

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

IN THE MATTER OF
MARVIN ACCESSORIES, INC., ET AL.

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

Docket 6418. Complaint, Sept. 21, 1955—Decision, Apr. 11, 1960

Order requiring New York City importers to cease selling in commerce silk scarves manufactured in Japan which were so highly flammable as to be dangerous when worn.

Mr. Brockman Horne, for the Commission.

Marlin & Sandberg, by *Mr. Milton Sandberg*, of New York, N.Y.,
for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint herein charges the respondents, Marvin Accessories, Inc., a corporation, and Julius Ruderman and Fannie Ruderman, individually and as officers of the respondent corporation, with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, as also with violation of the Rules and Regulations promulgated under the last named Act, in the sale of articles of wearing apparel so highly flammable as to be dangerous when worn by individuals. All respondents were duly served with the aforesaid complaint according to law and, within the required time filed

answer thereto denying the pertinent charges of violation and setting up ten affirmative defenses.

On the issues thus joined the matter proceeded to trial during the course of which certain testimony was had, and exhibits received in evidence, all of which testimony was stenographically reported and, together with the exhibits, duly filed of record in the Office of the Commission in Washington, D.C., as required by law.

Subsequent thereto, both parties were accorded an opportunity, of which they availed, of filing with the hearing examiner their respective Proposed Findings of Fact and Conclusions of Law those deemed proper to be admitted having been incorporated herein, and those rejected being ignored, as a reading of this Initial Decision may indicate.

FINDINGS AS TO THE FACTS

1. As charged in the complaint, and formally admitted by the respondents' answer, respondent Marvin Accessories, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New York. Julius Ruderman and Fannie Ruderman are individuals and, respectively, president and secretary-treasurer of respondent corporation and, as such, they formulate, direct and control its policies, acts and practices. The address of all respondents is 39-43 West 37th Street, New York, New York.

2. Subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, respondents did import from the country of Japan into the United States scarves having dimensions of approximately 32 x 32 inches and have sold, offered for sale, introduced, delivered for introduction, and transported and caused to be transported in commerce, as "commerce" is defined in the Flammable Fabrics Act, said scarves. Respondents have also transported and caused to be transported said scarves for the purpose of sale and delivery after sale in commerce.

3. Twelve scarves were received in evidence in support of the charges of the complaint, eleven of which were sold to six different customers located in various parts of the United States, the said eleven individual scarves being representative of, and extracted from, larger shipments made to its customers by the respondents.

4. All of the aforesaid eleven scarves were subjected to flammability tests in accordance with the standards contained in Commercial Standard 191-53, (Revised),¹ as expressly authorized and provided by section 4(a) of the Flammable Fabrics Act aforementioned,

¹ A publication of the United States Department of Commerce titled "Flammability of Clothing Textiles" recorded herein as Com. Ex. No. 19.

Findings

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the results of such tests demonstrating failure of such scarves to pass the tests prescribed and thus to be entitled to enter the channels of commerce.

5. On the subject of the testing procedures and results the Commission introduced as its witness the expert who had conducted same and whose testimony was to the effect that all of said scarves failed to meet the required standard and were, in accordance with the provisions of the Commercial Standard aforesaid, classified as Class 3, or dangerously flammable, hence within that class of merchandise prohibited by the statute.

In support of his testimony the witness produced his laboratory reports of experiments as affecting each of the scarves in question² which, coupled with and explained in detail, step by step, as appears of record, satisfied this examiner that the protocol set up by the Commercial Standard 191-53 had been adhered to in all material respects and that the results arrived at and reported upon in each instance were correct, and it is so found.

6. Respondents in the course and conduct of their business are in competition in commerce with others in the sale and offering for sale of scarves which are not flammable "articles of wearing apparel" under the provisions of the Flammable Fabrics Act.

7. The use by respondents of the acts, practices and policies as herein found has resulted in substantial trade in commerce being unfairly diverted to them from their competitors and substantial injury has been done to competition in commerce.

The Defense

A. In their defense to the action respondents contended that the method of testing was inadequate in that but a single thickness of material was subjected to test instead of multiple, (or at least two), thicknesses, because, in the actual wearing of the scarves but one thickness is rarely encountered, the garment being usually folded into two or more thicknesses and then wrapped around the head or waist, or draped around the neck and shoulders of the wearer, as disclosed by the evidence of record. As to this attempted defense it is found that under any reading or application of the controlling Act no such construction is possible.³

² Com. Ex. Nos. 20 A through 28.

³ In the Matter of Victor B. Handal & Bro., Inc., Docket No. 6375, wherein a similar contention was made, the Commission, in its opinion of April 11, 1957, said:

"The procedures for preparing test specimens which are prescribed in minute detail in the Commercial Standard, and incorporated by reference into the Act, do not provide for folding of the swatch specimens into dual layers as advocated by the respondents and, moreover, the protocols there specified in effect preclude their preparation in such manner. It is clear, therefore, that garment design is wholly irrelevant and immaterial to the Act's prescribed testing procedures."

B. As a further contention of the defense it was urged that "scarves," as involved in this proceeding, are not "articles of wearing apparel" intended to be covered by the Act and hence the complaint should be dismissed. It will be remembered that the scarves forming the subject matter of this proceeding are of dimensions of approximately 32 x 32 inches. This attempted defense was rejected.⁴

C. As a further defense respondents claim that, in introducing their scarves in commerce they have acted in good faith and reliance upon certain information and advices "received from the United States" which operate to form a "bar or estoppel" to this proceeding. The "certain information and advices" referred to, are contained in several letters addressed to respondent corporation and produced by respondents, appearing herein as respondents' Exhibits Nos. 2-3-4-7-8-9 and 10. These letters, signed by the Deputy Collector, Restricted Merchandise Division, Bureau of Customs, U.S. Treasury Department, have to do with certain shipments of scarves of which some of the scarves here in question form a part. It is pointed out that a reading of these communications will disclose that any determinations by Customs as to compliance of said goods with the Act did not, and could not, operate by way of estoppel, either based upon the facts or upon applicable law. In fact, the whole situation is neatly and succinctly stated by the Deputy Collector of Customs in Respondents' Exhibit No. 2, quoted in the following words:

This is not to be construed, however, as an official determination by the Federal Trade Commission that all of the merchandise contained in the shipment meets the prescribed tests for flammability set forth in the Flammable Fabrics Act *inasmuch as merchandise subject to the provisions of the Act must at all times speak for itself.* (Emphasis supplied.)

The foregoing represents a statement of the applicable law on the subject which, coupled with the facts hereinabove found that the merchandise is in violation of the provisions of the Act, forms the basis for rejection of the defense urged.

⁴This question was the subject of an inquiry and ruling of the Federal Trade Commission titled:

"In the Matter of: An interpretation of the term 'Article of Wearing Apparel' as used in the Flammable Fabrics Act with respect to its applicability to handkerchiefs and scarfs" (File No. 205-2).

wherein the Commission stated its opinion to be:

"(1) That handkerchiefs up to a finished size of twenty-four (24) inches square are not 'articles of wearing apparel' as that term is used in the Flammable Fabrics Act." (Issued May 18, 1954.)

and further:

"The Commission, after due consideration of the matter * * * is of the opinion that scarfs are 'Articles of wearing apparel' as that term is used in the Flammable Fabrics Act." (Issued September 13, 1954.)

For certification and copies of the foregoing see Com. Ex. Nos. 29 A-B-C-D and E.

CONCLUSION

The acts and practices of respondents as hereinabove found were and are in violation of the Flammable Fabrics Act and of the Rules and Regulations promulgated thereunder, and as such 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.

ORDER

It is ordered, That respondents Marvin Accessories, Inc., and its officers, and respondents Julius Ruderman and Fannie Ruderman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device do forthwith cease and desist from:

1. Importing into the United States; or
2. Selling, offering for sale, introducing, delivering for introduction, transporting or causing to be transported in commerce, as "commerce" is defined in the Flammable Fabrics Act; or
3. Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce,

any article of wearing apparel, which under the provisions of section 4 of said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission having considered the hearing examiner's initial decision, filed January 22, 1960, and having determined that said initial decision, as modified herein, is adequate and appropriate in all respects to dispose of this proceeding:

It is ordered, That the aforesaid initial decision be, and it hereby is, modified by striking the second sentence of paragraph 1 of the Findings as to the Facts contained therein, and substituting therefor the following two sentences:

"Respondents, Julius Ruderman and Fannie Ruderman, are president and secretary-treasurer, respectively, of said corporation. These individual respondents formulate, direct and control the policies, acts and practices of the respondent corporation."

It is further ordered, That the initial decision, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents Marvin Accessories, Inc., a corporation, and Julius Ruderman and Fannie Ruderman, individually and as officers of said corporation, shall, within sixty

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