

It is ordered, That the exceptions to the initial decision filed by counsel supporting the complaint be, and they hereby are, disallowed.

It is further ordered, That the hearing examiner's initial decision be, and it hereby is, vacated and that the complaint herein be, and it hereby is, dismissed without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondents at any time in the future as may be warranted by the then existing circumstances.

IN THE MATTER OF
SUNNYVALE, INC., ET AL.

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

Docket 8515. Complaint, June 28, 1962—Decision, Sept. 17, 1963

Order dismissing complaint charging New York City wholesalers of dresses with violation of the Flammable Fabrics Act, for the reason that the articles concerned were handkerchiefs less than 24 inches square not subject to the Act on the date complaint issued.

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 Sunnyvale, Inc., a corporation, and Jerome Aron and Mac Kaplan, individually and as officers of said corporation, and Sunnyvale of Pennsylvania, Inc., a corporation, and Abraham Meyers and Stanley Samber, 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 under the Flammable Fabrics 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 Sunnyvale, Inc., is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents Jerome Aron and Mac Kaplan are president and vice president, respectively, of Sunnyvale, Inc. The individual respondents formulate, direct and control the policies, acts and practices of the said corporate respondent. The aforesaid respondents are wholesalers of articles of wearing apparel,

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including dresses, with office and principal place of business at 1350 Broadway, New York, New York.

Respondent Sunnyvale of Pennsylvania, Inc., is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania. Respondents Abraham Meyers and Stanley Samber are president and secretary, respectively, of Sunnyvale of Pennsylvania, Inc. The aforesaid respondents are manufacturers of wearing apparel, including dresses, with office and principal place of business at 3 South Webster Avenue, Scranton, Pennsylvania.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, 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 for the purpose of sale or delivery after sale in commerce; as "commerce" is defined in the Flammable Fabrics Act, articles of wearing apparel, as the term "article of wearing apparel" is defined therein, which articles of wearing apparel were, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

Among the articles of wearing apparel mentioned above were dresses.

PAR. 3. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, sold and offered for sale, articles of wearing apparel made of fabric which was, under Section 4 of the Act, as amended, so highly flammable as to be dangerous when worn by individuals, which fabric had been shipped and received in commerce, as the terms "article of wearing apparel," "fabric" and "commerce" are defined in the Flammable Fabrics Act.

Among the articles of wearing apparel mentioned above were dresses.

PAR. 4. Respondents, subsequent to July 1, 1954, have furnished their customers with a guaranty with respect to the articles of wearing apparel mentioned in Paragraphs 2 and 3 hereof, to the effect that reasonable and representative tests made under the procedure provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, show that such articles of wearing apparel 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 articles of wearing apparel covered by such guaranty might be introduced, sold or transported in commerce.

Said guaranty was false in that with respect to some of said articles of wearing apparel, respondents have not made such reasonable and representative tests.

PAR 5. The acts and practices of respondents herein alleged were and are in violation of the Flammable Fabrics Act and 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.

Mr. Thomas J. Anderson and Mr. Edward B. Finch for the Commission.

Golenbock and Barell, by *Mr. Justin M. Golenbock and Mr. Melvin Michaelson* of New York, N.Y., with *Mr. Erwin Feldman*, New York, N.Y., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

This complaint was issued June 28, 1962, alleging, in substance, that respondents violated the Flammable Fabrics Act [hereinafter called the Act],¹ by manufacturing and selling in interstate commerce women's dresses which were so highly flammable and were made of a fabric which was so highly flammable, as to be dangerous when worn by individuals. The complaint also charges respondents with furnishing their customers a false guaranty under the Act.

Although the complaint charges respondents with manufacturing and selling dresses made from flammable fabrics, in violation of the Act, evidence offered in support of the complaint was limited to attempting to prove only that respondents' act of placing a flammable decorative handkerchief in the right-hand skirt pocket of only one of respondents' dresses, Style No. 466, violated the Act. The false guaranty charge also rests solely upon the flammability of the handkerchief inserted in the skirt pocket.

This proceeding involves substantially the same issues as Docket No. 8468, *Paintset Fashions, Inc., et al.*, in which a dismissal order was entered on September 4, 1962, and which is presently on appeal to the Federal Trade Commission. Another proceeding involving this same situation is *Murray Perlstein*, Docket No. 8522, presently pending before the examiner. The introduction of evidence has been completed in Docket 8522.

The Flammable Fabrics Act was signed into law on June 30, 1953, and became effective July 1, 1954. On April 30, 1954, the Commission

¹ Pertinent Sections of the Flammable Fabrics Act are reproduced in Appendix A [Appendix A. omitted in printing]. The Rules and Regulations thereunder can be found in 16 CFR 302.

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published in the Federal Register a notice of public hearings for the purpose of interpreting the term "article of wearing apparel" as used in that Act. On May 18, 1954, after such hearings, the Commission issued its ruling "that handkerchiefs up to a finished size of 24 inches square are not 'articles of wearing apparel' as that term is used in the Flammable Fabrics Act." (File 205-2.) In the same year, 1954, after the Commission's ruling had exempted handkerchiefs from the Act, Congress amended the Act by adding to it what is now subsection 4(c). While this amendment was being considered by the House Committee on Interstate and Foreign Commerce, the committee issued its report on S. 3379 which ultimately became subsection 4(c), and in that report, *inter alia*, stated:

Your committee is convinced that scarfs should be subject to the provisions of the law just as any other item of wearing apparel. They can be as much a danger to human safety as any other improperly protected garments. Scarfs are worn around the head or neck and tied on with a knot which may not be easily removable. Once ignited, the danger of the hair catching on fire is very great. The scarfs cannot be readily discarded under such circumstances.

* * * * *

Handkerchiefs up to 24 inches square, according to an administrative ruling of the Federal Trade Commission, are not "articles of wearing apparel" within the meaning of the Flammable Fabrics Act, and are, therefore, exempted from the provisions of this law.

A reading of the language employed in the Act, together with interpretations placed thereon by the Federal Trade Commission and the Committee of Congress, leads to the conclusion that the handkerchief, which is the subject of the controversy herein, is not an "article of wearing apparel" or "fabric" within the meaning of the Flammable Fabrics Act.

The entire industry has relied and acted upon the May 18, 1954, ruling of the Commission that handkerchiefs up to a finished size of 24 inches square are not articles of wearing apparel as that term is used in the Flammable Fabrics Act. Insofar as this examiner is able to ascertain, that ruling has not been challenged, vacated, modified, or set aside during the eight years since its issuance.

In a speech on October 11, 1962, at a meeting of the Home Safety Conference of the Fairfax County Safety Council, Harold S. Blackman, Chief of the Commission's Division of Regulation, stated:

The Commission had excepted handkerchiefs up to 24 inches square from the provisions of the Act holding they did not constitute articles of wearing apparel, and would be relatively safe or easily discarded in time of emergency. However, there have been instances *in the past year and a half* where a dress maker will buy small silk squares and attach them to a pocket or belt of a woman's dress by stitching, tying or pinning the square to the dress. It thus

acts as a fuse to help ignite the fabric of the dress. The Commission has taken action in a number of such cases to prevent the sale of such products. (Emphasis supplied.)

This speech, of course, does not necessarily reflect the views of the Commission, but is a recent public reiteration of the universally accepted ruling that handkerchiefs up to 24 inches square had been exempted by the Commission from the provisions of the Flammable Fabrics Act. The issue in this proceeding would appear, therefore, to be: Did respondents' mere act of inserting in the skirt pocket of a dress an easily removable flammable handkerchief render both of the articles, otherwise exempt, subject to the Act?

A prehearing conference was conducted on October 5, 1962, at which complaint counsel agreed that the issue here involves a determination of the legal consequences, if any, flowing from respondents' act in placing in the pocket of one of their dress styles a flammable silk square. Hearings were conducted and the record was closed on October 17, 1962. Proposed findings, conclusions and briefs have been filed. Based upon the entire record, including the pleadings, testimony and exhibits, the examiner makes the findings and conclusions hereinafter set forth. Any finding proposed by the parties which is not hereinafter made in the form proposed, or in substantially that form, hereby is rejected. All motions which have not previously been ruled upon, and which are not herein specifically ruled upon, are hereby denied.

Based upon the entire record, the examiner makes the following:

FINDINGS OF FACT

1. Respondent, Sunnyvale, Inc., is a New York corporation whose principal office is at 1350 Broadway, New York, N.Y. Respondent, Sunnyvale of Pennsylvania, Inc., is a Pennsylvania corporation whose principal office is at 3 South Webster Avenue, Scranton, Pennsylvania; it manufactures dresses exclusively for Sunnyvale, Inc., and in 1961 manufactured 1,500,000 such dresses. Both corporate respondents manufacture dresses for resale at retail. Respondents Jerome Aron and Mac Kaplan each own 50 percent of the outstanding and issued stock of these two corporations; they manage, control and direct the policies and practices of both corporations. Aron is in charge of manufacturing and Kaplan of sales. Respondents Abraham Meyers and Stanley Samber are president and secretary, respectively, of Sunnyvale of Pennsylvania, Inc. They do not exercise sufficient control over the policies and practices of that corporation to be bound by any cease and desist order which may be entered against

either of the corporate respondents. The complaint should be dismissed as to Abraham Meyers and Stanley Samber. The corporate respondents own factories in Scranton, Pennsylvania, Flemington, New Jersey; Greenville, Simpsonville, and New Ellington, South Carolina. They also control the production of about seven contractors and directly or indirectly employ approximately 1,200 people. In addition to its principal place of business at 1350 Broadway, New York, N.Y., Sunnyvale, Inc., maintains an office at 29 West 35th Street, New York City, which is a "consolidating point" where a variety of items for the factories are consolidated for shipment.

2. In the course and conduct of their business the corporate respondents transport their dresses from the various places where they are manufactured across state lines to purchasers located in various other States of the United States. The corporate respondents are engaged in commerce, as "commerce" is defined in § 2(b) of the Flammable Fabrics Act. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding.

3. In the course and conduct of their business in commerce the corporate respondents are in substantial competition with other individuals, firms and corporations engaged in the manufacture and interstate sale of women's dresses.

4. In the year 1961 the business enterprises owned and controlled by Aron and Kaplan manufactured and sold approximately three million dresses. These dresses are known in the industry as "Day Time" dresses, and ordinarily retail at prices ranging from \$5.98 to \$12.98.

5. The dresses which respondents sold in interstate commerce for resale at retail during 1961 included Style 466, of which RX-1 is a photographic likeness. This dress was made from a fine combed cotton striped chambray weighing more than two ounces per square yard and was fully washable. It was a plain surface fabric² and not a flammable fabric within the intent and meaning of the Act. It was a "three-quarter step-in dress, a little touch of shoulder, sheer, self-belt" with pockets on each side of the skirt. A fully-finished handrolled-edged handkerchief, approximately 18 inches square, lilac, gold, blue or red in color, was placed in the right-hand skirt pocket for colorful decoration. Respondents purchased the decorative silk handkerchiefs from Murray Perlstein, 265 West 40th Street,

² See Rules and Regulations under Flammable Fabrics Act, 16 CFR 302.1(a)(7)(8).

"(7) The term 'plain surface textile fabric' means any textile fabric which does not have an intentionally raised fibre or yarn surface such as a pile, nap or tuft, but shall include those fabrics having fancy woven, knitted or flock printed surfaces.

"(8) The term 'raised surface textile fabric' means any textile fabric which has an intentionally raised fibre or yard surface such as a pile, nap, or tufting."

New York, N.Y., at an average cost of about ten cents per handkerchief, according to the Perlstein invoices in evidence.

6. The price charged by respondents for dress Style 466 and the price charged by the retailers were not affected in any way by the handkerchief in the skirt pocket (Tr. 46). The handkerchiefs were inserted by either the shipping or the finishing department; sometimes they were pinned in with a safety pin (RX-2) and sometimes they were just stuck in depending upon how busy the operation was at the time. Sometimes the handkerchief was omitted altogether if the manufacturing and shipping schedule was crowded. The handkerchiefs were never sewn or otherwise permanently attached to the dress and were therefore not an integral part of dress Style 466. These silken squares were designated as "hankies" on Meyer Perlstein's invoices to respondents and characterized as handkerchiefs by the witnesses Jerome Aron, Mac Kaplan, Abraham Meyer, Charles H. Reynolds, Jr., and Max Milstein. The preponderance of the reliable, probative and substantial evidence in this record supports no finding other than that the silken squares placed in the right-hand skirt pocket of dress Style 466 were colored handkerchiefs, 18 inches square, or less. Counsel supporting the complaint did not place in this record (nor did he appear to have)³ a specimen or sample of such colored handkerchief. Absent such sample, the handkerchief's characteristics had to be reconstructed from secondary evidence, *i.e.*, the Perlstein invoices describing them and what the various witnesses recollected about them.

7. At respondents' 35th Street office, salesmen's samples are repressed, pinned up and made to look "pretty" before being shipped out to the salesmen. This address is also a consolidating point for "findings," "trim," buttons, belts, single bolts of fabric, "little odd bits of things" that have to be shipped to respondents' manufacturing facilities. Its trim buyers purchase buttons, belts, laces, ribbons, certain types of interlinings, handkerchiefs, decorative pins, "all the do-dads and accessories that go onto a dress, even the thread in some cases."

8. Respondents' fabric purchasing setup is a completely different office from its trim-buying office and is staffed by a principal fabric buyer and seven assistants. Aron testified:

* * * We purchase about twelve million yards of fabric a year. This is a highly complicated and professionalized office, and an extremely sophisticated

³ See the hearing examiner's citation of authorities in Docket No. 7812, *Kenton Leather Products, Inc.* [61 F.T.C. 1150, 1152], (dismissed without opinion by the Commission on November 13, 1962) to the effect that there is a recognized legal presumption that a party will produce evidence which is favorable to him if such evidence exists and is available.

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setup in connection with understanding fabrics, understanding the market, understanding the rules and regulations of the government in connection with the purchase of fabric.

When the Flammable Fabrics Act was passed, these people were set up with a procedure to comply with the law as they were as to other laws. We have a very complicated procedure in connection with the Fiber Identification Act. We use literally thousands of different types of fabric a year and every one of these has to be identified on the garment according to the law. All of those procedures are very carefully followed. In connection with our trim buyers, we have no procedures of that sort since we know of no laws that I believed they were subject to.

9. Respondents manufactured and sold approximately 168 dozen of dress Style 466. They began to cut the dress in December 1960, and by the end of January 1961, all of the dresses had been cut and within sixty days thereafter they had been sold. A specimen of dress Style 466 is not in evidence. (See Footnote 3, *supra*, re complaint counsel's failure to put in evidence a specimen of the handkerchief.)

10. The record will not support a finding that CX-19, the remnant of the white handkerchief given to Investigator Rose by Charles H. Reynolds, Jr., is in fact a specimen of the colored handkerchiefs placed in the skirt pocket of dress Style 466. Perlstein's invoices to Sunnyvale show that the "hankies" sold for use in Style 466 were either lilac, gold, blue or red. RX-19 is off-white. Commission's witnesses Rose and Lipnik testified that CX-19 was off-white when they received it. Charles H. Reynolds, Jr.'s "SPEED LETTER" (RX-17) of April 10, 1961, written when Rose obtained CX-19, in its whole condition recites:

Dear Mr. Rose: On March 9, 1961 we received Style 466 from Sunnyvale, Inc., which had attached to it by a safety pin the scarf you are taking. The invoice number was 29692.

Sunnyvale, Inc.

1350 Bway N.Y.C.

Sincerely yours,

Charles H. Reynolds, Jr.

Reynolds testified (Tr. 67) after examining CX-17 (his letter) and CX-19 (the remnant): "We furnished him with a silk scarf which was taken from a dress, but I don't really remember whether it was a print scarf, or colored scarf or white. All I know is that we gave him a scarf, and *whether this [CX-19] is the same one I don't know.*" (Underscoring supplied.) On cross-examination, Mr. Reynolds further testified (Tr. 68): "Q. Let me call your attention to dress style 466 of Sunnyvale. Do you recall what the dress looked like? A. No I do not." The witness Reynolds further testified that an examination of the photograph of the dress, in evidence, RX-1, would not help him recall what Style 466 looked like. He was not

the buyer for the dress department. He remembered that a "handkerchief" was inserted in the skirt pocket of Style 466, but could not testify as to the size or the color of the "handkerchief" (Tr. 69). Other witnesses recalled definitely that the handkerchiefs were colored, that none of them were the same color as CX-19, that they had hand-rolled edges, and were approximately 18 inches square.

11. Mr. Reynolds also testified there were numerous cases in his nine years' experience in which dresses were sold at retail in his department store with handkerchiefs as decorations or ornamentations, but that there would be no additional difficulty in selling Style 466 if the handkerchief were removed. It had no utility value as far as the use of the dress was concerned (Tr. 75).

12. The mere inclusion of a handkerchief or a scarf as an ornamentation to a dress does not change its basic nature or value. In Style 466 the handkerchief was included solely for decoration or ornamentation.

13. The one handkerchief upon which complaint counsel rests his entire case (CX-19) was practically destroyed by being cut up into pieces for the flammability tests conducted upon it. The only evidence that CX-19 came from a Sunnyvale dress is hearsay. On the other hand, CX-1 to CX-10, inclusive, contradict this hearsay evidence because these exhibits, the Perlstein invoices for the handkerchiefs, made out at the time they were purchased, show that no off-white (the color of CX-19) handkerchiefs were sold for use by respondents with Style 466 but only lilac, gold, blue or red handkerchiefs. Counsel supporting the complaint has not proven by a preponderance of reliable, probative and substantial evidence that the handkerchief handed to Investigator Rose by Mr. Reynolds, the ragged remnant of which is in evidence as CX-19, is in fact a handkerchief from dress Style 466, or the remnant of such a handkerchief.

14. Max Milstein, a member of the New York bar who was a witness in *Paintset, supra*, testified in the instant case that he had been connected with the apparel industry ever since he had started to practice law in 1935. He had been associate counsel to several apparel trade associations and was at the time of his testimony and for 5 years prior "director counsel" for the House Dress Institute, a national association of dress manufacturers, and had about 20 years' connection with apparel associations in the men's and women's wear fields. He had been a member of an advisory committee appointed by the Federal Trade Commission to assist in establishing guides for enforcement of the Flammable Fabrics Act. He testified (Tr. 119, *et seq.*):

Q. Mr. Milstein, are you aware of a 1954 ruling of the Commission relating to handkerchiefs?

A. Yes.

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Q. Will you tell us your interpretation of this ruling?

A. In that ruling the Federal Trade Commission held that handkerchiefs which were 24 x 24 inches or less in size were not articles of wearing apparel under the provisions of the Flammable Fabrics Act and were therefore exempt therefrom.

Q. What do you understand this exemption to mean?

A. Well, I think the exemption is quite simple, as plain as could be; a handkerchief of that dimension was not an article of wearing apparel.

Q. Is there any question in your mind as to whether the handkerchief could be a fabric?

A. There is no question in my mind but what it could not be a fabric. A fabric is an unsewn textile intended for incorporation into a garment. The Act itself, and the rules when speaking of fabrics, speak of fabrics intended for use in or contained in an article of wearing apparel. Obviously a handkerchief is not such a thing.

Q. Are you familiar, generally, with the legislative history of the Act itself?

HEARING EXAMINER GROSS: You mean the Flammable Fabrics Act?

MR. MICHAELSON: Yes, sir.

A. Fairly familiar. I know there was a series of very unfortunate accidents throughout the country which necessitated action of this kind. I don't know of any group there may have been who opposed any such action. And the Act was passed as a necessity.

Q. As you would interpret the Flammable Fabrics Act, is there any provision under the Act as it is now written and as it has been in force since 1954 which would include a handkerchief, whether it were attached to a dress or not?

A. My opinion would be definitely no, that such a handkerchief could not be regarded as being covered by the Flammable Fabrics Act. I might say that I, and other trade association executives, were strengthened in their opinion, aside from the clear-cut language of the ruling exempting handkerchiefs, by the fact that the Commission did not even add to that ruling in 1954 any language limiting their opinion and their exemption of handkerchiefs.

I am further bolstered in my belief by the fact that they very well knew that the Congress, when it exempted certain articles of wearing apparel from the Act, specifically added words of limitation, so that following upon that, following upon the fact that the Commission did not choose to use any such words of limitation, following upon the fact that the use of handkerchiefs in connection with dresses has been a practice that goes back many, many, many years, I am firmly convinced that these handkerchiefs are not covered by the Act.

Q. Has it been a practice for many years in the dress industry to attach handkerchiefs in various ways, such as pinning them with a safety pin or knotting them around the loop of a belt?

A. It has been a practice for many, many years, and it has been a practice for many, many years of women doing this on their own.

I think the manufacturers originally got the idea from women, not the other way around, and handkerchiefs for many, many years have been pinned to one side of a dress, tied in a buckle, stuck in a pocket, attached to the hip, almost any place you could mention.

Q. Let me show you Commission Exhibit 19. What you have here, of course, is simply a remnant of an article that was used in testing by the

Commission. Now, if this were to be a finished handkerchief of the approximate dimensions that you can visualize from seeing this thing, is there any doubt in your mind that this thing would be a handkerchief, and nothing more?

A. There is no doubt in my mind.

HEARING EXAMINER GROSS: Well, what is your conviction?

THE WITNESS: There is no doubt in my mind that it is a handkerchief.

15. Webster's "New World Dictionary of the American Language" defines a handkerchief as a "small piece of cloth, cotton, silk, linen, etc., usually rectangular, for wiping the nose, eyes, or face, or carried or worn for adornment." *The Language of Fashion*, by Mary Brooks Picken (Funk and Wagnalls, 1939) defines a handkerchief as a "piece of cloth of cotton, linen, silk, etc., usually square, varying in size and fabric according to purpose; often decorated with lace, embroidery, monogram, border, etc. * * * worn or carried for usefulness or as costume accessory." The word "hanky" is a common abbreviation for the word "handkerchief"; and "hanky" sometimes commonly denotes a small or dainty handkerchief. In the industry a handkerchief is an article made of fabric with a finished edge, not exceeding 24 inches square in its finished size, which may have a utilitarian function or may be used or worn for decorative purposes. Any disinterested observer must conclude that the silk remnant in evidence as CX-19 does not constitute reliable, probative and substantial evidence, which in a strict sense would prove that the original really was, but Investigator Rose, who first obtained CX-19, Mrs. Lipnik, the chemist to whom CX-19 was sent for testing, and Charles H. Reynolds, Jr., who gave CX-19 to Investigator Rose, all remembered the original as being a piece of silk approximately 18 inches square with handrolled edges. The examiner finds that CX-19, in its original condition, was a handkerchief. Elsewhere in this opinion the examiner has pointed out the failure of proof that the original of CX-19 was in fact a specimen of the type of handkerchief which was in the right-hand skirt pocket of Dress Style 466.

16. The failure of proof that the original of CX-19 was in fact a specimen of the type of handkerchief in the pocket of the dress cautions this examiner against a finding that the handkerchiefs in the pockets of Style 466 were in fact flammable and such finding is hereby rejected.

17. Dress Style 466 could have been worn, and was sold, without the handkerchief in the pocket. The inclusion of the handkerchief was not considered significant either by respondents or their customers. Handkerchiefs of the kind and character used by respondents in Style 466 are standard commercial items and they may be separately purchased in retail stores, to be used solely as handkerchiefs, or as ornamentation for dresses as they were used by respondents.

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18. For many years manufacturers have been selling dresses with handkerchiefs either tucked in the pocket, or pinned, looped or tied to the dress. These handkerchiefs are easily removable so that they can, if the owner so desires, be readily replaced by another handkerchief, or other accessory, to provide color and variety to the costume. Respondents and other dress manufacturers generally have used handkerchiefs with dresses in this way since the Commission's 1954 ruling that a handkerchief is not an article of wearing apparel within the meaning of the Flammable Fabrics Act. For many years women have customarily used handkerchiefs, and have purchased them separately, for ornamental purposes and as accessories for their costumes and have applied them by tucking them in a pocket, in a sleeve, looping them through a buttonhole or belt or by pinning or tying them to their costume.

19. In 1961 Sunnyvale, Inc., filed with the Commission a continuing guaranty under § 8 of the Flammable Fabrics Act and under the rules and regulations issued pursuant to said Act (16 CFR § 302.9(b)). This recites:

The undersigned, Sunnyvale, Inc., a corporation residing in the United States and having principal office and place of business at 1350 Broadway, New York 18, New York, and engaged in the marketing of or handling of [articles of wearing apparel] subject to the Flammable Fabrics Act and Regulations thereunder HEREBY GUARANTEES that reasonable and representative tests as provided in the Rules and Regulations made according to the procedures prescribed in Section 4(a) of the Flammable Fabrics Act, show or will show that all of the following described [fabrics used or contained in articles of wearing apparel] hereafter marketed or handled by it are not, in the form delivered or to be delivered by the undersigned, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals * * *.

The invoices with which Sunnyvale, Inc., billed their customers who purchased dress Style 466 had imprinted at the bottom:

Based upon guarantees received we hereby guarantee that reasonable and representative tests made according to the procedures prescribed in Sec. 4(a) of the Flammable Fabrics Act show that fabrics used or contained in the articles of wearing apparel and fabrics otherwise subject to said Act, covered by and in the form delivered under this document, are not, under the provisions of said Act, so highly flammable as to be dangerous when worn by individuals.

Sunnyvale, Inc., had not asked for nor obtained a guarantee from the supplier of the handkerchief because its officers and employees believed and in good faith relied upon the 1954 ruling of the Commission that handkerchiefs were not within the purview of the Flammable Fabrics Act. The officers of Sunnyvale, Inc., and its employees, therefore, reasonably and in good faith believed that the

guarantee given by Sunnyvale, Inc., to its customers did not apply to handkerchiefs. The examiner finds the guarantee given by Sunnyvale, Inc., to its customers was not false because it was not intended to nor did it apply to handkerchiefs.

20. After the Commission investigator obtained the original of CX-19, he transmitted it to the Washington, D.C. laboratories of the Commission where, on May 5, 1961, it was tested by the Commission's chemist, Judith Berman, now Mrs. Judith Berman Lipnick, in accordance with Commercial Standard 191-53 for "compliance with the Flammable Fabrics Act." Ten pieces were cut from the handkerchief and burned in an automatic clocking device in a machine specially designed for such tests. The burning time for the ten pieces was: (CX-18)

- | | |
|-----------------|------------------|
| (1) 3.8 seconds | (6) 3.3 seconds |
| (2) 3.1 seconds | (7) 3.4 seconds |
| (3) 3.1 seconds | (8) 3.7 seconds |
| (4) 3.3 seconds | (9) 3.0 seconds |
| (5) 3.2 seconds | (10) 3.0 seconds |

21. After Mr. Rose received the result of the test in May 1961, he called at the offices of Sunnyvale, Inc., in New York. Mr. Aron was on vacation and Mr. Rose talked with Mr. Kaplan, concerning dress Style 466. Prior to that time respondents had no idea that there was any objection to the handkerchiefs. Kaplan called in the office manager and trimming buyer and told them to extend every cooperation to Mr. Rose. Between the time that Rose called upon Sunnyvale in May 1961, and the time of the service of the complaint, Kaplan had heard only indirectly about the incident when a reporter from Women's Wear, a nationwide publication for the women's apparel business, called Kaplan and read him the official press release of the Commission concerning these proceedings dated July 3, 1962, which is in evidence as RX-3.

22. Both Jerome Aron and Abraham Meyers testified, and the hearing examiner finds that since Investigator Rose's visit to the office of Sunnyvale in the spring of 1961, respondents have discontinued and abandoned using handkerchiefs in any way in manufacturing dresses whether such handkerchiefs are attached or unattached. Respondents have "discontinued using a handkerchief in any shape or form" (Tr. 181). Mr. Meyers testified, "I really think it could be made of concrete and we wouldn't use it because the law was laid down at the onset of this. Nobody would buy anything that resembles a handkerchief in our company."

23. After Mr. Aron returned from his vacation and as soon as he learned of Mr. Rose's call, he issued orders to everyone connected

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with the firm that under no circumstances were handkerchiefs ever to be used as adornment or ornamentation for any more dresses manufactured by Sunnyvale, and none have since been used. Abraham Meyers, production manager for the Pennsylvania corporation, testified (and is uncontradicted in this record) that as soon as he heard from Aron about the question of the flammability of handkerchiefs he gave away to charitable institutions all the remaining silk handkerchiefs they had on hand. Aron's uncontradicted testimony was to the effect that as soon as he heard of Rose's call he and Kaplan decided that "never again would we purchase a handkerchief and insert it in a dress, because of the possible—ramifications of what might come of it seemed to be completely out of proportion to their worth, which was negligible to us." He testified that respondents have no intention of using handkerchiefs again; they have issued orders to buyers under no circumstances to purchase handkerchiefs, to their designers not to use them, and to their factory people to reject them if they receive them.

24. Even though the use of the silk handkerchief in Style 466 in the manner described in this decision did and does not constitute a violation of the Flammable Fabrics Act, respondents have nevertheless completely abandoned the use of handkerchiefs as ornamentation or decoration for their dresses. There is no likelihood that they will resume the use of handkerchiefs as ornamentation for the dresses they manufacture unless the Federal Trade Commission in this, and in *Paintset*, Docket No. 8468, and in *Murray Perlstein*, Docket No. 8522, specifically sanctions such practice.⁴

Applying the hereinabove found facts to the pertinent legal precedents, the examiner makes the following:

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding.
2. Corporate respondents Sunnyvale, Inc., a New York corporation, and Sunnyvale, Inc., of Pennsylvania, a Pennsylvania corporation, are engaged in commerce as "commerce" is defined in the Flammable Fabrics Act.
3. Individual respondents Jerome Aron and Mac Kaplan own all of the issued and outstanding stock of the corporate respondents. They

⁴ *Argus Cameras, Inc.*, 51 F.T.C. 405 (1954); *Dietzgen Co. v. FTC*, 142 F. 2d 321 (C.A. 7, 1944); *Firestone Tire & Rubber Co.*, Docket No. 7020; *Wildroot Co.*, 49 F.T.C. 1578 (1953); *Bell & Howell Co.*, Docket No. 6729, C.C.H. Tr. Reg. Rept. ¶26,626 (Transfer Binder 1957-1958); *United States v. W. T. Grant Co.*, 345 U. S. 629 (1953); *Chas. Pfizer & Co.*, Docket No. 7486, Comm. Opinion of May 23, 1960, affirming examiners dismissal of complaint.

are officers and directors of the corporate respondents, and manage, direct and control the policies and practices of the corporate respondents.

4. Individual respondents Abraham Meyers and Stanley Samber, although officers of one of the corporate respondents, do not exercise such degree of control over, and direction of, the policies and practices of the corporate respondents as to be included in any cease and desist order which might be entered against the corporate respondents. The complaint should be dismissed against them.

5. In the course and conduct of their business in commerce, the corporate respondents are in substantial competition with other individuals, firms and corporations engaged in the manufacture and interstate sale of women's dresses.

6. CX-19, the only fabric in evidence, has not been proven by a preponderance of the reliable, probative and substantial evidence in this record to have been, in its original state, a specimen of the allegedly flammable handkerchief inserted in the skirt pocket of dress Style 466 manufactured and sold by respondents. This failure of proof in itself requires dismissal of this proceeding.

7. The lilac, blue, gold or red handkerchief in the pocket of dress Style 466 was not an integral part of the dress. Although CX-19 has not proven to be a specimen of such handkerchief, it is, nevertheless, a "handkerchief" within the exemption of the May 18, 1954, ruling of the Federal Trade Commission. It was and is, therefore, exempt from the Flammable Fabrics Act and the rules and regulations issued thereunder.

8. However, even if the failure of proof enunciated in Conclusion 6, and the immunity given the handkerchiefs by the Federal Trade Commission ruling set forth in Conclusion 7 were cast aside, the preponderance of the reliable, probative and substantial evidence justifies the conclusion and the examiner hereby concludes that the corporate respondents and respondents Jerome Aron and Mac Kaplan have completely abandoned the practice of using handkerchiefs of any kind or character as a decoration or ornamentation for their dresses as was done in connection with Style 466, and the use of handkerchiefs in any connection with the manufacture of their dresses will not be resumed under any circumstances by respondents unless and until such use is specifically sanctioned by the Federal Trade Commission.

9. The handkerchief which was pinned into or merely stuck into the skirt pocket of Style 466 was not an integral part of the garment, and did not constitute a flammable fabric as defined in the Flammable Fabrics Act and the rules and regulations issued thereunder.

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10. Dress Style 466 as described herein was not and has not been challenged as a flammable fabric and is hereby found not to have been a flammable fabric under the Flammable Fabrics Act and the rules and regulations thereunder. Now therefore,

It is ordered, That this complaint and the proceedings thereunder be and hereby are dismissed as to each and all of the respondents jointly and severally.

ORDER DENYING PETITION FOR REVIEW AND DISMISSING COMPLAINT

This matter having come on to be heard by the Commission upon a petition for review of the initial decision filed by counsel supporting the complaint and upon respondents' answer wherein they contend, *inter alia*, that said petition was not timely filed; and

It appearing that this case involves the issue of whether or not "handkerchiefs" of a size of less than twenty-four (24) inches square when affixed to dresses for the purpose of decoration or ornamentation are exempted from the provisions of the Flammable Fabrics Act by reason of the Commission's interpretive opinion of May 18, 1954 (19 Federal Register 2985), 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"; and

The Commission having rendered its decision *In the Matter of Paintset Fashions, Inc., et al.*, Docket No. 8468 [p. 691 herein], wherein it determined that the Commission's aforesaid opinion of May 18, 1954, was subject to the interpretation that such "handkerchiefs" were not subject to the Act and that the recent amendment to Rule 6 of the Commission's Rules and Regulations under the Flammable Fabrics Act, 16 CFR 302.6(c) and (d) (28 Federal Register 6535, June 26, 1963; effective date July 26, 1963) clarifies the matter by expressly providing that handkerchiefs sold as a part of articles of wearing apparel are subject to the Act; and

The Commission, without passing on the validity of the hearing examiner's rulings or on respondents' contention that the petition for review was not timely filed, believing that the public interest will best be served by dismissing the complaint herein and allowing the respondents voluntarily to conform their practices to the new Rule 6 referred to above:

It is ordered, That the aforesaid petition for review of the initial decision be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision be, and it hereby is, vacated and that the complaint herein be, and it hereby is, dismissed without prejudice, however, to the right of the

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Commission to issue a new complaint or to take such further or other action against the respondents at any time in the future as may be warranted by the then existing circumstances.

IN THE MATTER OF

MURRAY PERLSTEIN TRADING AS MURRAY PERLSTEIN

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

Docket 8522. Complaint, July 24, 1962—Decision, Sept. 17, 1963

Order vacating initial decision and dismissing—following the July 26, 1963 clarifying amendment to Rule 6 under the Flammable Fabrics Act making subject to its provisions handkerchiefs intended to be a part of wearing apparel—complaint charging a New York City importer with selling in commerce handkerchiefs less than 24 inches square, intended to be a part of wearing apparel, which were so flammable as to be dangerous when worn.

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 Murray Perlstein, an individual trading as Murray Perlstein, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics 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. Murray Perlstein is an individual trading as Murray Perlstein, with his office and place of business located at 265 West 40th Street, New York, New York. Respondent is a jobber of notions, accessories and fabrics used in the manufacture of articles of wearing apparel.

PAR. 2. Respondent, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, has sold and offered for sale in commerce; has imported into the United States; and has introduced, delivered for introduction, transported, and caused to be transported, in commerce; and has transported and caused to be transported for the purpose of sale or delivery 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

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Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

PAR. 3. The acts and practices of respondent herein alleged 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 within the intent and meaning of the Federal Trade Commission Act.

Mr. Thomas C. Marshall and *Mr. Edward B. Finch* for the Commission.

Golenbock and Barell, New York, N.Y., by *Mr. Melvin Michaelson*; and *Mr. Erwin Feldman*, New York, N.Y., for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The Commission's complaint in this matter charges the respondent, Murray Perlstein, an individual trading under that name, with violation of the Flammable Fabrics Act and the Federal Trade Commission Act. After the filing of respondent's answer hearings were held at which evidence was introduced both in support of and in opposition to the complaint. Proposed findings and conclusions have been submitted by the parties, together with supporting memoranda, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the evidence or the applicable law.

2. The proceeding involves a sale by respondent to a dress manufacturer, Sunnyvale, Inc., of 84/10/12 dozen handkerchiefs. The handkerchiefs apparently were part of a shipment which had been imported from Japan into the United States in November 1959 by Brochers Trading Corp., 108 West 39th Street, New York, New York. In January 1960 the handkerchiefs were sold by Brochers to Continental Scarf & Novelty Co. at the same address.

3. In January 1961 respondent, in response to a purchase order from Sunnyvale, purchased 84/10/12 dozen of the handkerchiefs from Continental and immediately resold them to Sunnyvale. Respondent's only place of business is located at 265 West 40th St., New York, New York, and Sunnyvale's principal office is also located in New York City. Respondent went to the place of business of Continental, picked up the handkerchiefs, and immediately delivered them to Sunnyvale's receiving department in New York City.

4. Subsequently, Sunnyvale shipped the handkerchiefs to its manufacturing plant in Scranton, Pennsylvania, where they were used in connection with a dress known as Style No. 466. The skirt of this

dress had two pockets, and a handkerchief was inserted in the right-hand pocket of the skirt. The purpose of the handkerchief was to add a bit of color to the dress and thereby possibly make it more attractive to prospective purchasers.

In some instances the handkerchiefs were merely inserted in the skirt pocket and left loose; in other instances the handkerchiefs were pinned inside the pocket by means of a very small safety pin. In both cases part of the handkerchief was left hanging outside the pocket so as to be seen by prospective purchasers.

The handkerchiefs were made of a silken fabric, had hand-rolled hems, and were approximately 18 inches square. All were of a solid color, being either lilac or gold.

5. Some of the dresses were sold by Sunnyvale to Reynolds Department Store in Perth Amboy, New Jersey, and were shipped to that store from Sunnyvale's plant in Scranton, Pennsylvania.

6. A handkerchief purporting to have been taken from one of the dresses sold to Reynolds Department Store by Sunnyvale was subjected by one of the Commission's chemists to the test prescribed by the Flammable Fabrics Act and was found to be flammable within the meaning of that Act. The remaining remnant of the handkerchief was received in evidence as Commission's Exhibit 3. The color of the remnant can best be described as off-white.

(The same remnant had previously been received in evidence in Docket 8515, *Sunnyvale, Inc., et al.*, as Commission's Exhibit 19 and will be found in the record in that case.)

7. The principal defense interposed by respondent to the present proceeding is that the handkerchiefs were not within the purview of the Flammable Fabrics Act. Other defenses are:

(a) Jurisdiction. Respondent contends that insofar as he was concerned the transaction involving the handkerchiefs was purely local or intrastate and therefore not covered by the Act.

(b) The identity of the handkerchief found to be flammable. Respondent urges that the handkerchief tested by the Commission's chemist could not have been one of those sold by him to Sunnyvale, because all of the latter were either lilac or gold in color, whereas the handkerchief tested was an off-white.

(c) Abandonment. Respondent is engaged almost exclusively in the sale of buttons. The sale of handkerchiefs has never accounted for more than a very small fraction of his business, and he testified that he had no intention of dealing in handkerchiefs in the future.

8. In view of the conclusion reached by the hearing examiner on respondent's principal defense—that the handkerchiefs sold by him

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were not within the scope of the Flammable Fabrics Act—it is considered unnecessary to deal with the other defenses.

9. As pointed out by hearing examiners Walter R. Johnson and Leon R. Gross in their initial decisions in Docket 8468, *Paintset Fashions, Inc.*, and Docket 8515, *Sunnyvale, Inc.*, respectively, the Commission has determined that handkerchiefs are not “articles of wearing apparel” within the meaning of the Flammable Fabrics Act.

10. Commission counsel urge that while under the Commission’s holding handkerchiefs are not articles of wearing apparel, nevertheless they may properly be considered “fabrics” within the meaning of the Act.

This contention is rejected. Handkerchiefs, of course, are made from fabric, but they are not themselves fabrics within any ordinary or reasonable use of the term.

11. Counsel also urge that respondent’s handkerchiefs, by reason of being inserted in the dress pockets, and particularly when pinned in the pockets, lose their identity as handkerchiefs and become an integral part of the dresses.

Whatever validity this argument might have as to Sunnyvale (on which point the examiner expresses no opinion), it is without merit as to respondent. Respondent had nothing whatever to do with inserting or pinning the handkerchiefs in the dress pockets. He simply sold and delivered the handkerchiefs as such. He knew that Sunnyvale was a dress manufacturer, but he is not shown to have had any knowledge whatever as to the use to which the handkerchiefs were to be put.

To hold respondent liable for the use made of the handkerchiefs by Sunnyvale clearly would be unwarranted and violative of elementary considerations of equity and fairness. Certainly the Flammable Fabrics Act was not intended to have any such effect.

12. In summary, it is concluded that the handkerchiefs here involved, at least insofar as respondent is concerned, were not subject to the Flammable Fabrics Act, and that the complaint therefore has not been sustained.

ORDER

It is ordered, That the complaint be, and it hereby is dismissed.

ORDER DENYING PETITION FOR REVIEW AND DISMISSING COMPLAINT

This matter having come on to be heard by the Commission upon a petition for review of the initial decision filed by counsel supporting the complaint and upon respondent’s answer in opposition thereto; and

It appearing that this case involves the issue of whether or not "handkerchiefs" of a size of less than twenty-four (24) inches square when sold and intended for use as decoration on dresses are exempted from the provisions of the Flammable Fabrics Act by reason of the Commission's interpretive opinion of May 18, 1954 (19 Federal Register 2985), 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"; and

The Commission having rendered its decision *In the Matter of Paintset Fashions, Inc., et al.*, Docket No 8468 [p. 691 herein], wherein it determined that the Commission's aforesaid opinion of May 18, 1954, was subject to the interpretation that such "handkerchiefs" were not subject to the Act and that the recent amendment to Rule 6 of the Commission's Rules and Regulations under the Flammable Fabrics Act, 16 CFR 302.6(c) and (d) (28 Federal Register 6535, June 26, 1963; effective date July 26, 1963), clarifies the matter by providing that handkerchiefs intended or sold to be a part of wearing apparel are subject to the provisions of the Act; and

The Commission, without passing on the validity of the hearing examiner's rulings, believing that the public interest will best be served by dismissing the complaint herein and allowing the respondent voluntarily to conform his practice to the new Rule 6 referred to above:

It is ordered, That the aforesaid petition for review of the initial decision be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision be, and it hereby is, vacated and that the complaint herein be, and it hereby is, dismissed without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondent at any time in the future as may be warranted by the then existing circumstances.