American, or all or substantially all of the assets of either of them, may be substantially to lessen competition, or to tend to create a monopoly in the lines of commerce, as "commerce" is defined

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in the Clayton Act, in which the acquired companies were engaged throughout various sections of the United States.

PAR. 7. The foregoing alleged acts and practices of respondent Pillsbury as set forth herein constitute a violation of Section 7 of the Clayton Act (U. S. C. Title 15, Sec. 18) as amended and approved December 29, 1950.

PAR. 8. In June 1952 the Commission issued and served upon Pillsbury its original complaint in this matter. The charges in said complaint were in all material respects identical to the charges as set forth in Paragraphs 1 through 7 herein. Issue was joined; hearings were held during which the case in chief of counsel supporting the complaint was introduced in evidence; following a motion to dismiss by Pillsbury, the hearing examiner held that a *prima facie* case had not been established and filed his initial decision providing for dismissal of the complaint without prejudice; and upon counsel's appeal therefrom, the Commission on December 21, 1953, set aside the initial decision and remanded the case to the hearing examiner for further appropriate proceedings.

PAR. 9. Duff Baking Mix Corporation, hereinafter referred to as "Duff Corporation," is a corporation organized on December 11, 1953, 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 830 Broad Street, Newark, New Jersey.

On or about December 21, 1953, Pillsbury sold, assigned and transferred to Duff Corporation, pursuant to various arrangements and agreements, one of which was under date of December 15, 1953, certain of its assets which had been acquired by Pillsbury on March 10, 1952, from American. Said assets sold, assigned and transferred by Pillsbury to Duff Corporation included the business of selling and distributing prepared baking mixes, such as waffle, hot muffin, corn muffin, hot roll, layer cake, devil food, spice cake and gingerbread mixes, under the trade name "Duff's," the going-concern value, goodwill, trademarks, copyrights and patents incident to said business; and the formulae and manufacturing methods, processes and techniques used in connection therewith. Said sale by Pillsbury to Duff Corporation did not include, among other things, the physical property and equipment acquired by Pillsbury from American such as land, buildings and machinery.

The terms and conditions of sale of said assets by Pillsbury to Duff Corporation provided for a sales price of \$750,000, of which \$50,000 was paid upon the execution of the sale with the remainder to be paid in the form of a surcharge assessed on all mixes manufactured for sale by the Duff Corporation and beginning in 1955 by the payment

from Duff Corporation to Pillsbury of 50% of all annual net profits of the Duff Corporation in excess of \$75,000. It was further provided, among other things, that for a period of two years Pillsbury would furnish from the Hamilton plant, which it had acquired from American, Duff Corporation's prepared mix requirements, but not in excess of a figure which was represented to be 20% of the 1954 estimated total production of prepared mixes at said Hamilton plant; that Pillsbury would have the option of manufacturing Duff labeled mixes to conform to current formulae used for manufacturing Pillsbury labeled mixes; that Pillsbury would have the option of conforming the types and dimensions of Duff's labeled mixes manufactured to those used in packaging Pillsbury labeled mixes; and until \$500,000 of the purchase price shall have been paid, Duff Corporation could not sell or divest itself of the assets acquired from Pillsbury without the written consent of Pillsbury.

Duff Corporation entered into the agreements and arrangements, as heretofore described in this Paragraph, with Pillsbury with full knowledge that said assets, together with other assets heretofore described in Paragraph 3 herein, were the subject of a proceeding brought by the Federal Trade Commission in which it was charged that the acquisitions by Pillsbury of Ballard and the Duff's Baking Mix division of American, as heretofore described, constituted a violation of Section 7 of the Clayton Act, as amended.

Duff Corporation purchases all, or nearly all, of its prepared mixes in commerce, as "commerce" is defined in the Clayton Act, and offers to sell, sells and distributes said products principally through brokers throughout the several States of the United States and the District of Columbia.

PAR. 10. The sale by Pillsbury of a portion of the assets previously acquired by it from American and the purchase of such portion by Duff Corporation, as set forth in Paragraph 9 herein, does not constitute such a disposition of said assets as to render moot the violations of Section 7 of the Clayton Act, as amended, as charged in Paragraphs 1 through 7 herein.

IN THE MATTER OF
STANRICH MILLS CORP. AND MAURICE MARCUS

Docket 6070. Complaint, Dec. 12, 1952—Decision and opinion, June 30, 1954

Charge: Misbranding interlining fabrics in violation of the Wool Products Labeling Act.

Before *Mr. John Lewis*, hearing examiner.
Mr. George E. Steinmetz for the Commission.

DECISION AND OPINION OF THE COMMISSION

This matter has come before the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner. A brief in support of the appeal has been filed. No brief has been filed by respondents. Oral argument has not been requested.

In support of his appeal counsel supporting the complaint contends that the hearing examiner erroneously held that the record did not establish that the fabrics which respondents denied being of their manufacture were their products and that the proof as to the remaining fabrics was not sufficient under the circumstances to justify the issuance of a cease and desist order.

The Commission has carefully reviewed the matter and is of the opinion that the hearing examiner has correctly analyzed the evidence and that his initial decision is proper in all respects.

It is ordered, therefore, That the appeal of counsel supporting the complaint is hereby denied, and that the initial decision is hereby adopted as the decision and opinion of the Commission.

It is further ordered, That the complaint in this proceeding is hereby dismissed.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

This proceeding came on to be considered by the above-named Hearing Examiner, heretofore duly designated by the Commission, upon the complaint of the Commission, the answer of respondents thereto, and testimony and other evidence introduced in support of and in opposition to the allegations of the complaint at hearings held herein. The undersigned, being of the opinion that the evidence of violation is not sufficiently substantial to require any corrective action in the public interest, will order that the complaint herein be dismissed,

without prejudice. The reasons and basis for such dismissal are as follows:

Respondent Stanrich Mills Corporation (hereinafter referred to as Stanrich) is engaged in the manufacture of various types of cloth. Respondent Maurice Marcus is its President and Treasurer and controls its operations. The events at issue occurred during 1951 and the early part of 1952. Until the end of 1951 Stanrich was largely engaged in the weaving of interlining cloth for sale to textile wholesalers and to clothing manufacturers. During this period Stanrich operated a mill in Worcester, Massachusetts, where it performed both spinning and weaving operations, sending out its cloth on a commission basis to be finished and dyed by others. The yarn used in the weaving of its cloth was spun from wool stocks, consisting of thread and card waste from other mills, which Stanrich purchased through a middleman. Toward the end of 1951, Stanrich ceased making interlining cloth almost entirely and began manufacturing cloth which it cut up into blankets and sold as such.

During the middle of 1952, Stanrich bought out the Thayer Woolen Mills, a considerably larger mill, in North Oxford, Massachusetts, and since that time it has been performing many of the operations which were theretofore performed for it on a commission or subcontract basis. It is now engaged almost exclusively in making cloth for blankets which it completes and sells to the trade.

The complaint charges respondents with misbranding certain wool products in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder. Specifically, respondents are charged with falsely labeling as "100% Wool", "100% Virgin Wool", or as "All Wool" certain of its interlining fabrics and blankets which contained reused or reprocessed wool, together with substantial quantities of miscellaneous fibers other than wool, and with failing to disclose on certain interlining fabrics the name or registered identification number of the manufacturer or other proper person.

The evidence offered in support of the complaint revolves about eleven pieces of fabric alleged to have been manufactured by Stanrich. Three of the pieces (Com. Exs. 22, 23 and 24) were obtained from Stanrich by a Commission investigator and purport to be samples of interlining fabrics manufactured by Stanrich for sale to the trade. The remaining eight pieces (Com. Exs. 25-A to 32-A) were obtained by another Commission investigator from various customers of Stanrich. Seven of these eight pieces purport to be samples of interlining fabric actually manufactured and sold by Stanrich and the eighth (Com. Ex. 31-A) is a blanket also alleged to have been manufactured and sold by Stanrich.

Identification tags attached to the various samples of interlining fabric describe them as containing "All Wool—Exclusive of Ornamentation." According to tests made by the National Bureau of Standards these fabrics contain varying amounts of non-wool fibers. The amount of non-wool fiber in most of the samples is approximately 9 percent, although one sample (Com. Ex. 32-A) is as much as 20 percent non-wool and another (Com. Ex. 25-A) is as high as 32 percent non-wool. The blanket (Com. Ex. 31-A) tested 98 percent wool and counsel supporting the complaint has waived any claim of misbranding with respect to it. Although the reports of the tests state that the various samples reflect "wool fiber damage" which is considered indicative of the presence of reused or reprocessed wool, they concede that there is no method known for the quantitative determination of such reused or reprocessed fiber. According to respondent Marcus and the expert witness Musgrave, the presence of damaged fiber may be the result of the rather harsh picking and garnetting process to which the thread and card waste is subjected in reducing them to fiber form, and not to the presence of reused or reprocessed wool. On the present state of the record no finding can be made as to the presence of reused or reprocessed wool in the samples received in evidence. This leaves as the primary issue for disposition the question of whether respondents are responsible for misbranding wool products containing substantial quantities of non-wool fiber.

Respondents concede that the three pieces of fabric obtained from their place of business were manufactured by Stanrich but, for the reasons which will hereafter appear, contend that no claim of misbranding may be based thereon. They likewise admit that the blanket (Com. Ex. 31-A) and one of the seven pieces of interlining fabric (Com. Ex. 27-A), which were obtained from Stanrich's customers, were manufactured and sold by Stanrich. While admitting that they sold the remaining six pieces of interlining fabric to various customers, respondents deny having manufactured these pieces and deny responsibility for their misbranding. A considerable portion of the evidence in this proceeding was devoted to the question as to whether these six pieces of fabric were manufactured by Stanrich. Since in the opinion of the undersigned a resolution of this issue is important to the outcome of this proceeding, it will be disposed of first.

1. The Six Pieces of Interlining Fabric Obtained From Stanrich's Customers

Respondents' explanation of how six pieces of fabric which they had not manufactured came into the hands of their customers is substantially as follows:

During the early part of 1951, Stanrich sold several hundred pieces of interlining fabric to one of its customers in New York City, Henry Gewirtz Textile Corp. (hereinafter referred to as Gewirtz). According to respondents, the market in textiles at the time of these sales was rising sharply due to the Korean War, but that after a slump in the market later in the year, Gewirtz, in August 1951, insisted on returning most of the fabric, using as a pretext the claim that he had found it was not all-wool. Respondents accepted the return of the merchandise, agreeing to refund the purchase price and pay Gewirtz \$350.00 in damages. According to respondents, they later concluded, after investigation, that Gewirtz had not returned merchandise which they had sold him, but had substituted for it other part-wool fabric which had been manufactured by other concerns and had substituted respondents' identification tags for those of the other manufacturers. Respondents, accordingly, refused to pay Gewirtz the \$350.00 in damages. In the meantime, however, respondents had resold the merchandise to other customers, being under the impression that it was actually the all-wool fabric which they had sold to Gewirtz.

In support of their defense, respondents showed first that during the early part of 1951 Gewirtz had purchased several hundred pieces of part-wool interlining fabric from Thayer Woolen Mills and that during the spring and summer of that year Gewirtz had also had made up for him on a commission basis, substantial quantities of interlining fabric by one Paul Bousquet from wool stocks which Gewirtz had purchased. Although the wool stocks used by Bousquet were supposed to be all-wool, Gewirtz later ascertained that the cloth contained substantial quantities of non-wool fiber. It further appears that when Gewirtz returned several hundred pieces of interlining fabric to Stanrich in August 1951 he had on hand a substantial quantity of the part-wool interlining fabric which had been manufactured for him by Thayer and Bousquet. The record also discloses that when the fabric, alleged to have been respondents, was returned to a public warehouse in New York by Gewirtz, for the account of Stanrich, the wrappings on a number of pieces were torn and had to be replaced, and some of the identification tags had to be replaced. It further appears that it was Gewirtz' practice to remove the manufacturer's identification tag from fabric before selling it to his customers and there is reason to believe that Gewirtz had on hand at the time of the return a number of Stanrich's identification tags.

This evidence tends to establish the existence of circumstances under which an interchange or confusion of merchandise, such as that claimed by respondents, could have occurred. It is true that the mere existence of an opportunity for the substitution of merchandise is a

fact of limited persuasive value when considered by itself. However, respondents offered additional evidence to show that some of the fabric claimed to be theirs contains identifying features different from the type of fabric manufactured by them and, further, that some of the features of the fabric alleged to be theirs were similar to that of cloth manufactured by Bousquet or Thayer.

Among the identifying features claimed by respondents to distinguish some of the disputed cloth from their own was the fact that several pieces contain a "selvage" or bound edge on only one side of the cloth, whereas their own fabric has a selvage on both sides. Ordinarily when cloth is woven both sides have a bound edge as it comes off the loom. However, sometimes it is woven in double width with a space and connecting threads in the center, which are later cut, and the cloth is rolled into two separate rolls of narrower width, each having a selvage on only one side. In this connection, respondents established that the cloth woven by Bousquet for Gewirtz was of this latter type. It was woven on a 92-inch loom and was split down the middle into two pieces, each approximately 42-inches wide, with a selvage on only one side of each piece. The record also discloses that respondents' cloth was woven on a 72-inch loom, which was the only loom they had at the time, and that their cloth was woven in 60- or 42-inch widths with a selvage on both sides. Ordinarily, it would not be possible to weave two bolts of 42-inch cloth simultaneously on a 72-inch loom. While counsel supporting the complaint attempted to show that this could be done by a freak process, the method is not commercially feasible and no reason was suggested why respondents would have used it. Moreover, the resulting fabric would not have a selvage on both sides.

Another feature which respondents claim distinguishes some of the disputed fabric from their own is the fact that the yarn of which it is composed has been spun with a left twist to it, whereas their own fabric, at the time in question, was made from yarn with a right twist. While counsel supporting the complaint sought to show through an expert witness that the direction of the twist is only one of many features used in identifying cloth, it is undoubtedly a relevant negative factor in eliminating a particular manufacturer as having woven a particular piece of cloth. Counsel supporting the complaint also endeavored to show that the direction of the twist of the yarn could be changed by changing all of the bands on the spinning mule. However, this is a time-consuming and commercially wasteful process, and no reason is suggested why respondents would have undertaken it during the period at issue.¹

¹ During 1952, after respondents had bought out the Thayer mill, which had several mules with a left twist, respondents changed their own single mule from right to left twist to make it conform with the others. This, however, occurred after the events at issue had transpired and merely demonstrates a commercially feasible circumstance when a manufacturer might want to change the direction of the twist in his fabric.

Finally, respondents contend that the samples of the disposed cloth are all different from their own cloth in that the samples all have a rather coarse texture due to the fact that they have not been put through a "fulling" or "felting" process in their finishing, unlike respondents' own cloth which they claim was always put through such a process. A comparison of the samples which respondents concede are theirs (Com. Exs. 22, 23, 24, and 27-A) with those which respondents deny manufacturing, discloses that the former have a soft, felted type of finish which appears to be different from the finish of the latter samples. The testimony of respondent Marcus that his cloth was always put through a fulling process in the finishing was corroborated, in part, by the witness Musgrave, who testified that during 1950-1951 while he was employed by a company which finished respondents' cloth it was always put through the fulling process. While it is possible that other firms which did finishing for respondents during this period did not put it through a fulling process, no evidence to this effect was offered by counsel supporting the complaint and the undersigned feels obliged to accept the apparently credible testimony of Marcus, supported as it was by the witness Musgrave.²

The evidence offered by respondents was thus sufficient to establish the following significant facts with respect to respondents' cloth during the period at issue: (1) that respondents' cloth contained a selvage on both ends; (2) that it is highly improbable that they could have woven two pieces of 42-inch cloth having a single selvage, simultaneously on their 72-inch loom; (3) that their cloth was made from yarn having a right twist; and (4) that their cloth was put through a fulling or felting process.

An examination of the six disputed samples in the light of the above facts reveals the following:

1. Commission's Exhibits 26-A, 28-A, and 30-A all appear to be 42 inches wide. They were identified by the witness Bousquet as being 42-inch cloth woven double on a wide loom and as having a selvage on only one side. While Bousquet conceded that it was possible that the samples in evidence were originally of a wider width and had been cut down to 42 inches, the witness Musgrave confirmed that it was 42-inch cloth. Although the Commission's investigator, Scott, testified in rebuttal that it was his belief that the samples he had received were all cut from 60-inch fabric, this possibility would appear to be precluded by the relatively low price of the fabric.³ Moreover, the evenness of the cut at the unbound edge, as compared with some

² Musgrave was conceded to be an unbiased witness by counsel supporting the complain-

³ The fabric was sold at from 44¢ to 55¢ per yard, as compared to 70¢ and upward from the 60-inch fabric.

of the samples which were obviously cut from a large piece, militates against the possibility of these samples having been cut from a wider piece.

2. According to the credible testimony of the witness Musgrave, Commission's Exhibits 25-A, 28-A, and 29-A are comprised of yarn having a left twist, thus distinguishing them from respondent's fabric spun from yarn with a right twist. In this connection it may be noted that the sample conceded by respondents to be theirs (Com. Ex. 27-A) has a right twist in the yarn.

3. None of the six samples in question appear to have the soft felted finish which is characteristic of those samples admitted to be respondents. In this connection it may be noted that Commission's Exhibit 22, which was given to the Commission's investigator as a sample of fabric manufactured by respondent under Style Numbers 570, 601, and 801, and Commission's Exhibit 27-A, which was obtained by another investigator from one of respondents' customers and bears Style Number 801, both appear to have the soft felted finish which was described by the respondent Marcus and by the witness Musgrave as resulting from the fulling process to which respondents' fabric was subjected during the finishing operation. It may also be noted that the disputed samples bear the Style Numbers 570, 601, or 801, and, accordingly, it would be assumed that they would be similar in texture and finish to the two samples bearing those numbers which respondents concede are theirs.

4. Commission's Exhibit 32-A is approximately 80 percent wool and 20 percent rayon, which coincidentally were the specifications of the fabric purchased by Gewirtz from Thayer.

5. While four of the contested pieces of cloth bear identification tags with Stanrich's name as the manufacturer, the tags on two of them (Com. Exs. 25-A and 32-A) do not contain the name of any manufacturer and respondents deny that they are their tags. Although the piece number on one of the tags (Com. Ex. 32-B) coincides with that on Stanrich's invoice purporting to cover the sale, and style number on the tag (570-16) differs from the style number on the invoice (801-12).

SUMMARY

The question of whether Stanrich manufactured the six disputed pieces is one which is not easy of decision. It must be conceded that the evidence offered in the first instance by counsel supporting the complaint is persuasive of a finding in the affirmative on that issue. The almost precise correlation between the information appearing on the identification tags attached to the merchandise and Stanrich's

covering invoices is strong evidence that the fabrics were manufactured by Stanrich. The undersigned is frank to admit that respondents' explanation of how these fabrics came into their customers' hands at first impressed him as somewhat strained. However, the evidence which they developed gives to respondents' theory a reasonable degree of plausibility. Thus, the evidence offered by them establishes a background in which a confusion of fabrics and identification tags could have taken place. It further establishes that each of the fabrics in issue contains one or more identifying features dissimilar from the type of fabric manufactured by Stanrich and, that in several instances, the contested fabrics are similar to fabrics manufactured by the two concerns from which Gewirtz purchased interlining fabric.

Although the matter is not entirely free from doubt, the undersigned cannot conscientiously find, on the present state of the record, that the fabric in question was manufactured by Stanrich. While it may be that on the basis of the showing made by respondents no affirmative finding could be made as to what actually occurred with respect to alleged interchange of fabrics, the undersigned is not required to make any such finding in order to dispose of this issue. Counsel supporting the complaint, as the proponent of the issue that respondents manufactured these fabrics, has the burden of establishing his position by a fair preponderance of the evidence. This, in the opinion of the undersigned, he has not done since the evidence offered by respondents is sufficient to at least balance the showing made by him.

In his proposed findings, counsel supporting the complaint has suggested an alternative theory on which respondents can be held accountable for the misbranding of these six pieces of fabric. Counsel argues that even assuming, *arguendo*, Stanrich did not manufacture the fabric, that by admittedly accepting the return of the merchandise from Gewirtz and then reselling it, respondents thereby sold and distributed "in commerce" a misbranded wool product in violation of Section 3 of the Wool Products Labeling Act. While this conclusion would be valid if the resale or distribution to respondents' customers had taken place "in commerce", unfortunately, from the viewpoint of counsel supporting the complaint, the resale and distribution of the merchandise all took place within New York City. The merchandise which Gewirtz returned had been stored partly in his own place of business and partly in a public warehouse, both located in New York. The merchandise in Gewirtz' place of business was returned to the warehouse for Stanrich's account and that in the warehouse was retitled to Stanrich. Thereafter, so far as appears from the record, it

was all reshipped or resold to other concerns in New York City. The samples of the six disputed pieces were all obtained from customers located in New York. Unless, therefore, the merchandise was originally manufactured by respondents and shipped by them from Massachusetts, no finding can be made that the resale and shipment which took place in New York City occurred "in commerce".

2. The Three Samples Obtained From Respondents

As previously mentioned, three samples of fabric, admitted by respondents to be theirs, were obtained by a Commission investigator from respondents' place of business. All of these samples were found, on test by the National Bureau of Standards, to be approximately 93 percent wool. Respondents contend that no violation occurred with respect to these three samples since no orders were ever taken for these fabrics and none of them were sold.

The samples in question were obtained by the investigator during February 1952. According to the testimony of respondent Marcus his company had practically ceased making interlining fabric by the end of 1951, and thereafter was engaged in making blankets almost exclusively. This fact was confirmed by the testimony of the Commission's investigator, Ott, to the effect that he was advised by Marcus at the time of the investigation that Stanrich was only making blankets at the time, although it did have on hand a small quantity of interlining fabric. According to Ott, Marcus told him that two of the samples which he gave Ott (Com. Exs. 23 and 24) were samples of fabric "which he intended to manufacture in the near future depending upon the demand." There is no evidence in the record that such fabric was ever actually manufactured or sold to customers in commerce; nor is there any evidence that samples of this fabric were ever used to promote or effect sales in commerce (cf. Rule 22, Rules and Regulations promulgated under the Wool Products Labeling Act). It seems clear, therefore, that with respect to Commission's Exhibits 23 and 24 the record fails to establish any violation of the Act.

With respect to the third sample received from Marcus (Com. Ex. 22), Ott testified that Marcus told him that this was the type of material "he had been manufacturing which was sold under different and various style numbers." The style numbers appearing on this sample are 570, 601, and 801. The only evidence in the record of any actual sales of misbranded merchandise manufactured by respondent and bearing any of these style numbers is Commission's Exhibit 27-A (bearing Style Number 801) to which reference has already been made.

CONCLUSION

Out of eleven pieces of fabric offered by counsel supporting the complaint to establish his case, only two (Com. Exs. 27-A and 31-A) were shown to have been manufactured by respondents and to have been sold in commerce. Commission's Exhibit 31-A, the blanket, is 98 percent wool and counsel supporting the complaint has waived any claim of misbranding based thereon. Commission's Exhibit 27-A thus remains as the only piece of evidence of actual misbranding which took place in commerce, with the possible exception of Commission's Exhibit 22, which was merely a sample of merchandise theretofore sold.

The question arises whether this is sufficient evidence to require the issuance of a cease and desist order in the public interest. While it is true that numerous violations need not be shown in order to establish public interest, the insubstantiality of the evidence of actual violation is a factor to be considered. In such a setting the matter of the likelihood of similar violations occurring in the future has an important bearing on the disposition to be made of the proceeding. With regard to the latter consideration, the evidence shows that since the events at issue transpired, respondents have ceased making interlining cloth, that they are now making blankets exclusively, that the evidence with respect to their making of blankets discloses no substantial violations, and that they are no longer occupying the relatively small plant where due to the inefficiency of their operations violations might have previously occurred, but are now occupying a larger plant where they are apparently endeavoring to be more careful in the testing of the wool content of the fabrics made by them.

Under all circumstances, it is the opinion of the undersigned that the public interest does not require the issuance of a cease and desist order, with its possible adverse effect upon respondents in their new operation. In the opinion of the undersigned the bringing of the present proceeding will probably constitute sufficient corrective action for any possible violation which may have occurred. It will therefore be ordered that the present proceeding be dismissed, without prejudice however, to its reopening in the event respondents' future conduct discloses the need for corrective action.

The undersigned being of the opinion, for the reasons above given, that the public interest does not require the taking of any corrective action in this proceeding.

It is ordered, That the complaint in this proceeding be, and the same hereby is, dismissed, without prejudice.

