

adopted as the decision of the Commission.

It is further ordered, That respondent, Joseph A. Kaplan & Sons, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist as set forth in this order.

By the Commission. Commissioners Elman and Higginbotham concurring in the result.

IN THE MATTER OF

AL ROBBIN TRADING AS A. ROBBIN & COMPANY

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

Docket 8532. Complaint, Oct. 2, 1962—Decision, Nov. 15, 1963

Order requiring a Chicago importer, wholesaler and retailer of fabric piece goods to cease violating the Flammable Fabrics Act by importing or selling in commerce any fabric—including silk illusion used for the manufacture of bridal and communion veils—which was so highly 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 Al Robbin, an individual trading as A. Robbin & Company, hereinafter referred to as respondent, has violated the provisions of said Acts, and the Rules and Regulations promulgated under said 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 Al Robbin is an individual trading as A. Robbin & Company with his office and principal place of business located at 321 West Jackson Boulevard, Chicago, Illinois. Said Respondent is an importer, wholesaler and retailer of fabric piece goods.

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, 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. The aforesaid acts and practices of the respondent 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. Michael P. Hughes, counsel supporting the complaint.

Mr. Irvin H. Weiss, Chicago, Ill., for respondent.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

The complaint in this matter charges respondent with violation of the Flammable Fabrics Act¹ and the Federal Trade Commission Act in connection with prohibited transactions involving the importation and sale of fabric alleged to be so highly flammable as to be dangerous when worn by individuals. The evidence shows the involved fabric to be a silk illusion used for the manufacture

¹ The pertinent Sections of the *Flammable Fabrics Act* are as follows:

Sec. 3(b) "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. (It should be noted that the above-quoted Section of the *Flammable Fabrics Act* expressly makes transactions prohibited under its provisions subject to the *Federal Trade Commission Act*.)

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.

Sec. 4(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 standard shall be classified as class 1, normal flammability, when the 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."

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of bridal and communion veils. (See opening page of Respondent's Proposed Findings of Fact.)

A similar bridal veil fabrics case under the same Acts was recently before the Commission in *Novik & Co., Inc.*, Docket No. 8452, February 8, 1963 [62 F.T.C. 229]. The Initial Decision in the *Novik* case was also rendered by the undersigned hearing examiner.

The complaint herein was issued on October 2, 1962. Prior to answering the complaint, respondent moved "for a more definite statement in complaint" which, pursuant to order of the undersigned, was duly furnished by counsel supporting the complaint. Treating this response to the motion as an amendment to the complaint, respondent on December 5, 1962, filed his answer to the complaint "and amendment thereto." The answer in its opening paragraph expressly denies that respondent at any time has been in violation of "* * * the provisions or the Rules and Regulations of the Flammable Fabrics Act, and for further answer states that all fabrics purchased by said Respondent was accompanied by a warranty as provided by said Rules and Regulations from his supplier."

As a still "further answer" to the complaint, respondent pleads that the complaint "does not allege a cause of action against respondent as it contains no allegations that its proposed order is necessary and that there exists some cognizable danger of recurrent violations, or that there is any reason to presume they will be resumed, or that there is a likelihood that any violation could occur in the future."

Hearing in this matter was deferred pending the opinion and final order of the Commission in the aforementioned *Novik* case in order to give the parties opportunity to consider the Commission decision therein and to further explore the possibilities of settlement herein in the light of the *Novik* case. The Commission's opinion of February 8, 1963 [62 F.T.C. 238], in the *Novik* case having failed to bring the parties together in a settlement of the instant matter, the case was set for trial and heard at Chicago, Illinois, on April 30 and May 1, 1963, immediately following an all day pre-hearing conference in the matter on April 29, 1963.

Towards the end of the presentation of complaint counsel's case-in-chief, respondent through his counsel announced his intention not to further contest the charges of the complaint and submitted a motion to withdraw respondent's original denial answer and for leave to file in lieu thereof a substituted answer admitting all of the material allegations of the complaint. He reserved, however, the right to adduce evidence on the basis of which respondent proposed

to seek an amendment to the complaint's proposed cease and desist order which will be shown below to be outside the scope of the complaint and evidence.

The motion was allowed and the substituted admission answer was duly filed. The motion was not made, however, until after respondent's counsel had exhaustively cross-examined the Commission's fabric flammability test technician, Miss Idelle Shapiro, on her testimony that samples of the fabric in question had failed to meet the flammability time limitation tests established under the provisions of the Flammable Fabrics Act. The cross-examination was so searching as to even include questions as to whether the involved samples of respondent's fabric had been stored in a moisture proof cabinet prior to testing, notwithstanding the fact that respondent's counsel then had knowledge (Tr. 115) of test reports made for respondent at his request and expense by an independent testing laboratory (later placed in evidence as part of respondent's case) showing that samples of respondent's subsequent purchases of the same fabric had failed to pass the Commission's flammability test standards.

Respondent's motion for leave to file a substituted admission answer was not made until after respondent's counsel was completely satisfied in his own mind (Tr. 237) that complaint counsel had established or nearly established all of the charges of the complaint.

At the end of the pre-hearing conference in this matter and after the establishment of certain facts therein, respondent moved for a dismissal of the complaint on the ground stated in his heretofore noted original denial answer to the complaint, to wit, "that the complaint herein does not allege a cause of action against this respondent as it contains no allegations that its proposed order is necessary and that there exists some cognizable danger of recurrent violations, or there is any reason to presume they will be resumed." The examiner being of the opinion that the motion was wholly without merit, the motion was denied. Notwithstanding respondent's substituted admission answer admitting all of the material allegations of the complaint, respondent in his proposed findings of fact again seeks a dismissal of the complaint on the ground "* * * that the circumstances and the evidence introduced warrants a dismissal * * *." Elsewhere in his proposed findings of fact, respondent refers to such circumstances as "extenuating circumstances."

The same alleged "extenuating circumstances" are offered by respondent as justification for either an order dismissing the complaint or in the alternate, if dismissal is denied, for an amendment to the proposed cease and desist order which as heretofore indicated injects

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an issue in the case not presented by the complaint or evidence. These "extenuating circumstances" will be discussed below at their appropriate place.

Under respondent's substituted admission answer, all charges of the complaint now stand admitted as follows:

PARAGRAPH ONE: Respondent Al Robbin is an individual trading as A. Robbin & Company with his office and principal place of business located at 321 West Jackson Boulevard, Chicago, Illinois. Said Respondent is an importer, wholesaler and retailer of fabric piece goods.

PARAGRAPH TWO: 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, 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.

PARAGRAPH THREE: The aforesaid acts and practices of the respondent 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.

Additional pertinent facts are these. Respondent commenced his fabrics piece business in 1937 at the above-stated address in Chicago. He has eight employees. His business is exclusively a piece goods business: he is not engaged in any manufacturing and does not sell dresses or garments of any sort. He handles many different kinds of piece goods, including in addition to the silk illusion here involved, such fabrics as rayon, taffeta, satins, chiffon, and organdy. Approximately 5,000 yards of his total annual sales of about 400,000 yards consist of silk illusion. A little over half of his total sales are at the wholesale level and the balance to the retail trade. Except for the involved silk illusion, which is manufactured abroad, all other fabrics handled by respondent are manufactured in the United States. Part of his silk illusion purchases are made directly from a manufacturer in France, the Aime Baboin & Co. of Paris. The remainder is purchased from Gelmore Trading Company of New York, New York, a broker-importer, whose foreign source of supply is not established by any reliable and probative evidence of record. In the past year and half, the bulk of respondent's purchases of silk illusion have been direct imports from Aime Baboin & Co.

Under invoice dated December 13, 1960, respondent purchased and imported approximately \$700 worth of French silk illusion from

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Aime Baboin. Under invoice dated July 27, 1961, he also purchased about \$200 of imported French silk illusion from Gelmore. The merchandise under both of these invoices was offered for sale and sold to various customers during 1961. Contrary to later invoices, neither of these two invoices carry guaranties that the fabrics shipped thereunder comply with the test requirements of the Act.

Flammability tests of samples of the fabrics under the above-described invoices, conducted in accordance with Commercial Standard 191-53, as provided for in Section 4 of the Flammable Fabrics Act, showed that the average flame spread, before washing, was less than the 3.5 seconds time limitation specified in Section 4(c) of said Act and the time limitation in said Commercial Standard. These test results place the involved fabrics in Class 3 category deemed to be so highly flammable as to be dangerous when worn by individuals.

The "extenuating circumstances" offered by respondent as justification for either a dismissal of the complaint, notwithstanding his substituted admission answer, or, in the alternative, for an order which injects a new issue, are that shortly after the commencement of the pre-complaint investigation herein in September 1961 he commenced a course of action which he believes has placed him in full compliance with the requirements of the Flammable Fabrics Act at all times since that time.

The record shows that shortly following the commencement of the pre-complaint investigation herein there were communications between respondent and the Commission with reference to the subject matter of the investigation.

On November 13, 1961, respondent addressed a letter to the Commission which reads as follows:

Gentlemen:

This is to advise you that our firm will not sell any silk bridal tulle (illusion) purchased by us from Gelmor Trading Company or Aime Baboin unless it complies with the Flammable Fabrics Act.

We further advise you that we have one piece from Gelmor which has not been tested by you, but which we agree not to sell until it has been tested and complies with the Flammable Fabrics Act. Other than this one piece, we have no further merchandise on hand from these two suppliers.

We further wish to advise you that we have in transit merchandise from Aime Baboin and we agree that when same is received it will not be sold until such time as a sample has been tested either by your department or the U.S. Testing Company in Hoboken, New Jersey, and unless same complies with the Flammable Fabrics Act, it will be returned to our supplier. (CX 37.)

On November 27, 1961, Mr. Henry D. Stringer, then Assistant Director of the Commission's Bureau of Textiles and Furs and pres-

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ently Director of the Bureau, addressed the following letter to Mr. Robbin:

Dear Mr. Robbin:

Reference is made to the conversation had with you today concerning the importation of approximately 100 pieces of bridal illusion of approximately 40 yards each.

The purpose of the tests mentioned in the Flammable Fabrics Act is to determine whether the goods are so highly flammable as to be dangerous when worn by individuals. Also, if a guaranty is given it must be based upon reasonable and representative tests as prescribed in Rule 7 of the Regulations under the Flammable Fabrics Act.

By testing ten percent of the pieces, assuming them to pass, this would be sufficient under Rule 7 for the giving of a guaranty. I understand four lots are involved and there should be representative samples from each lot. Of course, as to each piece of fabric, whether it is dangerously flammable, it must stand on its own merits. (CX 43.)

The final letter of record is one dated December 22, 1961, by respondent to Mr. Stringer, reading as follows:

Dear Mr. Stringer:

I met today with Miss Stein of your Chicago office, and exhibited to her the matters contained herein, and she suggested we forward the within enclosures.

As suggested in your letter to us of November 27, 1961, we had samples tested by the U.S. Testing Company, and a copy of their report is enclosed herewith. We are also enclosing a copy of the warranty received on these goods from our supplier. For your further consideration, we wish to advise, that on all our invoices of these and similar goods, we advise customers, "Goods not inflammable if dry cleaned or washed". (CX 38.)

If there is any further information needed, please feel free to call upon us.

Subsequent to the investigation, respondent made three additional purchases of silk illusion from the Baboin firm. The first of these is reflected by an invoice dated October 6, 1961, in the amount of \$4,279.93; the second, dated September 27, 1962, is in the amount of \$1,026.37; and the third, dated December 11, 1962, is in the amount of \$4,832.55. Various grades of silk illusion are shown on each of the three invoices and their varying prices appear to average about 45 cents per yard.

The last two mentioned invoices are typed or stamped with the following guaranty under the signature of Aime Baboin & Co.:

The undersigned hereby guarantee that reasonable and representative tests made according to the procedures prescribed in Section 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 such act so highly flammable as to be dangerous when worn by individuals.

No such guaranty appears on the Baboin invoice dated October 6, 1961, but in response to respondent's wired request therefor, Ba-

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boin, sent both a telegram and confirming letter stating that the fabric was "treated with flame retardant finish and has passed test." The letter response, dated November 22, 1961, also states that "Tests were made before dispatching, by the 'Centre Recherche Soieries Industries Textiles', 7 Rue St. Polycarpe LYON, under numbers:

7095-104

7249-52

7546-51

and results of these tests can be sent to you if necessary."

Testimony shows that respondent sent samples from 10 percent of the pieces purchased under the above-described, post-investigation Baboin invoices to the United States Testing Company, Inc., a reputable and qualified testing company, with laboratories at Hoboken, New Jersey, for testing for compliance with the flammability time limitation requirements of the Act. (See Respondent's Proposed Findings of Fact, page 5.)

A test report (RX6 A-C) dated December 11, 1961, by the Testing Company on samples of fabric submitted to it by respondent from the shipment under the Baboin invoice dated October 6, 1961, shows that all samples passed the prescribed flammability tests.

The Testing Company's report (RX2 A-E) dated October 26, 1962, on samples submitted by respondent from the shipment under the Baboin invoice dated September 27, 1962, shows that 4 of the submitted 28 samples failed to pass the test and that the remaining 24 samples passed the tests.

The final test report of record (RX4 A-E) by the Testing Company on samples submitted by respondent from the shipment under the Baboin invoice of December 11, 1962, showed that out of 16 samples tested, 15 passed and 1 failed to pass the test.

The expenses incurred by respondent for the testing of samples from 10 percent of the pieces of silk illusion received from the Baboin firm under the above noted invoices increased the cost of each shipment thereunder about 10 percent.

Respondent testified that he destroyed all pieces or bolts of silk illusion purchased from Baboin which reports from the Testing Company showed did not pass the prescribed flammability test. While the examiner is skeptical that respondent would destroy such non-test meeting fabric rather than to return same for credit, respondent's testimony, being uncontested, is accepted as establishing the fact of destruction of fabric failing to meet the test.

Similarly after the commencement of the investigation leading to the complaint herein, respondent has also made a number of

purchases of silk illusion from the aforementioned Gelmore Trading Company of New York City. There were 13 such post-investigation purchases in 1962 totaling \$2,427.36 and 3 such purchases in 1963 totaling \$978.19. All the invoices reflecting these purchases carry the following guaranty:

We hereby guarantee that reasonable and representative tests made according to Commercial Standard 191-53 [foregoing number reflects correction of typographically erroneous number shown in transcript] show that the fabrics covered by this invoice are suitable for wearing apparel use under the provisions of the Flammable Fabrics Act. Silk, bridal illusion will be dangerously flammable if dry cleaned or washed. (Tr. 293.)

Respondent has not tested or caused to be tested any of the silk illusion purchased from Gelmore in 1962 and 1963 for compliance with the Act but relies exclusively for such compliance on the said guaranties from Gelmore.

The "extenuating circumstance" urged by respondent for a dismissal of the complaint in connection with his domestic source of supply from Gelmore Trading Company of the involved fabric is the fact that at all times after the commencement of the investigation leading to the complaint herein he has received the aforementioned written guaranties from Gelmore of compliance with the Flammable Fabrics Act and that this gives him "protection". The argument stated in respondent's own phraseology is as follows:

* * * It is our understanding of the Flammable Fabrics Act that a warranty received by the respondent from a supplier in the United States protects the respondent under the Act. However, the party giving the warranty to the respondent for merchandise purchased in New York must be relying upon a warranty which he received from France. Under Rule 11 of the Act, a guaranty furnished under Section 8 by a person who is not a resident of the United States may not be relied upon as a bar to prosecution under Section 7 of the Act for a violation of Section 3 of the Act. This puts the respondent in this position. If he imports from France under this rule, he cannot protect himself by a guaranty received from the manufacturer in France, but if he purchases the same goods from a jobber or sales representative in the United States and received a guaranty and it is from the same source as whom the respondent would have purchased said bridal illusion, then he is protected * * *. See Respondent's Proposed Findings of Fact, p. 4.

Preliminarily, it should be noted that although respondent contends that Gelmore purchases its silk illusion from Baboin and that Baboin guarantees to Gelmore that the fabric complies with the Flammable Fabrics Act, there is no proper basis in the record for such purported statements of fact. There was no testimony in this proceeding by any representatives of Gelmore: none of Gelmore's invoices showing its sources of supply or guaranties received from its supplier were offered in evidence; and respondent, as throughout

his proposed findings of fact, does not support his statements by references to the record. But even if the purported statements of fact were true, they would not give respondent "protection" against a cease and desist order sought under the complaint in this proceeding for the reasons hereinafter indicated.

The difficulty with respondent's aforesaid contention "* * * that a warranty received by the respondent from a supplier in the United States protects the respondent under the Act * * *" is that it erroneously assumes that a "guaranty" of the kind here under consideration is a defense to a "cease and desist" order sought as in this proceeding under Section 3(b) of the Flammable Fabrics Act whereas our analysis will show that a "guaranty" is a defense or bar only against misdemeanor charges under Section 7² of the same Act.

Section 3 bears the caption "PROHIBITED TRANSACTIONS" and subsection (b) thereof³ makes the importation, sale, or offering for sale of any fabric so highly flammable as to be dangerous when worn by individuals "an unfair method of competition and an unfair and deceptive act or practice in commerce under the *Federal Trade Commission Act*." (Emphasis supplied.)

The Commission's only empowerment against a transaction prohibited by Section 3(b) of the Flammable Fabrics Act is to issue a cease and desist order under the provisions of the Federal Trade Commission Act against the proscribed practice. (See Section 5(a) (6) and Section 5(b) of the *Federal Trade Commission Act*.)

An administrative cease and desist order such as sought in this proceeding is in the nature of an injunction. Its purpose is to prevent future violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which have been found to have been committed by the party in the past. *73 Corpus Juris Secundum* 483, par. 151. The complaint in this matter seeks *only* a cease and desist order prohibiting in the future the transactions barred by the Flammable Fabrics Act which respondent under his substituted admission answer now admits that he has engaged in in the past. The Commission has no power to punish for past offenses and the complaint does not seek to punish.

On the other hand, Section 7 of the Flammable Fabrics Act is definitely a penal Section but since the Commission has no penal jurisdiction, the enforcement of such Section lies with the courts, as

²Sec. 7 of the Flammable Fabrics Act provides:

"Any person who willfully violates section 3 or 8(b) of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$5,000 or be imprisoned not more than one year or both in the discretion of the court: *Provided*, That nothing herein shall limit other provisions of this Act."

³For text of Sec. 3(b) of the Flammable Fabrics Act, see footnote on page 1353 herein.

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indeed the Section shows. Section 7 defines a *willful* violation of Section 3 of the same Act as a misdemeanor and fixes the penalty for such willful violations by fines up to \$5,000 or by imprisonment up to one year "or both in the discretion of the *court*." (Emphasis supplied.)

Section 8(a)⁴ gives a person charged with a Section 7 prosecution a defense thereto if he establishes that he has received in good faith a written guaranty from his supplier that the fabric complies with the flammability time limitations imposed by the Act. However, under the Regulations of the Commission "A guaranty furnished under Section 8 of the Act by a person who is not a resident of the United States may not be relied upon as a bar to prosecution under Section 7 of the Act for a violation of Section 3 of the Act." See *Commission's Rules and Regulations Under the Flammable Fabrics Act*, effective July 1, 1954, as amended to date on October 1, 1961.

But while a guaranty, as defined by Section 8(a), is a defense against a prosecution for a Section 7 misdemeanor, there are no provisions under either the Flammable Fabrics Act or the Federal Trade Commission Act making such a guaranty a defense against a proposed cease and desist order. The obvious reason for this is that the objective of Section 3 of the Flammable Fabrics Act is to prevent future violations of "Prohibited Transactions" or practices, whereas the objective of Section 7 of the same Act is to punish for willful past violations of practices prohibited by the Section 3 of the Act.

⁴Sec. 8(a) of the Act provides:

"No person shall be subject to prosecution 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. (Emphasis supplied.)

"(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."

Accordingly the fact that respondent has been receiving guaranties from his domestic silk illusion supplier of compliance with the test requirements of the Flammable Fabrics Act on purchases of the fabric made subsequent to the "prohibited transactions" charged by the complaint, or more importantly, the fact, if it were a fact as in truth it is not, that respondent had such guaranties from his domestic supplier at the time he made the sales charged in the complaint, would not constitute a defense against the cease and desist order sought in this proceeding. This is specifically spelled out by Rule 7 of the Commission's aforementioned Rules and Regulations which respondent's counsel had in his possession at the hearing and which reads in pertinent part as follows:

* * * While one establishing a guaranty received in good faith would not be subject to criminal prosecution under Section 7 of the Act, he, or the merchandise involved, would nevertheless, remain subject to the administrative processes of the Federal Trade Commission under Section 5 of the Act, as well as the injunction and condemnation procedures under Section 6 of the Act. * * *

The other "extenuating circumstance" urged by respondent for a dismissal of the complaint relates to his imports of silk illusion from France. In part the claimed "extenuating circumstance" is that since the prohibited transactions charged in the complaint respondent has received from his foreign supplier guaranties of compliance with the test requirements of the Act identical with that received from his domestic supplier. Our conclusion above that such guaranties are not a defense to cease and desist orders is also for the same reasons applicable here. But in addition we have here with respect to these imports from France the aforementioned express and explicit Regulation of the Commission that "A guaranty furnished under Section 8 of the Act by a person who is not a resident of the United States may not be relied upon as a bar to prosecution under Section 7 of the Act for a violation of Section 3 of the Act."

The other part of the claimed "extenuating circumstances" relating to respondent's importations from France is that respondent has caused to be tested by an independent testing laboratory 10 per cent of all pieces or bolts of such importations of silk fabric purchased and received from his foreign supplier since the investigation (leading to the complaint herein) for compliance with the applicable test requirements and has offered for sale only those fabrics which have passed the test and destroyed all others.

In his brief, as well as at the hearing, respondent insists that he was "advised" by the national office of the Commission "* * *

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that if he would receive a guaranty under the Flammable Fabrics Act and *would in addition thereto test 10% of the bridal silk illusion imported from France, this would satisfy the Commission's requirements.*" (Emphasis supplied.) See Respondent's Proposed Findings of Fact, etc., at page 5.

Based on this assumption, respondent continues his argument as follows:

This procedure has been followed by this Respondent and is still being followed as the evidence submitted so clearly proves. The respondent's position, therefore, is that if he continues as he so testified to follow the recommendations of the Commission that there is no necessity in this cause for a cease and desist order to issue. The purpose of a cease and desist order is not to punish, but to prevent similar violations in the future. Where there is no likelihood of a practice complained of being resumed, all extenuating circumstances should be considered by the hearing examiner and a dismissal of the complaint would be in order * * *. *Idem*, page 5.

Respondent's difficulty here again is that he is relating the "guaranty" protection features of Section 8(a) against prosecution for "misdemeanors" under Section 7, to the administrative processes of the Federal Trade Commission Act under Section 5 of that Act. Under the "guaranty" provisions of Section 8(a) of the Act, the receipt in good faith of a written guaranty by a supplier to a buyer that "*reasonable and representative tests* * * * show that the fabric covered by the guaranty * * * is not * * * so highly flammable as to be dangerous when worn by individuals" relates exclusively to the protection afforded by said Section 8(a) to criminal prosecution under Section 7 of the Act and does not afford a defense against "** * * administrative processes of the Federal Trade Commission under Section 5 of the * * **" (Emphasis supplied.) See *Rules and Regulations Under the Flammable Fabrics Act*, Rule 7, *supra*.

As heretofore noted, respondent contends that he was "advised" by the Commission in a letter (CX 43) dated November 27, 1961, signed by Henry D. Stringer, Assistant Director, Bureau of Textiles and Furs, "that if he would receive a guaranty under the Flammable Fabrics Act and would in addition thereto test 10% of the bridal silk illusion imported from France, this would satisfy the Commission's requirements. (See *Respondent's Proposed Findings of Fact*, etc., at page 5.)

This contention is based upon a completely erroneous interpretation of Mr. Stringer's letter. Mr. Stringer merely advised in his letter that "** * * if a guaranty is given it must be based upon reasonable and representative tests * * **" as prescribed under the Commission's Regulations. (Emphasis supplied.) The letter then goes on to advise *with reference to such guaranties* that "By testing

10 per cent of the pieces, assuming them to pass the test, this would be sufficient under Rule 7 [of the Commission's aforementioned Rules and Regulations] for the giving of a guaranty." This is a warning to respondent that the guaranty provisions of Rule 7 relates only to a person's protection under Section 8 of the Act against prosecution under Section 7 of the Act for a *willful violation of Section 3* of the Act, i.e., that Section which prohibits the sale in commerce of fabric which is so highly flammable (as defined by Section 4 of the Act) as to be dangerous when worn by individuals.

To make doubly certain that there would be no misunderstanding that such a "guarantee" gives immunity for violations of the prohibitions contained in Section 3 of the Act against the sale of fabrics which are dangerously flammable, Mr. Stringer's letter concludes with the following express and explicit warning that "Of course, as to each piece of fabric, whether it is dangerously flammable, it must stand on its own merits."

In summary, it is manifest that a guaranty such as is here under consideration plus the testing of 10 per cent of all fabrics for conformity with prescribed test requirements, even if these circumstances had been present as they admittedly were not with respect to the transactions charged in the complaint, would not give protection from and immunity to a cease and desist order against future violations. The purpose of Section 3 of the Act is to give the public absolute protection against dangerously flammable fabrics through the absolute prohibition of the sale of such fabrics to the public.

Respondent, however, in effect is seeking a dismissal of the complaint on the ground of "abandonment" of the practices charged in the complaint, notwithstanding his counsel's oral disclaimer of such at the hearing. (TR 122.) This appears from his answer in which he pleads, as heretofore noted, "* * * that the complaint does not allege a cause of action against this respondent as it contains no allegations * * * that there exists some cognizable danger of recurrent violations, or that there is any reason to presume they will be resumed, or that there is a likelihood that any violation could occur in the future." All the cases cited by respondent in his brief to support his argument for dismissal of the complaint involve issues popularly known as "abandonment" issues.

The only evidence offered by respondent to show "abandonment" of the practices charged in the complaint with respect to his post-investigation purchases of silk illusion from his domestic source of supply is the heretofore shown fact that he has obtained guaranties from his domestic supplier on all such purchases of compliance with the test requirements of the Act.

With respect to his post-investigation direct importations from France, respondent offers as proof of his "abandonment" of the proscribed practices the fact that he has similarly received guaranties of compliance with the prescribed test requirements from his foreign supplier on such subsequent shipments and the further fact that he has subjected 10 per cent of such importations to the prescribed tests and has offered for sale only such of the tested fabrics as have passed tests.

Requests for dismissals of complaints on grounds of abandonment of charged unlawful practices are addressed to the discretion of the Commission. *Ward Baking Co.*, (1958) 54 F.T.C. 1919, at 1921. The Commission has held that dismissals of complaints due to the discontinuance of an unlawful practice "should be limited to the truly unusual situation." *Ward Baking Co.*, *supra*. The primary consideration in the determination of whether a dismissal should be granted due to discontinuance of proscribed practices is whether or not an order is needed for the protection of the public to prevent the resumption of such unlawful acts at some future date.

The case law on dismissals due to discontinuance of proscribed practices was developed mostly in cases involving harmful practices other than those involving as here potential grave bodily injury or danger to life itself. If in the ordinary case not involving danger to the human body, dismissals due to discontinuance of an unlawful practice are "limited to the truly unusual situation", dismissals for discontinuances of prohibited practices in cases such as the instant matter involving potential serious personal injury or possible death should be granted only by the establishment of facts showing beyond any question of doubt that the discontinued practices cannot under any circumstances be resumed in the future.

It is difficult to conceive a case in which there is less justification for a dismissal of a complaint for alleged discontinuance of an unlawful practice than in the instant matter. The record shows that there has been no abandonment of the proscribed practice in the absolute sense that respondent has gone out of business, or changed his business so as to be no longer engaged in the sale of fabrics of any sort, or that he has even given up the handling and sale of silk illusion.

Respondent is still engaged in the sale of silk illusion. His annual silk illusion purchases of \$5,000 are sufficient to furnish bridal veils to hundreds of brides. The steps he has taken to avoid future violations of the sale of dangerously flammable silk illusion are woefully insufficient to protect these brides from possible bodily harm from wearing such fabrics as bridal veils in the event they accidentally catch on fire. The guaranties he receives from his

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French supplier of compliance with the test requirements of the Act are untrustworthy as respondent's own tests show that some of his importations from his French supplier, despite the supplier's guaranties thereon, do not meet the test requirements.

Furthermore, respondent tests only 10 per cent of his French importations. It is reasonable to assume that there will be at least the same percentage of failures in the 90 per cent of the shipments which were not tested as there were in the tested 10 per cent. These highly probable failures in the untested 90 per cent of respondent's foreign shipments will be passed along to the consuming public to its peril. It was found above, chiefly due to the lack of any evidence to the contrary and with some skepticism, that respondent has destroyed and thereby withdrawn from the market those fabrics included in the 10 per cent of his foreign shipments subjected to testing which failed to pass the test. There is nothing in the record established by respondent herein to inspire confidence he will continue in the future to withhold from sale bolts of silk illusion which do not pass the test.

On the issue of the alleged abandonment of the proscribed practice with respect to respondent's post-investigation purchases of the foreign fabric under "guaranty" from his domestic source of supply, Gelmore, there is even less assurance of compliance with the statutory testing requirements, as respondent does not even attempt to have his supplies from this source tested in any part for compliance with the flammable standards of the Act. If as claimed by respondent that Gelmore in turn purchases its supplies of silk illusion from Aime Baboin & Co., respondent's primary source of supply, then upon the basis of respondent's own testing experience with the Baboin silk illusion it is virtually certain that some of respondent's purchases from Gelmore would also fail to pass the prescribed test.

Wholly aside from the fact that the actions taken by respondent to place himself in compliance with the flammable standard of the Act must be regarded as ineffective, there is nothing in the conduct of respondent in this proceeding to inspire confidence in the sincerity of his professions of desire to respect the law in the future. Such professions come with poor grace from a respondent who, as in the instant matter, compelled counsel supporting the complaint to prove facts well known to respondent before he came to a decision to file a substitute answer admitting all of the material allegations of the complaint. Nor can we place much confidence in a respondent who, as in the present matter, saw fit through his counsel to engage the Government's technician-expert witness in an exhaustive cross-

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examination on the latter's direct testimony that samples of respondent's involved silk illusion had failed to pass the prescribed flammability tests, notwithstanding the fact that respondent himself then had in his possession test reports made by an independent laboratory at respondent's request and expense showing that some samples of his post-investigation importations of the same fabric had failed to pass the prescribed tests.

For the reason shown above, it is found that there has been no "abandonment" or discontinuance of the practices charged in the complaint subsequent to the investigation leading to the issuance of the complaint herein. Respondent's request or motion for a dismissal of the complaint by reason of such alleged abandonment of the unlawful practices is denied.

Finally, as heretofore noted, respondent, in the event his request for a dismissal of the complaint is denied, seeks an amendment to the proposed order set forth in the complaint. The amendment consists of two parts. In the first part, respondent would add to the complaint's proposed cease and desist order a brand new prohibition not contained in the complaint's proposed order. This new self-imposed prohibition would bar respondent from issuing false guaranties on his fabrics of their compliance with the test requirements of the Act. No such issue was raised by the pleadings or litigated by consent. The second part of respondent's proposed amendment would give him an "escape clause" from the first part of his proposed amendment on fabrics sold which he directly imported from abroad. The first part of his proposed amendment has a similar "escape clause" on foreign fabrics purchased from domestic suppliers.

It should be noted initially that the complaint's proposed cease and desist order would merely prohibit respondent from handling any fabrics which are so highly flammable, as measured by statutory standards, as to be dangerous when worn by individuals. The text of the complaint's proposed cease and desist order is as follows:

It is ordered, That the respondent Al Robbin, an individual trading as A. Robbin & Company, or under any other trade name, and his representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

- (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.

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The text of the amendment desired by respondent to the proposed cease and desist order is as follows:

2. (a) Furnishing to any person a guaranty with respect to any fabric which Respondent has 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 Respondent 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.⁵

(b) And provided further, 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 Respondent 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 even though such person, firm or corporation is not a resident of the United States, upon the Respondent in addition to receiving said guaranty shall subject ten percent of the shipment involved, to reasonable and representative tests as prescribed in Rule 7 of the Regulations under the Flammable Fabrics Act.

It is difficult to understand why respondent is seeking the above amendment to the proposed cease and desist order. It would appear that he is so intent on having the "escape clause" shown in paragraph 2(b) above that he is overlooking the fact that he would not need such escape clause if it were not for his own self-imposed prohibition in paragraph 2(a) above. Since the complaint does not ask for the prohibition shown in said paragraph 2(a), it is evident that respondent is seeking an escape from a non-existing boggy.

We have carefully reviewed and considered all of the proposed findings of fact, conclusions of law, and arguments in support thereof filed by the parties. Such proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance,

⁵ The above quoted paragraph (2(a)) appears to have been copied verbatim from one of the paragraphs in the Commission's cease and desist order in the *Novik* case, *supra*, which was the first case involving silk illusion under the Flammable Fabrics Act to come before the Commission for final decision. It is possible that respondent was misled by the appearance of this paragraph in the *Novik* order into believing that it had application to the instant matter. But in the *Novik* case there was justification for the order because the issue thereunder had been raised by the pleadings and because the *Novik* complaint had requested such an order in its proposed cease and desist order. In the instant matter, as shown above, the same issue was not raised by the pleadings and the instant complaint's proposed cease and desist order does not contain the order here under discussion.

are rejected as not supported by the record or as involving immaterial matters.

ORDER

It is ordered, That the respondent Al Robbin, an individual trading as A. Robbin & Company, or under any other trade name, and his representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

- (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.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come on to be heard upon the appeal of the respondent from the hearing examiner's initial decision and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined that respondent's appeal should be denied and that the initial decision should be modified by striking therefrom the paragraph beginning at the bottom of page 1367 and ending at the top of page 1368 and that such decision as so modified should be adopted as the decision of the Commission:

It is ordered, That respondent's appeal be, and it hereby is, denied.

It is further ordered, That the paragraph beginning at the bottom of page 1367 and ending at the top of page 1368 in the initial decision be, and it hereby is, stricken.

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

It is further ordered, That respondent, Al Robbin, shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist contained in the initial decision.

Complaint

IN THE MATTER OF

SUN OIL COMPANY

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6934. Amended Complaint, April 7, 1959—Decision, Nov. 22, 1963

Order requiring one of the Nation's major integrated producers of oil and other petroleum products, to cease entering into such arrangements for fixing and maintaining resale prices as that under which it imposed upon its independent retail dealers in the Portsmouth-Norfolk-Virginia Beach, Virginia, area an alleged agency consignment agreement which was not a bona fide agency but was a fiction and a subterfuge, the primary purpose of which was to enable it to fix the retail price for its "Blue Sunoco" gasoline in the area concerned.

AMENDED AND SUPPLEMENTAL COMPLAINT

The Federal Trade Commission, having reason to believe that Sun Oil Company, a corporation, hereinafter referred to as respondent and more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended and supplemental complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent, Sun Oil Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 1608 Walnut Street, Philadelphia, Pennsylvania. Respondent is now, and for several years last past, has been, among other things, engaged in the offering for sale, sale and distribution of gasoline and other petroleum products throughout some 22 states in which the respondent markets its products. Said gasoline is extensively advertised and sold under the brand name "Blue Sunoco" and enjoys wide public acceptance in such states. Respondent, one of the nation's leading producers and marketers of gasoline and other petroleum products, comprises an integrated unit in the petroleum industry. It is engaged in the acquisition, development and exploitation of oil and other petroleum products as well as the purchase, sale and transportation of crude oil, and the refining of crude oil and its derivatives, and the subsequent transportation and