

Decision

IN THE MATTER OF
MAX SCHWARTZ AND SARAH SCHWARTZ TRADING AS
MAX SCHWARTZ COMPANY

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

Docket 6192. Complaint, Mar. 11, 1954—Decision, Mar. 18, 1955

Order requiring an individual in New York City who purchased from mills and jobbers bolts of cloth which he cut into suit lengths and sold to peddlers, to cease labeling such domestic "cuts" falsely as imported from the British Isles; failing to disclose that certain wool-like fabrics were in fact made from rayon and acetate, and that others were "seconds", "mill ends", and "unmerchantables"; and failing to label certain wool products as required by the Wool Products Labeling Act, with respect to the constituent fibers, country of origin, and otherwise.

Before *Mr. Frank Hier*, hearing examiner.

Mr. George E. Steinmetz and *Mr. John J. McNally* for the Commission.

Mr. Hyman Fried, of New York City, for respondents.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated March 18, 1955, the initial decision in the instant matter of hearing examiner Frank Hier, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Complaint herein issued March 11, 1954, charges respondents as copartners with violation of the Federal Trade Commission Act (15 U. S. C. 45) and the Wool Products Labeling Act of 1939 (15 U. S. C. 68 (a)-(j)) in that it alleges that respondents:

1. Misrepresented domestically produced fabrics as being imports.
2. Failed to disclose true fiber contents on synthetic fiber fabrics simulating natural fiber fabrics.
3. Failed to disclose that inferior fabrics were not first quality.
4. Falsely labeled fabrics as to true fiber content.
5. Failed to label fabrics as to true fiber content.

Findings

51 F. T. C.

Respondents' answer denied partnership, admitted jurisdictional facts, and denied the charges. Six hearings before the undersigned Hearing Examiner, theretofore duly designated by the Commission, resulted in 485 pages of testimony from 24 witnesses, and 47 exhibits, all received in support of the complaint and all of which were filed of record in the Office of the Commission. Respondents offered no evidence. On final consideration of the above, plus the proposed findings and conclusions submitted by all counsel, the Hearing Examiner finds that this proceeding is in the interest of the public and makes the following:

FINDINGS AS TO THE FACTS

1. Respondent Max Schwartz, an individual trading as Max Schwartz Company, has had his office and place of business located at 143 West 29th Street, New York City, New York, during 1950 and part of 1951. Since 1951 his place of business has been located at 27 East 20th Street, New York City. Respondent Sarah Schwartz is the wife of respondent Max Schwartz and occasionally visited his place of business and while there would occasionally answer the telephone or otherwise incidentally assist him, but there is no substantial evidence to indicate commercial partnership with him or complicity in or responsibility for the acts and practices charged.

2. Since 1949 to the present, respondent Max Schwartz, (hereinafter referred to as respondent) under his own name or as Max Schwartz Company, has been and is now engaged in the sale and distribution in interstate commerce, of wool, rayon and acetate fabrics, primarily to peddlers, located throughout the United States, for resale to the consuming public. Sales volume was between \$75,000 to \$85,000 annually.

3. Respondent's operation was the purchase of bolts or partial bolts of cloth, mostly from jobbers, a few of which he occasionally resold intact or in part to other jobbers, but the great majority of which he cut into $3\frac{1}{2}$ yard pieces, known in the industry as "cuts" because this yardage is sufficient to make therefrom a suit, and these he sold to peddlers. The latter operate in various localities around the country with no fixed place of abode or business. They find out about respondent from each other, order by mail, either C. O. D. or with cash. Each bolt when bought is labeled as to fiber contents and usually, but not always, the invoice would state the fabric or the fiber content or both. Respondent kept these "cuts" in 25 piles of 25 each on tables in his premises assorted as to color or weave or type, unlabeled, however, as to origin, fabric or fiber content. On occasion, respondent does not reduce a bolt to "cuts" until he gets an order.

4. When an order is received, respondent, usually at the request of the customer, would impress on the inside of the cloth a "transfer" which is a decalcomania on tissue paper impressed on the cloth with a hot iron. Only one transfer was put on any one "cut." At least up until 1952, respondent used transfers reading "Bradford, England All Wool" and "Bradford, England," together with a depiction of a coat of arms or heraldic device. There is no evidence that the former transfer was used on any fabric not in fact all wool. On July 31, 1952, he registered with the U. S. Patent Office a trade mark of "Lord Leslie," together with a coat of arms depiction. He denied thereafter using the "Bradford" transfers, but the record shows that in 1953 he did buy substantial quantities thereof and it cannot be assumed, in the absence of other explanation, that they were not used.

5. The depictions of these coats of arms on these transfers are not, as urged by the respondent, duplicates of the royal British seal, but are close enough to it, and do resemble other British coats of arms so that without minute comparison, or training in heraldry, an ordinary citizen of this country would nevertheless think so. Mere inspection of these transfers convinces the Hearing Examiner that anyone outside the industry would assume that fabrics so marked were imports from the British Isles. There is also substantial and credible testimony that the ordinary purchaser would so believe. Actual deception is unnecessary—a tendency and capacity to deceive is sufficient. The fact is that practically all of the fabrics so marked were of domestic manufacture.¹ Respondent's testimony on this issue was either so evasive or so vague, and its contradiction in the record so patent, that it is rejected for lack of credibility.

6. Although there are American fabrics, whether wool or otherwise, which are just as good, if not better, than British fabrics, nevertheless the overwhelming evidence is that a substantial part of the American purchasing public believe the contrary to the extent that they will pay as much as dollar a yard more for a British import over an American product. "Although the false article is as good as the true one, the privilege of deceiving the public even for their own benefit is not a legitimate subject of commerce."²

7. Counsel for respondent urge that since respondent has, as he says, discontinued using these labels—the Bradford labels since 1951, and Leslie label since 1953—this charge should be dismissed. However, the evidence of discontinuance is in conflict, and respondent's

¹ No evidence was offered by respondent as to any imports.

² *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 529; *National Silver Co. v. F. T. C.*, 88 F. 2d 425, 427.

Findings

51 F. T. C.

lack of candor and surprisingly poor memory of details, which would ordinarily be fresh in his mind, convinces the Hearing Examiner that it is highly doubtful that the practice has ceased and still more doubtful that it will not be resumed when "the heat is off." The plea for dismissal is accordingly denied.

8. The conclusory finding on this issue therefore is that respondent's practice of labeling, as found above, has the tendency and capacity to deceive a substantial portion of the purchasing public into buying domestically made fabrics believing them to be British imports.

9. Rayon and acetate are synthetic textile fibers which may be and are manufactured so as to simulate wool or other natural fibers in texture and appearance. Fabrics manufactured from such fibers have the appearance and feel of wool, particularly where the weave and pattern are the same as well known and typical woolen fabrics, such as gabardine, covert, sharkskin, herringbone, serge, etc. Many in the textile business can distinguish them from what they simulate, but comparatively few other members of the public can do so. Some, with years of experience in textiles, are unable to so distinguish; certainly the Hearing Examiner could not from the exhibits in this case. There is no doubt in his mind that these synthetic fabrics simulating natural fiber fabrics have been purchased by a substantial number of the public for what they are not, since the bulk of respondent's sales were of these rayon and acetate fabrics and respondent did not label many of them as to content. Such a practice, under the circumstances, has, at least, the capacity and tendency to deceive and to induce purchases in that belief.

10. Effective relief, however, can be afforded by that prayed for under the fifth issue, and no separate prohibition under the Federal Trade Commission Act, as distinguished from the Wool Products Labeling Act, is deemed necessary.

11. The third issue is that of respondent selling "seconds," "tender or weak goods" and "unmerchantables" without marking them as such. A "second" is a fabric containing too many defects (in the color, weave or width) to be satisfactorily usable for all purposes. All fabrics contain some and the tolerance per 60 yard bolt seems to vary with the individual cloth producer's own standards. One allows 6 defects per bolt, another 24. Included in "seconds" are "tender or weak goods" which generally connotes a tensile strength less than what is necessary to withstand, without tearing, the strains put on various parts of a suit in ordinary wear. This also varies with the manufacturer. One will reject as a "second" any fabric which will not withstand 25 lbs. pull, others less. Eighteen pounds pull with-

out tearing seems, however, to be the minimum. "Unmerchantables" are "seconds" of the poorest grade—so many defects they are fit only for shrouds, certain linings or boys' caps. All of these substandard goods are made by all mills, sold by them as such, plainly marked, and at as little as $\frac{1}{3}$ of the price of first quality merchandise.

12. Respondent admits buying this substandard merchandise most of the time. He did deny buying and reselling "tender goods," but a number of his purchase invoices shows that he did. If these were exceptional, respondent offered no evidence to that effect. One of his "cuts" in evidence was so "tender" that it tore in the hands. His records further show the purchase of "unmerchantables—as is" from mills. His own purchase records, plus his experience in the textile business, refutes any claim of ignorance on respondent's part that he was buying "seconds." The record amply establishes that upon resale this substandard quality was *not* marked, although he well knew that his customers peddled these "cuts" to individuals inexperienced in textiles, who would buy by appearance and price, without testing, to have suits made therefrom. Naturally such ultimate purchasers want only first quality merchandise, free from latent as well as patent defects to the extent that the suit would wear comparably with those purchased in responsible retail stores. Direct proof of this, of course, would be redundant. Actual deception need not be shown—the capacity and tendency is enough.³

13. It is now too well settled to admit of cavil, that one who puts into the hands of retailers or others the means and instrumentality whereby members of the purchasing public may be misled and deceived is equally responsible therefor. "That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition."⁴ The record here shows that substantially all of respondent's sales were to itinerant peddlers, who bought from him by mail for cash or by C. O. D. to general delivery; that they move constantly from locality to locality, peddling from door to door; that they form sort of a gypsy brotherhood, tied by blood, marriage, common interest or method; that the National Better Business Bureau has voluminous files of complaints and a long record of fraud, swindling, misrepresentation, deceit, shoplifting and even thieving against them; and that at least one of them had obtained from respondent his business card with her name printed thereon as his representative. Respondent admitted furnishing these cards to anyone demanding them. These people apparently paint

³ *Bockenstette v. F. T. C.*, 134 F. 2d 369; *Brown Fence & Wire Co. v. F. T. C.*, 64 F. 2d 934.

⁴ *F. T. C. v. Winsted Hosiery Co.*, 258 U. S. 483, 494; *Chas. A. Brewer & Sons v. F. T. C.*, 148 F. 2d 74.

barns with alleged aluminum paint which, however, promptly washes off after the first heavy rain, or they sell, under their Scotch or English names, fabrics represented to be imports. They engage also in other activities, complained of, as confidence games and swindling schemes.

14. It is true, of course, as urged by respondent, that he cannot be held to be a guarantor or insurer of the honesty or dishonesty of his customers—no seller, absent complicity, can be punished for happening to sell to a thief. This evidence is not competent on that point, but it is competent to show the social importance of accurate and adequate labeling; that frauds could be and were practiced on purchasing consumers by his customers, made possible or at least easier by his failure to label or his mislabeling done at their request; and that respondent knowingly aided and abetted their practice. It is also competent in answer to respondent's contention that his mislabeling, failure to label, and failure to label properly did not deceive those to whom he sold. Of course, these peddlers were not deceived. From their character and record they apparently wanted just what respondent did or failed to do. This is borne out by the fact that the transfers connoting or suggesting importation were put on by respondent largely at the suggestion of these peddlers. It is obvious from this record as a whole that respondent, knowing the character and operations of those with whom he dealt and upon whom he depended for practically all of his business (and the Hearing Examiner is satisfied that he did know) failed to label at all, failed to label accurately, mislabeled and dealt in per se deceptive "seconds" to satisfy these swindlers and thereby increase his sales volume—in other words, aided and abetted them.

15. The remaining two charges allege violation of the Wool Products Labeling Act, namely, failing to label true fiber content and falsely labeling such content. As to the first, there is no doubt on this record. Respondent bought and resold wool fabrics and also rayon and acetate fabrics and mixtures of both. Wool purchases alone represented about 10 percent of the total. As to the wools, the record is uncertain as to labeling. But as to the bulk of his sales, wool and rayon or acetate, by his own admission, respondent sold in interstate commerce without any marking as to fiber content whatsoever except such deceptive transfer markings described in Par. 4, *supra*, put on by him at the request of the peddler. Most of this material came to him marked as to fiber content as the law requires. Hence, the finding is that respondent misbranded most of his "cuts" in that he did not, when sold, affix thereto a stamp, tag, label, etc., which showed the percentage of wool and each fiber other than wool in violation of Section 4 (a) (2) of said Act.

16. As to false labeling, the record is barren as to how shipments of pure woollens were labeled as to fiber content, and since no tags were affixed to shipments of other fabrics showing their exact fiber content, there is nothing to show that respondent falsely tagged non-wool as wool. However the Act referred to provides in Section 2 (e) thereof that "wool product" means any product, or portion thereof, which contains, *or purports to contain or in any way is represented as containing* wool, etc. The charge, therefore, rests on the circumstances which would lead to the impression that fabrics were all wool or contained wool when in fact they were not.

17. Very little rayon or acetate made in the British Isles is imported into this country—so little that the public here believes an import from there to be woollen. Respondent, as found supra, has misrepresented domestic fabrics to be British imports by the use of the transfers hereinabove described in Par. 4. A very substantial part of respondent's sales were so marked regardless of fiber content. Specific examples are in the record, without fiber content, tag or other marking, except the transfers referred to. Many an unskilled person would assume that such fabrics were woollen. This false impression is heightened by the fact that these rayon and acetate fabrics resemble woollens in weave, color, pattern and type (see Par. 9, supra) and by the fact that these fabrics were made up at the mill in 60 inch or more widths, which, the record shows, is the usual width for woollens.

18. Moreover, there is in the record as an exhibit a "cut"⁵ purchased by an investigator from a peddler and which upon scientific analysis for fiber content showed 17.0 to 17.3 percent wool, the balance rayon. This piece was unlabeled as to fiber content, except indirectly, in that it bore the "Lord Leslie" transfer. The peddler witness testified he became acquainted with the fact that respondent sold "cuts" through buying a number of them from a man in a poolroom. He subsequently bought from respondent 150 or more cuts, but was unable to say whether the sample he sold the investigator was so bought or was among the six or seven pieces he bought in the poolroom. Respondent's name and address were on the brown wrapping paper which surrounded these "poolroom cuts." There was thus some doubt at that time that the material analyzed for fiber content came from the respondent, but subsequent evidence dispels that doubt.

19. The analyzed piece has the "Lord Leslie" transfer. The die from which this transfer was made, was specially cut for and paid for by respondent by a transfer making concern. The mark was registered in the U. S. Patent Office by respondent for use in commerce on woollen

⁵ Commission's Exhibit 14.

Order

51 F. T. C.

and rayon piece goods. The transfer making concern's officials testified categorically that when a die is especially made up by them for a particular customer it was available to no one else, although they sell transfers of their own designs. Respondent, however, in one place said six more used the same transfer,⁶ in another place in the transcript said it "could be" others used it, that everyone uses transfers.⁶ Respondent, as a witness, was so uncertain and so uncooperative that the credibility is clearly with the officials of the wholly disinterested transfer manufacturer and it is so found. The preponderant and substantial evidence therefore is that respondent by using these transfers, together with other facts noted, has sold in commerce fabrics which he represented to be woolen when in fact they either were not woolen or contained a very small percentage thereof, in violation of Section 4 (a) (1) of the Wool Products Labeling Act.

20. All conflicts between respondent's testimony and the testimony of others, or between respondent's testimony and documentary evidence or circumstances in the record have been resolved against the respondent due to what in the Hearing Examiner's judgment, from his observation of respondent as a witness, was a lack of candor, a most surprising lack of memory or knowledge about his business, and evasive answers.

CONCLUSION

The acts and practices of respondent as hereinabove found were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act (15 U. S. C. 45) and in violation of the Wool Products Labeling Act of 1939 (15 U. S. C. 68 (a)-(j)) and of the rules and regulations promulgated thereunder and by reason thereof constituted unfair methods of competition, and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent Max Schwartz, individually, trading as Max Schwartz Company, or under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of fabrics, do forthwith cease and desist from:

⁶ Transcript 47, lines 7-16.

1. Representing, directly or by implication, that fabrics manufactured in the United States are manufactured in any other country.

2. Selling fabrics known as "seconds" or "unmerchantables" without clearly and conspicuously marking said fabrics with the above words or terms or other words or terms of the same import, in such manner that such markings will not be obliterated.

It is further ordered, That the respondent, Max Schwartz individually, trading as Max Schwartz Company, or under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, of wool fabrics or other wool products, as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool" or "reused wool," as those terms are defined in said act, 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 therein.

2. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products, either directly or by implication, as to the country of origin thereof.

3. Failing to affix securely to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

(a) the percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum of said total weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

(b) the maximum percentage of the total weight of such wool product of any non-fibrous loading, filling or adulterating matter;

(c) the name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce or in the offering for sale, sale, transportation, or distribution thereof in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Wool Products Labeling Act of 1939. *Provided,* That the foregoing provisions concerning misbranding shall not be construed to prohibit

Order

51 F. T. C.

acts permitted by paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939; *and, provided further*, That nothing contained in this order shall be construed as limiting any applicable provisions of said Act or the rules and regulations promulgated thereunder.

It is further ordered, That complaint herein be, and the same hereby is, dismissed as to Sarah Schwartz, named as respondent herein.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent Max Schwartz, an individual trading as Max Schwartz Company, shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist [as required by said declaratory decision and order of March 18, 1955].

Complaint

IN THE MATTER OF
GOLDIN-FELDMAN, INC., ET AL.

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

Docket 6266. Complaint, Nov. 26, 1954—Decision, Mar. 18, 1955

Consent order requiring furriers in New York City to cease violating the Fur Products Labeling Act through misbranding and false invoicing of mink stoles, jackets, and other fur garments as to the country of origin, and otherwise failing to comply with requirements of the Act.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William R. Fincher for the Commission.

Baron & Baron, of Brooklyn, N. Y., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Goldin-Feldman, Inc., a corporation; Morris Schilling and William Feldman individually and as officers of said corporation, and Morris Schilling, William Feldman and Fred Goldin, copartners trading as A. Goldin-S. Feldman Company, hereinafter referred to as respondents, have violated the provisions of said Acts, and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Goldin-Feldman, Inc., is a corporation organized under the laws of the State of New York. Its officers are Morris Schilling, President, and William Feldman, Secretary-Treasurer. These individuals formulate, direct and control the acts and practices of corporate respondent. Respondents Morris Schilling, William Feldman and Fred Goldin are copartners trading as A. Goldin-S. Feldman Company. The office and principal place of business of all respondents is 345 Seventh Avenue, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, the respondents have introduced, manufactured for introduction, sold, offered for sale, transported, and dis-