

Complaint

IN THE MATTER OF

NOVIK & CO., INC., ET AL.

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

Docket 8452. Complaint, Nov. 9, 1961—Decision, Feb. 8, 1963

Order requiring one of the four largest importers of bridal veil fabrics in the United States to cease violating the Flammable Fabrics Act by selling imported "silk illusion net" which was so highly flammable as to be dangerous when worn, and furnishing their customers a false guaranty that tests showed the fabrics not to be dangerously flammable.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Novik & Co., Inc., a corporation, Sheffield Novik, Thomas Elliott and Benjamin Silberberg, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the Rules and Regulations promulgated thereunder, 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 Novik & Co., Inc., is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents Sheffield Novik, Thomas Elliott and Benjamin Silberberg are president, vice president, and secretary-treasurer, respectively, of Novik & Co., Inc. The individual respondents formulate, direct and control the policies, acts and practices of the said corporate respondent. The business address of all respondents is 41 West 38th Street, New York 18, N.Y.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have sold and offered for sale, in commerce; have imported into the United States; and have introduced, delivered for introduction, transported, and caused to be transported, in commerce; and have transported and caused to be transported, after sale in commerce; as "commerce" is defined in the Flammable Fabrics Act, fabric, as that term is defined therein, which fabric was, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

PAR. 3. Respondents, subsequent to July 1, 1954, have furnished their customers with a guaranty with respect to the fabrics, men-

tioned in Paragraph 2 hereof, to the effect that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, show that said fabrics are not, in the form delivered by respondents, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals. There was reason for respondents to believe that the fabrics covered by such guaranty might be introduced, sold, or transported in commerce.

Said guaranty was false in that (1) with respect to some of the said fabrics, respondents have not made such reasonable and representative tests, and (2) with respect to other of said fabrics, the tests which were made showed that the fabrics were so highly flammable as to be dangerous when worn by individuals.

PAR. 4. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, and as such constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Thomas J. Anderson supporting the complaint.

Keating and Brodtkin, by *Mr. John M. Keating*, of New York, N.Y., for respondents.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

MAY 18, 1962

The principal issues in this matter are (1) whether respondents are in violation of the Flammable Fabrics Act¹ in connection with transactions involving the importation and sale of certain fabrics used in bridal veils and (2) whether they are also in violation of the Federal Trade Commission Act² in connection with false guarantees issued by respondents on the flammability of said fabrics. Respondents' amended answer also raises an "Affirmative Defense" which reads as follows: "The tests apparently required by the Act and Regulations

¹ Section 3(b) of the *Flammable Fabrics Act*, here applicable as one of the "PROHIBITED TRANSACTIONS" under the Act, reads as follows:

"The sale or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported in commerce or for the purpose of sale or delivery after sale in commerce, of any fabric which under the provisions of section 4 of this Act is so highly flammable as to be dangerous when worn by individuals, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act."

² Section 5(a)(1) of the *Federal Trade Commission Act* reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

for the fabric involved are arbitrary and invalid for the reason that the bridal illusion involved is not customarily and normally worn by the consumer after dry cleaning, notwithstanding which the Act and the Regulations appear to require the fabric to be submitted to a flammability test after dry cleaning."

The complaint herein was issued on November 9, 1961. The case was heard on February 13, 1962, at New York, New York. Thereafter proposed findings of fact and conclusions of law, together with briefs in support of the proposed findings of fact and conclusions of law, were filed by the parties. These have been carefully reviewed and considered and such proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters. The facts hereinafter set forth are based on the entire record.

*

FINDING OF FACT

Respondent Novik & Co., Inc., is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents Sheffield Novik, Thomas Elliott and Benjamin Silberberg are president, vice president and secretary-treasurer, respectively, of Novik & Co., Inc. The individual respondents formulate, direct and control the policies, acts and practices of the said corporate respondent. The business address of all respondents is 41 West 38th Street, New York 18, N.Y.

Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have sold and offered for sale, in commerce, have imported into the United States, and have introduced, delivered for introduction, transported, and caused to be transported, in commerce, and have transported and caused to be transported, after sale in commerce; as "commerce" is defined in the Flammable Fabrics Act, fabric, as that term is defined therein, which fabric was, under Section 4 of the Flammable Fabrics Act, as amended,³ so highly flammable as to be dangerous when worn by individuals.

³ Sec. 4(a) Any fabric or article of wearing apparel shall be deemed so highly flammable within the meaning of Section 3 of this Act as to be dangerous when worn by individuals if such fabric or any uncovered or exposed part of such article of wearing apparel exhibits rapid and intense burning when tested under the conditions and in the manner prescribed in the Commercial Standard promulgated by the Secretary of Commerce effective January 30, 1953, and identified as "Flammability of Clothing Textiles, Commercial Standard 191-53," * * * for the purposes of this Act, such Commercial Standard 191-53 shall apply with respect to the hats, gloves, and footwear covered by Section 2(d) of this Act, notwithstanding any exception contained in such Commercial Standard with respect to hats, gloves, and footwear.

(b) * * *

(c) Notwithstanding the provisions of paragraph 3.1 Commercial Standard 191-53, textiles free from nap, pile, tufting, flock, or other type of raised fiber surface when tested as described in said standards shall be classified as class 1, normal flammability, when the

Respondents are engaged in the business of selling millinery veils and silk bridal veil fabrics. This proceeding involves only silk bridal veil fabrics. The commodity is imported from Europe. Although only about 5 percent of corporate respondent's sales are attributable to bridal veil fabrics, it is one of the four largest importers and sellers of this material in the United States. The total annual delivered dollar volume of imported bridal veil fabric in this country is about \$650,000. The four importers referred to import about 90 percent of the total annual imports of such fabric. The fabric is used to make up bridal veils, and bridal veils, as the term suggests, are used by brides at marriage ceremonies. A bridal veil is made up of a length of bridal veil fabric attached to a plastic crown or headpiece. The plastic crown has two built-in combs, one on each side, for fastening the bridal veil to the hair of the bride. Additionally, bobby pins are also sometimes used to further secure the crown to the head. It is found that the method of fixing the veil to the hair of a bride would normally render its quick removal difficult if the veil caught on fire.

Approximately 1,500,000 weddings take place annually in the United States. There are three large nationally circulated magazines devoted to bridal clothes and other commodities of interest to brides. These are "The Bride's Magazine", "Modern Bride", and "Bride and Home".

The fabrics used in the veils are known in the trade as "silk illusion net" and will be referred to as such or simply as silk illusion hereinafter. The fabric consists of a netting of fine denier silk made from greige goods of pure silk.

Respondents sell silk illusion to manufacturers of bridal veils, jobbers, and retailers. They also manufacture a small quantity of the material into the completed bridal veil. Respondents' wholesale prices on silk illusion are from \$1 to \$1.50 per yard. The fabric retails at \$2.59 to \$2.99 per yard.

Bridal veils vary in lengths from a minimum of 12 inches to a maximum of about 6 yards. The average bridal veil uses about 2 yards of silk illusion and extends down about a yard from the headpiece. Each yard is 72 inches wide. The silk illusion used in bridal veils is of a single thickness but hangs in drape-like folds.

Respondents at the hearing moved to be relieved of its written stipulation of record herein that the silk illusion here involved "can be used as bridal veiling and when so used constitutes or forms a covering for the neck, face, or shoulders when worn by individuals" on the ground that said stipulation is "contrary to the facts". (The evidence shows that silk illusion not only "can be used as bridal veiling" but that

time of flame spread is three and one-half seconds or more, and as class 3, rapid and intense burning, when the time of flame spread is less than three and one-half seconds.

as an item of apparel, it is used exclusively as material for bridal veiling.) The motion, taken under advisement at the hearing, is pressed in respondents' brief. By reason of the facts hereinafter stated in this paragraph, the motion is denied as being frivolous. Numerous magazine illustrations of brides in bridal costumes, constituting part of the record in the case, show that bridal veils form a covering for the neck, face, or shoulders or that such veils actually touch or are in close proximity to the neck, face, or shoulders of the bride. At the trial of this matter, counsel for respondents questioned respondent Sheffield Novik, president of corporate respondent, as to whether he believed silk illusion was subject to the Act, the colloquy between the two being as follows:

Q. I read it to you this morning from the rules and regulations—the definition of what class a fabric is. Does bridal illusion come within that test?

A. Yes, sir. (Tr. 135)

Documentary evidence, consisting in part of correspondence and other business documents passing between respondents and their foreign suppliers of silk illusion net and in part of invoices issued by corporate respondents to customer-purchasers of the fabric, show that respondents have for years recognized that silk bridal illusion is subject to the provisions of the Flammable Fabrics Act. On June 15, 1960, corporate respondent filed a "Continuing Guaranty" with the Federal Trade Commission in which it acknowledged that it was engaged in the marketing or handling of fabrics subject to the said Act and Regulations thereunder, and guaranteed that reasonable and representative tests as provided in the Rules and Regulations would be made on fabrics prior to their marketing to show that the fabrics were "not, in the form delivered or to be delivered" by corporate respondent "so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals".

From all the evidence of record it is found that the silk illusion here involved is an "article of apparel" in that it "constitute[s] or form[s] part of a covering for the neck, face, or shoulders when worn by individuals" within the meaning of said terms or phrases as defined or set forth in the Flammable Fabrics Act.⁴

⁴ Section 2(d) of the Flammable Fabrics Act reads:

The term "article of wearing apparel" means any costume or article of clothing worn or intended to be worn by individuals except hats, gloves, and footwear: *Provided, however*, That such hats do not constitute or form part of a covering for the neck, face, or shoulders when worn by individuals: * * *

Section 2(e) of the Flammable Fabrics Act reads:

The term "fabric" means any material (other than fiber, filament, or yarn) woven, knitted, felted, or otherwise produced from or in combination with any natural or synthetic fiber, film, or substitute therefor which is intended or sold for use in wearing apparel except that interlining fabrics when intended or sold for use in wearing apparel shall not be subject to this Act.

The countries of origin of the involved silk illusion are France and England. Corporate respondent's chief source of supply is France from which it imports about one-third of that country's total production of silk illusion. It also imports a small quantity of silk illusion from England, the great bulk of whose production goes to one of corporate respondent's competitors.

In 1961, corporate respondent purchased from its French manufacturing-supplier, Aime Baboin & Cie, of Lyon, France, with whom it has had dealings for many years, a quantity of silk illusion identified under a continuing style number as Style 654. In the same year it also purchased from an English manufacturing-supplier, Black Brothers & Boden, Ltd., of Nottingham, England, a quantity of silk illusion identified under a continuing style number as Style 3056.

In connection with the aforementioned purchases, neither the French supplier nor the English supplier furnished respondents with a signed written guarantee, in accordance with the provisions of Section 8(b) of the Flammable Fabrics Act,⁵ that reasonable and representative tests made under the procedures provided in Section 4 of the Act, show that their respective silk illusion fabrics are *not* "so highly flammable as to be dangerous when worn by individuals", although both suppliers knew the requirements of the said Section 4 of the Act and were aware of respondents' concern that there be compliance with such requirements.

⁵ Although only subparagraph (b) of Section 8 of the Flammable Fabrics Act appears to be here directly involved, its full meaning requires reference to the language of par. (a) of Section 8. Accordingly the full text of Section 8(a) and (b) is set forth below:

Sec. 8(a) No person shall be subject to prosecution [for misdemeanor] under section 7 of this Act for a violation of section 3 of this Act if such person (1) establishes a guaranty received in good faith signed by and containing the name and address of the person by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received, to the effect that reasonable and representative tests made under the procedures provided in section 4 of this Act show that the fabric covered by the guaranty, or used in the wearing apparel covered by the guaranty, is not, under the provisions of section 4 of this Act, so highly flammable as to be dangerous when worn by individuals, and (2) has not, by further processing, affected the flammability of the fabric or wearing apparel covered by the guaranty which he received. Such guaranty shall be either (1) a separate guaranty specifically designating the wearing apparel or fabric guaranteed, in which case it may be on the invoice or other paper relating to such wearing apparel or fabric; or (2) a continuing guaranty filed with the Commission applicable to any wearing apparel or fabric handled by a guarantor, in such form as the Commission by rules or regulations may prescribe.

(b) It shall be unlawful for any person to furnish, with respect to any wearing apparel or fabric, a false guaranty (except a person relying upon a guaranty to the same effect received in good faith signed by and containing the name and address of the person by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received) with reason to believe the wearing apparel or fabric falsely guaranteed may be introduced, sold, or transported in commerce, and any person who violates the provisions of this subsection is guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act.

Samples of said silk illusion Styles 654 and 3056 were obtained by Commission representatives and submitted to laboratories for testing in accordance with the requirements of Section 4 of the Act. Reports by the laboratories on record herein show that each of ten samples of each of the two style numbers submitted to the test failed to meet the flammability test requirements of Commercial Standard 191-53, as incorporated by the said Section 4 of the Act and made part thereof, in that the time of flame spread in the tested samples were substantially less than the 3.5 second time limitation as specified in the requirements of the said Commercial Standard 191-53.

It is found that the involved silk illusion handled by respondent under the continuing designations of Styles 654 and 3056 are so highly flammable as to be dangerous when worn by individuals.

Respondents have not at any time caused the aforementioned silk illusion, Styles 654 and 3056, to be tested for compliance with the Commercial Standard 191-53 as provided in Section 4 of the Flammable Fabrics Act.

Among the sales of silk illusion made in 1961 by respondents were several of Style 654 to customer-dealers in the States of New York, Massachusetts, and Pennsylvania, in the aggregate amount of \$619.46. The invoices on each of these sales bears the following rubber stamped words: "The articles covered by this invoice are guaranteed to meet the tests required by the Flammable Fabrics Act." At the time of these sales, respondents had reason to believe that the silk illusion so guaranteed might be introduced, sold, or transported in commerce.

The aforementioned guarantees made by respondents to customer-dealers in New York, Massachusetts, and Pennsylvania that the fabric in silk illusion Style 654 "are guaranteed to meet the tests required by the Flammable Fabrics Act" are in fact false. This ultimate finding is based on evidentiary facts shown above, summarized as follows: (1) Respondents had never received any written guarantees in the terms described by the Act from its French manufacturer-supplier of the involved fabric that reasonable and representative tests had been made which showed that the fabric was not, under the provisions of Section 4 of the Act, so highly flammable as to be dangerous when worn by individuals. (2) Respondents themselves had never caused such tests to be made for compliance with Section 4 of the Act. (3) Laboratory tests of numerous samples of silk illusion Style 654 show that such samples and consequently all of the lot of Style 654 from which the samples came do not comply with the flammability provisions of Section 4 of the Act.

DISCUSSION AND CONCLUSIONS

It is concluded in the language of Section 3(b) of the Flammable Fabrics Act that respondents have been engaged in the unlawful "sale or the offering for sale, in commerce, or in the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported in commerce or for the purpose of sale or delivery after sale in commerce," of fabrics "which under the provisions of Section 4 of this Act is [are] so highly flammable as to be dangerous when worn by individuals", and that the said acts and practices of respondents also constitute unfair methods of competition and unfair and deceptive acts or practices in commerce under the Federal Trade Commission Act. (It should be noted that Section 3 of the Flammable Fabrics Act is captioned "PROHIBITED TRANSACTIONS" and that each of the three subparagraphs of Section 3 makes a violation of the Flammable Fabrics Act also a violation of the Federal Trade Commission Act.)

Respondents' principal argument is that silk illusion as used in a bridal veil is not an "article of wearing apparel" as defined by the Flammable Fabrics Act and accordingly is not subject to the provisions of the Act. As seen, the Act *includes* "hats" in the definition of "articles of wearing apparel" *if* such hats "constitute or form part of the covering for the neck, face, (or shoulders when worn by individuals)", but *excludes* "hats" which do not constitute or form part of a covering for the neck, face, or shoulders.

Respondents' arguments revolve around dictionary definitions of "hats" and "coverings" in an attempt to show that bridal veils do not constitute or form part of a covering for the neck, face or shoulders and, therefore, fall into that statutory category of "hats" which are exempt from the provisions of the Act.

The obvious purpose of the Congress in placing hats which constitute or form part of a covering for the neck, face, or shoulders subject to the provisions of the Flammable Fabrics Act is to protect the wearers of such hats against the excessive hazards of fire to their persons from articles of apparel which are made of fabrics susceptible to flames beyond the statutory norm as established in Commercial Standard 191-53 whose provisions are incorporated by reference into the Act. With such legislative purpose in mind, we are not concerned in this case with dictionary definitions of the words "hats" and "coverings", although it may be noted in passing that the statutory definitions of "hats" subject to the Act and of "covering" are not without dictionary definition support.

The true issues in this matter are (a) whether the silk illusion used in bridal veils has such proximity to the neck, face, or shoulders of

the wearer as to constitute a covering for the neck, face, or shoulders and (b) whether such silk illusion is so highly flammable as to be dangerous to the wearer. The evidence shows, and common knowledge indicates, that bridal veils have such proximity to the upper part of the body as to constitute in the statutory language a "covering for the neck, face, or shoulders". In fact, respondents have stipulated that bridal veilings constitute such covering. With reference to the flammability of the involved fabric, undisputed laboratory tests show that the imported silk illusion used for bridal veilings is so highly flammable "as to be dangerous when worn by individuals".

Under Section 8(b) of the Flammable Fabrics Act, a person charged with the accusations involved in the instant complaint may defend on the ground that he relied on a "guaranty received in good faith signed by and containing the name and address of the person by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received, to the effect that reasonable and representative tests made under the procedures provided in Section 4 of this Act show that the fabric covered by the guaranty, or used in the wearing apparel covered by the guaranty, is not, under the provisions of Section 4 of this Act, so highly flammable as to be dangerous when worn by individuals". Respondents have failed to establish that they have received such a guarantee from their supplier-manufacturers and accordingly the defense of Section 8(b) is not available to them.

The respondents have issued guarantees to their customer-dealer that the involved fabric is "guaranteed to meet the tests required by the Flammable Fabrics Act". Inasmuch as the evidence shows that such guarantees are false, respondents are in violation of the Federal Trade Commission Act and an appropriate order will be issued thereunder.

Respondents' joint answer, as seen, contains an affirmative defense reading as follows: "The tests apparently required by the Act and Regulations for the fabric involved are arbitrary and invalid for the reason that the bridal illusion involved is not customarily and normally worn by the consumer after dry cleaning, notwithstanding which the Act and the Regulations appear to require the fabric to be submitted to a flammability test after dry cleaning." Since the respondents have not requested any findings of fact on the above affirmative defense and since they do not mention it in their brief, it is deemed abandoned, but in any event it is our conclusion that the defense is without merit.

ORDER

It is ordered, That the respondent Novik & Co., Inc., a corporation, and its officers, and respondents Sheffield Novik, Thomas Elliott and

Opinion

62 F.T.C.

Benjamin Silberberg, 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. (a) Importing into the United States; or
(b) 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
(c) Transporting or causing to be transported for the purpose of sale or delivery after sale in commerce;
any fabric, which, under the provisions of Section 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals;
2. Furnishing to any person a guaranty with respect to any fabric which respondents, or any of them, have reason to believe may be introduced, sold or transported in commerce, which guaranty represents, contrary to fact, that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations thereunder, show and will show that the fabrics, covered by the guaranty, is not, in the form delivered or to be delivered by the guarantor, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals, provided, however, that this prohibition shall not be applicable to a guaranty furnished on the basis of, and in reliance upon, a guaranty to the same effect received by respondents in good faith signed by and containing the name and address of the person by whom the fabric was manufactured or from whom it was received.

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

This matter is before the Commission for consideration of respondents' exceptions to the hearing examiner's initial decision in which he found that respondents have violated Section 3(b) of the Flammable Fabrics Act.¹ In substance the respondents are charged with importing and selling fabric intended or sold for use in wearing apparel, which fabric is so highly flammable as to be dangerous when worn by individuals. The complaint also alleges, and the hearing examiner found, that respondents have furnished a false guaranty to customers with respect to such fabrics.

¹ 67 Stat. 111 (1953) (effective July 1, 1954), as amended, 15 U.S.C. § 1191 *et seq.*

The particular fabrics imported and sold by respondents which the hearing examiner found have failed to meet the requirements of the Act are two styles of white silk netting manufactured abroad and known in the trade as "bridal illusion" or "silk illusion net." The respondents do not deny that the samples of these two styles of bridal illusion, tested according to the procedures set forth in the Act, burn in a manner and with such rapidity as to fail to meet the requirements for fabrics that are subject to the Act.²

The term "fabric" is defined in the Act as meaning ". . . any material . . . intended or sold for use in wearing apparel. . . ." The fabrics here under consideration are used in the garment industry exclusively for making bridal veils. It is respondents' contention that a bridal veil is not an "article of wearing apparel" as that term is defined and used in the Act.

Section 2 of the Flammable Fabrics Act states in part:

As used in this Act. . . (d) The term "article of wearing apparel" means any costume or article of clothing worn or intended to be worn by individuals except hats, gloves, and footwear: *Provided, however,* That such hats do not constitute or form part of a covering for the neck, face, or shoulders when worn by individuals. . . .

Respondents contend that bridal veils are "hats" within the exception in the above definition and that the proviso clause thereto is not applicable. We cannot agree. Although bridal veils are usually attached to a crown or headpiece which sits on the head, this headpiece is a very minor part of the bridal veil ensemble. Counsel have stipulated that the average bridal veil is one yard in length and representative illustrations in the record show that there is very little similarity between bridal veils and customary millinery veils which are used as hats or accessories thereto.³ These illustrations show that bridal veils extend down behind the neck and shoulders and, in many

² Respondents take issue with the hearing examiner's characterization that "numerous samples" were tested. Be that as it may, the record shows that numerous individual tests were performed on two pieces each taken from two swatches; one swatch being a sample of a particular style of bridal illusion imported from France, the other a sample imported from England. The average burning time for one swatch was 2.0 seconds (for a 2 x 6 inch strip) and the average burning time for the other swatch was 2.6 seconds. The minimum requirement under Section 4(c) of the Act is 3.5 seconds.

³ The Commission has recognized that ornamental millinery veiling is not a "covering" within the meaning of Section 2(d) of the Act. On June 9, 1954, the following interpretation by the Commission was published in the Federal Register at p. 3373:

Ornamental millinery veils or veilings when used as part of, in conjunction with or as a hat, are not to be considered such a "covering for the neck, face, or shoulders" as would, under the first proviso of section 2(d) of the Flammable Fabrics Act, cause the hat to be included within the definition of the term "article of wearing apparel."

Respondents concede that this interpretation does not apply to bridal veils. That the Commission did not intend it to apply is clear from Rule 5(a) of the Rules and Regulations promulgated under this Act. Therein, in setting forth test procedures for certain classes of fabrics, bridal illusion is specifically named as an example of the type of fabric intended.

instances, extend part of the way down the back of the wearer. In our view, these facts alone are sufficient to warrant the conclusion that a bridal veil is not a hat but is a separate garment in itself. This conclusion is further supported by testimony that bridal veils sometimes reach the length of 6 yards.

The fact that a bridal veil is worn only for a special occasion cannot alter our conclusion that it is an article of wearing apparel subject to the prohibitions of the Act, since calamity is notoriously inconsiderate in its selection of the time and place it will strike.

Even assuming that bridal veils are "hats" as contended by respondents, they would come within the purview of the Act. Respondents' argument that they do not constitute or form part of a covering for the neck, face or shoulders is without substance.⁴ The illustrations mentioned above, which depict the manner in which bridal veils are worn, clearly show that the veil often touches the shoulders and back of the bride's gown. Moreover, in those illustrations showing bridal gowns with low backs, the veil often is in close proximity or actually contacts the bare skin. The word "covering" must be interpreted in light of the purpose of the Act which is to protect members of the public from the danger of being burned by highly flammable material. Where, as here, the fabric extends over and is in close proximity to the neck and shoulders, we have no doubt that such danger exists and that the fabric constitutes a "covering" within the meaning of the proviso. The fact that it does not afford protection to or fully enclose the stated parts of the body is of no consequence.

Respondents, however, would narrow the definition of a "covering" to exclude therefrom articles which are not difficult to remove. They contend that the Act was not intended to include hats unless they constitute a covering for the neck, face or shoulders in the sense that a hood or helmet or baby bonnet is a covering and is a hazard in that it would be difficult to remove. In support of this argument, they rely on the legislative history. Congress has clearly stated in the proviso in Section 2(d) that a hat becomes an article of wearing apparel when it constitutes or forms a part of covering for the neck, face or shoulders of the wearer. This is the test prescribed. Had Congress intended to add the additional test of "difficulty of removal" it could have easily expressed this criteria. In effect, Congress has determined that once

⁴ Respondents themselves, through counsel, stipulated during the hearing before the examiner, that bridal veiling "constitutes or forms a covering for the neck, face, or shoulders when worn by individuals." Respondents have requested that they be relieved from this stipulation on the ground that it was entered into inadvertently. Although we disagree with the hearing examiner's characterization of the respondents' motion as being "frivolous," it is unnecessary for us to rule on this request because we base our determination on other evidence in the record.

a hat is such a "covering," it is a hazard if flammable without regard to the question of ease of removal.

Notwithstanding the explicit wording of the statute, we have reviewed the excerpts from the legislative history cited by respondents and find nothing therein which discloses a different intent on the part of Congress. As pointed out by respondents, in the course of the hearings the Department of Commerce opposed a flat exemption for hats, gloves and footwear for the reason that such articles could be extremely dangerous to persons unable to remove them easily. However, this approach was rejected and the present proviso relating to "covering" was inserted. From the fact that no provision is made in the statute with respect to the difficulty of removal, we think it obvious that additional factors influenced Congress in its decision to use a "covering" as the test for exemption. One such obvious factor is that an article which constitutes or forms a part of the covering for the neck, face or shoulders, unlike the conventional hat, is easily within reach of open flames and cigarettes. Of interest in this connection is an illustration in the record of a bride wearing her veil which is pictured against the background of a lighted candle.

Respondents, in furtherance of their argument, except to the hearing examiner's finding that "the method of fixing the veil to the hair of a bride would normally render its quick removal difficult if the veil caught on fire." Although under our interpretation of the statute this finding is not controlling to decision, we find no error therein. The record shows that bridal veils are often secured to the hair with combs and bobby pins. Although the word "difficult" may be subject to different interpretations, we are convinced from the rapid burning time of this fabric that it is not probable that a bridal veil, so attached, could be removed quickly enough to avoid serious consequences.

Respondents assert that they acted in good faith in that they believed that the fabrics in question had been tested by their European suppliers and found to be safe, and that as soon as they were notified by representatives of the Commission that the two bridal illusion styles failed to meet the standards of the Act they stopped selling the fabrics. The circumstances do not excuse them from having sold fabrics which Congress has deemed a public hazard. While respondents' action in ceasing the sale of this fabric is commendable, this action did not take place until the investigation began and does not support a conclusion that the public interest would be adequately protected in the absence of an order to cease and desist.

Respondents also object to the scope of the order as contained in the initial decision, which would direct them to cease and desist from importing and selling any fabric in violation of Section 4 of the Act

Opinion

62 F.T.C.

and giving false guaranties with such fabric. The respondents contend that an order, if issued, should be limited to bridal illusion as only this type of fabric sold by them has been shown to be so highly flammable as to be dangerous when worn by individuals. We are of the opinion, however, that the broader order is in the public interest. The complaint charges respondents with importing and selling "fabric" in violation of the Act and that charge has been proven. Protection of the public from dangerously flammable fabrics and apparel requires us to order the respondents to cease and desist from this type of practice altogether, once it has been shown to exist as to any part of their business. *Baar & Beards, Inc.*, Docket 6400 [57 F.T.C. 937] (1960). We are "not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 [5 S. & D. 388, 391] (1952); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385 [6 S. & D. 564] (1959).

The hearing examiner found that respondents furnished false guaranties with respect to this fabric and respondents have not excepted to this finding. However, in interpreting the Act on this issue, the hearing examiner stated that a person charged with the accusations involved in the instant complaint may defend on the ground that he relied on a guaranty received in good faith as specified in Section 8(b). Although the respondents did not receive such a guaranty, this is an erroneous interpretation of the Act that should be corrected. The defense included in Section 8(b) pertains only to a charge of furnishing a false guaranty under that subsection. (A similar defense under Section 8(a) pertains only to a misdemeanor charge under Section 7 of the Act.) This defense is of no avail to a person charged with importing or selling flammable fabrics in violation of Section 3(b) of the Act.

There is some suggestion in the initial decision that the giving of a false guaranty with respect to the standards of the Act is a violation of only the Federal Trade Commission Act, whereas the selling of a highly flammable fabric which is intended for use in wearing apparel is a violation of only the Flammable Fabrics Act. Actually, both practices are illegal under the Flammable Fabrics Act and it is expressly provided in Sections 3(b) and 8(b) that such practices are also in violation of the Federal Trade Commission Act.

In view of the foregoing, the respondents' exceptions to the initial decision are denied. The initial decision is modified to conform to the views expressed in this opinion and as modified will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon exceptions of respondents to the initial decision and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having ruled on said exceptions and having determined that the initial decision should be modified to conform to the views expressed in the accompanying opinion:

It is ordered, That the initial decision be modified by striking therefrom that section beginning on page 237 with the words "Under Section 8(b) of the Flammable Fabrics Act," and ending with the words "and an appropriate order will be issued thereunder" and substituting the following:

Respondents have furnished false guaranties with respect to the fabric in question within the meaning of Section 8(b) of the Flammable Fabrics Act. As respondents have failed to establish that they received a guaranty from their suppliers, the defense included within Section 8(b) is not available to them.

It is further ordered, That the respondents' exceptions to the initial decision be, and they hereby are, denied.

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

It is further ordered, That respondents Novik & Co., Inc., Sheffield Novik, Thomas Elliott, and Benjamin Silberberg, 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 contained in the initial decision.

IN THE MATTER OF

LURIA BROTHERS AND COMPANY, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT