

the order served upon them, file with the Commission a report, in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

VERRAZZANO TRADING CORPORATION TRADING AS
LAN ETRURIA, ET AL.

ORDER OF DISMISSAL, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, THE WOOL PRODUCTS LABELING AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket 8801. Complaint, Oct. 17, 1969—Decision, Apr. 13, 1971*

Order dismissing the complaint which charged a New York City importer and seller of Italian woolen and textile fabrics with misbranding, falsely invoicing, and deceptively guaranteeing its wool and textile fiber products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Verrazzano Trading Corporation, a corporation, trading under its own name or as Lan Etruria; Francesco Datini, Inc., a corporation, and Walter Banci, individually and as agent for said corporations, and for Lanificio Tuscania, a foreign entity which trades under its own name and as Lan Etruria, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification 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 Verrazzano Trading Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, trading under its own name or as Lan Etruria, with its office and principal place of busi-

*Reporting as amended by Hearing Examiner's order of July 16, 1970, by amending Paragraph One.

Complaint

78 F.T.C.

ness located in Room 1500, Two Pennsylvania Plaza, New York, New York.

Respondent Francesco Datini, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located in Room 1500, Two Pennsylvania Plaza, New York, New York.

Individual respondent Walter Banci is agent for the aforesaid corporations, and in such capacity is authorized to bind said corporations in their names and in the names of their officers. His office and principal place of business is the same as that of the corporate respondents.

Respondents are engaged in the business of importation from Italy and sale of woolen and textile fabrics to customers in various States of the United States. Respondent Walter Banci is also agent for Lanificio Tuscania, a foreign entity which trades under its own name and as Lan Etruria, and in such capacity is authorized to bind said foreign entity and its principals.

PAR. 2. Respondents, now and for some time last past, have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in said Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were woolen fabrics stamped, tagged, labeled, or otherwise identified as containing "20% Linen, 70% Reprocessed wool, 5% Nylon and 5% Other Fibers," whereas in truth and in fact, such fabrics contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were woollen fabrics without labels or with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding five per centum of said total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool when said percentage by weight of such fiber was five per centum or more; and (5) the aggregate of all other fibers.

PAR. 5. The respondents furnished false guaranties that certain of their said wool products were not misbranded when respondents in furnishing such guaranties had reason to believe that the wool products so falsely guaranteed might be introduced, sold, transported or distributed in commerce, in violation of Section 9(b) of the Wool Products Labeling Act of 1939.

PAR. 6. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now 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.

PAR. 7. Respondents are now and for some time last past have been engaged in the advertising, offering for sale, sale, and distribution of certain products, namely fabrics. In the course and conduct of their business as aforesaid, respondents now cause and for some time last past, have caused their said products, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. Respondents in the course and conduct of their business have made statements on invoices to their customers, misrepresenting the fiber content of certain of their products.

Among such misrepresentations, but not limited thereto, were statements setting forth the fiber content of such products as "20% Linen, 70% Reprocessed wool, 5% Nylon and 5% Other Fibers," whereas, in truth and in fact, the said products contained substantially different amounts and types of fibers than represented.

PAR. 9. The acts and practices of respondents, as alleged in Paragraph Eight above, were, and are, all to the prejudice and injury of the public, and constituted, and now constitute, unfair and de-

ceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 10. Respondents are now and for some time last past have been engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 11. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely fabrics, which contained substantially different amounts and types of fibers than as represented.

PAR. 12. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely fabrics, without labels or with labels on or affixed thereto which failed:

1. To disclose the true generic name of the fibers present.
2. To disclose the true percentage of the fibers present by weight.

PAR. 13. The acts and practices of respondents as set forth above in Paragraphs Eleven and Twelve were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, under the Federal Trade Commission Act.

637

Initial Decision

Mr. Thomas J. Kerwan and Mr. Arthur B. Patrizio supporting the complaint.

Pavia & Harcourt, New York, N.Y., by *Mr. David A. Botwinik and Mr. Walter T. Cassidy* for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER
NOVEMBER 2, 1970

CONTENTS

	Page
PRELIMINARY STATEMENT.....	641
FINDINGS OF FACT.....	643
I. RESPONDENTS AND THEIR BUSINESS.....	643
II. THE STATUTORY PROVISIONS.....	647
III. THE EVIDENCE AS TO MISBRANDING.....	649
A. Under the Wool Products Labeling Act.....	649
B. Under the Textile Fiber Products Identification Act.....	657
IV. THE CHARGES UNDER THE FEDERAL TRADE COMMISSION ACT.....	661
SUMMARY, ANALYSIS, AND CONCLUSIONS.....	661
I. WOOL ACT CHARGES.....	661
II. TEXTILE ACT CHARGES.....	663
III. FEDERAL TRADE COMMISSION ACT CHARGES.....	663
IV. CONCLUSIONS.....	667
ORDER.....	668

PRELIMINARY STATEMENT

The complaint in this proceeding was issued by the Federal Trade Commission on October 17, 1969, and was duly served on respondents on October 31, 1969.¹ The complaint charges respondents with misbranding wool and textile fiber products, falsely invoicing such products, and falsely guaranteeing wool products, in violation of the Wool Products Labeling Act of 1939, the Textile Fiber Products Identification Act, and the Federal Trade Commission Act.

After complaint counsel filed a more definite statement concerning the allegations of the complaint, pursuant to the examiner's order of November 26, 1969, each of the respondents filed answer on January 5, 1970, admitting in part and denying in part the various factual allegations of the complaint, essentially denying any violation of law, and alleging as an affirmative defense that respondents

¹ The complaint was amended during the hearings to clarify the status of Lanificio Tuscania by eliminating from the caption and from the preamble, references indicating that it was a trade name used by respondent Verrazzano Trading Corporation, and by adding an allegation that Lanificio Tuscania is an Italian entity for which respondent Walter Banci is an agent. The amendment also added an allegation that both Verrazzano and Lanificio Tuscania traded as Lan Etruria. (See Order Confirming Amendment of Complaint, filed July 17, 1970.)

"acted with due care" and that "any violation charged in the complaint is the result of unavoidable manufacturing variations." In their answers, respondents also contended, that "[i]n relation to the total volume of respondents' business the allegations charged in the complaint are not substantial and thus, this proceeding is not in the public interest as required by Sec. 5(b) of the Federal Trade Commission Act."

Following a prehearing conference on January 22, 1970, 12 days of hearings were held between April 14, 1970, and July 31, 1970, a series of intervals between hearings having been necessitated by a variety of circumstances, including a postponement occasioned by difficulties in arranging for the testimony of a witness from Italy on behalf of respondents. (See Commission Order Suspending Hearings filed June 15, 1970.)

The record consists of 1,271 pages of trial transcript and approximately 75 physical exhibits and documentary exhibits.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and evidence have been duly recorded and filed. The parties were represented by counsel and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order, accompanied by supporting briefs, were filed by counsel supporting the complaint and by counsel for respondents. Reply briefs were also filed by counsel for both parties. Those proposed findings that are not adopted herein, either in the form proposed or in substance, are rejected as lacking support in the record or as involving immaterial matters.

Having heard and observed the witnesses and having carefully reviewed the entire record in this proceeding, together with the proposed findings and briefs filed by the parties, the hearing examiner makes the following findings of fact, enters his resulting conclusions, and issues an appropriate order.

As required by Section 3.51(b)(1) of the Commission's Rules of Practice, the findings of fact include references to the principal supporting items in the record. Such references are intended to serve as convenient guides to the testimony and to the exhibits supporting the findings of fact, but they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the

parties, such references are ordinarily intended to include their citations to the record.

References to the record are made in parentheses, and certain abbreviations are used as follows:

CPF—Proposed Findings of Fact, Conclusions of Law and Order filed by counsel supporting the complaint.

CRB—Complaint counsel's Reply [Brief] to Respondents' Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law.

CX—Commission Exhibit.

RPF—Respondents' Proposed Findings of Fact, Conclusions and Order.

RML—Respondents' Memorandum of Law in Support of Proposed Findings of Fact and Conclusions of Law.

RRB—Respondents' Reply [Brief] to Complaint Counsel's Memorandum of Law.

RX—Respondents' Exhibit.

Tr.—Transcript.

Sometimes references to the testimony cite the name of the witness and transcript page number without the abbreviation "Tr."—for example, Golub 299. References to the submittals of counsel are keyed to page numbers—for example, CPF 14, RML 17.

FINDINGS OF FACT

I. Respondents and Their Business

Respondents Verrazzano Trading Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York. It trades under its own name and as Lan Etruria.

Respondent Francesco Datini, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York.

Respondent Walter Banci is agent for the aforesaid corporations and, in such capacity, is authorized to bind these corporations in their names and in the names of their officers. He is also agent for Lanificio Tuscania, a foreign entity which trades under its own name and as Lan Etruria, and, in such capacity, is authorized to bind such foreign entity and its principals.

Respondents are engaged in the business of the importation from Italy and the sale of woolen and textile fabrics to customers in various States of the United States.

Both corporate respondents and Mr. Banci have their office and principal place of business at Two Pennsylvania Plaza, New York, New York.

The foregoing facts are established by the admissions of respondents in their answers to the complaint or in the course of hearing. However, Mr. Banci's "agency" is only nominal, and a broader finding is warranted, as follows:

In conjunction with certain Italian business entities, both corporate respondents and Mr. Banci constitute a unified family business operation designed to import and sell in the United States fabrics produced in Italy. Although, technically, Mr. Banci is, as alleged, the "agent" for the named corporations, the record establishes that he directs and controls a bi-national enterprise designed to sell fabrics from the Italian mill that he owns and controls.

Mr. Banci, in partnership with his wife, Lola Conti (his share, 98 percent; hers, 2 percent), owns a mill—Lanificio Walter Banci—in Prato, Italy, that produces fabrics or piece goods. Established in 1938, the mill is the largest in Prato and the third largest in Italy. Mr. Banci represents the mill in the United States. The mill began exporting goods to the United States through a jobber about 1958 and later began making direct sales in this country. In 1964–1965, Mr. Banci established Verrazzano "to bring piecegoods in this country, to import the piece goods, to clear the goods, to pay the duty, and to deliver the goods to the customer . . ." (Tr. 526). Through Verrazzano, Mr. Banci has sold directly to such "big customers" as Bobbie Brooks and Jonathan Logan. For dealing with smaller customers, Mr. Banci contracted with Maylis Associates of New York City to act as sales agent. However, because Maylis Associates did not want to use the name Verrazzano, it was agreed that sales through Maylis would be in the name of Lanificio Tuscania, an Italian entity owned by Mr. Banci's wife² from whom Mr. Banci had a broad power of attorney (CX 52 A–H) that gives him control. Lanificio Tuscania has now been incorporated as a New York corporation, but it will continue to operate in conjunction with Maylis Associates. (Banci 526–28, 534, 539–40, 544, 548–49, 741–42, 822–25.)

According to one of the partners in Maylis Associates, this firm represented both Verrazzano and Tuscania, but he was unsure of the exact relationship between the two. Although this witness dealt "basically" with Mr. Banci's son Rodolfo Banci in Italy (as to whose

² Although generally referred to simply as Lanificio Tuscania, the formal name of this entity appears to be Lanificio Tuscania Ditta Individuale (CXs 47–51). The power of attorney (CX 52 A–H) identifies the entity as "Lanificio Tuscania Di Conti Lola."

exact role he disclaimed knowledge), he had frequent contacts in New York with Walter Banci, whom he assumed to be "someone of interest." (Ellis 473-79, 483, 489, 517-18; see CXs 48, 49.)

Subsequently, in order to facilitate and to distinguish sales made through agents other than Maylis Associates, the trade name "Lan Etruria" was used (Banci 528-30, 535). Although Lan Etruria is a trade name of Tuscania (CX 50, Banci 530-31), it was actually used on behalf of Lanificio Walter Banci (Banci 534-35, 604-09). Verrazzano also used the trade name Lan Etruria, representing itself as "selling agent" for Lan Etruria (CXs 13 A, 14 A; Tr. 472).

Francesco Datini, Inc., was incorporated in 1967 or 1968 to sell fabrics manufactured by Lanificio Walter Banci to American coat manufacturers. Because Maylis Associates was already representing another Italian mill in the coat fabric field, Datini entered into a sales agency arrangement with Berkshire-Cerey of New York City. Datini later sold goods to or through other outlets. (Banci 527, 531, 533-34.)

Although its business relationship was primarily with Datini, Berkshire-Cerey dealt with Mr. Banci and with other personnel of Verrazzano respecting shipments and sales. In addition, Berkshire-Cerey occasionally sold goods on behalf of Verrazzano. The president of Berkshire-Cerey was under the impression that Banci was the "owner" of both Verrazzano and Datini. (Gordon 445, 447-49.)

Datini now appears to be dormant (Banci 827).

Regardless of the corporation or the trade name involved in any transaction—whether it was Verrazzano, Datini, Tuscania, or Lan Etruria—the fabrics were the products of Lanificio Walter Banci, and Verrazzano was the "importer of record" (Banci 537-39, 545, 611, 736-37, 822).

Mr. Banci testified that in the case of Verrazzano, his son Marzio Rodolfo Banci "is the president, the shareholders, he is everything." (Tr. 543; see CX 2 A-C.)

Although Mr. Banci initially could not identify the other officers of Verrazzano, he did so after his memory was refreshed. Similarly, his memory was uncertain regarding the officers of Datini, but he agreed that they were the same as the officers of Verrazzano. (Tr. 543-44, 828-29.) Mr. Banci testified that his son Rodolfo is the principal stockholder in both Verrazzano and Datini and referred to him as the "owner" (Tr. 615, 824-25).

Nevertheless, it is essentially undisputed that Walter Banci exercises direction and control over Verrazzano (Tr. 597, 825) and Tuscania (CX 52 A-H), and it is clear also that he played a similar

role with respect to Datini (Banci 596-98, 826-27; Gordon 445-49). Although Mr. Banci minimized his role in connection with the Tuscania transactions handled through Mayliss Associates (Tr. 544-45, 548, 551-53, 555, 826), disavowed any control of Datini (Tr. 836-37), and denied any personal participation in the labeling, invoicing, and shipping of goods (Tr. 580-83), the record as a whole establishes that he directs and controls the policies and practices in this country of the corporate respondents and other entities involved in this proceeding. The whole complex of corporations, trade names, and other entities, both American and Italian, is a single unified enterprise—an integrated family-owned business—designed to sell in the United States fabrics manufactured by Lanificio Walter Banci. The corporate respondents were created by Mr. Banci, and he put his son in as owner (Tr. 824-25). As the entrepreneur of the whole operation, as the representative in the United States of Lanificio Walter Banci and Lanificio Tuscania, and also as the so-called “agent” for Verrazzano and Datini, he may properly be held accountable individually for the practices of the unified enterprise and of each of its component parts.

The business of respondents is substantial. Since 1965 Lanificio Walter Banci has exported to the United States, for sale and distribution through respondents, approximately 20 million yards of fabric, including 6 million yards in each of the years 1968 and 1969. Of the 1968 total, from 2 million yards to 2.5 million yards were imported under the name of Lanificio Tuscania. (RX 5; Banci 738-39.)

Sales in the name of Lanificio Tuscania through Maylis Associates from early 1967 to April 30, 1970, totalled \$7.3 million (CX 49; Ellis 518-19).

The annual gross sales volume of Verrazzano has ranged from \$4 million to \$7 million (Banci 539).

The total gross volume of Datini was estimated as from \$100,000 to \$200,000 (Banci 541-42).

Respondents are now, and for several years have been, engaged in the introduction, delivery for introduction, advertising, offering for sale, and sale in commerce, in the transportation and shipment in commerce, and in the importation into the United States, of wool products and textile fiber products, as such products are defined in the Wool Products Labeling Act and in the Textile Fiber Products Identification Act, and as “commerce” is defined in those statutes and in the Federal Trade Commission Act. In the course and conduct of their business, respondents have caused their products, when sold,

to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States, and they have maintained a substantial course of trade in such products in commerce as "commerce" is defined in the cited statutes.

II. The Statutory Provisions

Applicable statutory provisions are set forth in pertinent part as follows:

Wool Products Labeling Act of 1939

SEC. 3. The introduction, or manufacture for introduction, into commerce, or the sale, transportation, or distribution, in commerce, of any wool product which is misbranded within the meaning of this Act or the rules and regulations hereunder, is 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; and any person who shall manufacture or deliver for shipment or ship or sell or offer for sale in commerce, any such wool product which is misbranded within the meaning of this Act and the rules and regulations hereunder is guilty of an unfair method of competition, and an unfair and deceptive act or practice, in commerce within the meaning of the practice, in commerce within the meaning of the Federal Trade Commission Act. (15 U.S.C. § 68a.)

* * * * *

SEC. 4 (a) A Wool product shall be misbranded—

(1) If it is falsely or deceptively stamped, tagged, labeled, or otherwise identified.

(2) If a stamp, tag, label, or other means of identification, or substitute therefor under section 68c of this title, is not on or affixed to the wool product and does not show—

(A) The percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; and (5) the aggregate of all other fibers: *Provided*, That deviation of the fiber contents of the wool product from percentages stated on the stamp, tag, label, or other means of identification, shall not be misbranding under this section if the person charged with misbranding proves such deviation resulted from unavoidable variations in manufacture and despite the exercise of due care to make accurate the statements on such stamp, tag, label or other means of identification. (15 U.S.C. § 68b.)

* * * * *

SEC. 9. (b) Any person who furnishes a false guaranty, . . . with reason to believe the wool product falsely guaranteed may be introduced, sold, transported, or distributed may be introduced, sold, transported, or distributed in commerce, is guilty of an unfair method of competition, and an unfair and deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act. (15 U.S.C. § 68g(b).)

Initial Decision

78 F.T.C.

Textile Fiber Products Identification Act

SEC. 3. (a) The introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product which is misbranded or falsely or deceptively advertised within the meaning of this Act or the rules and regulations promulgated thereunder, is 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.

(b) The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce, and which is misbranded or falsely or deceptively advertised, within the meaning of this Act or the rules and regulations promulgated thereunder, is 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.

(c) The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, which is misbranded or falsely or deceptively advertised, within the meaning of this Act or the rules and regulations promulgated thereunder, is 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. (15 U.S.C. § 70a.)

* * * * *

SEC. 4. (a) [With exceptions not here material] a textile fiber product shall be misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

(b) * * * a textile fiber product shall be misbranded if a stamp, tag, label, or other means of identification, or substitute therefor authorized by Section 5, is not on or affixed to the product showing in words and figures plainly legible, the following:

(1) The constituent fiber or combination of fibers in the textile fiber product, designating with equal prominence each natural or manufactured fiber in the textile fiber product by its generic name in the order of predominance by the weight thereof if the weight of such fiber is 5 percentum or more of the total fiber weight of the product * * *

(2) The percentage of each fiber present, by weight, in the total fiber content of the textile fiber product, exclusive of ornamentation not exceeding 5 per centum by weight of the total fiber content: * * * *Provided further*, That in the case of a textile fiber product which contains more than one kind of fiber, deviation in the fiber content of any fiber in such product from the amount stated on the stamp, tag, label, or other identification shall not be a misbranding under this section unless such deviation is in excess of reasonable tolerances which shall be established by the Commission:³ *And provided*

³ Rule 43 of the Commission's Rules and Regulations under the Textile Fiber Products Identification Act provides in part as follows:

"RULE 43—*Fiber Content Tolerances*. [see next page]

further, That any such deviation which exceeds said tolerances shall not be a misbranding if the person charged proves that the deviation resulted from unavoidable variations in manufacture and despite due care to make accurate the statements on the tag, stamp, label, or other identification. (15 U.S.C. § 70b (a) (b).)

Federal Trade Commission Act

Sec 5(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. (15 U.S.C. § 45(a) (1).).

Definition of Commerce

The term "commerce" means commerce among the several States or with foreign nations. * * * (Wool Products Labeling Act, Sec. 2(h); Textile Fiber Products Identification Act, Sec. 2(k); Federal Trade Commission Act, Sec. 4, 15 U.S.C. §§ 68(h), 70(k), 44.)

III. The Evidence As To Misbranding

A. Under the Wool Products Labeling Act

The record contains evidence that labels and invoices concerning five fabrics imported by one or more of the respondents bore tags or labels setting forth fiber-content information that did not conform to the actual fiber content, as disclosed by the testing of samples.

The exact procedures used by respondents for the fiber-content labeling of the fabrics that are imported by or for them is not altogether clear, but no issue has been raised as to the responsibility of respondents for the labeling of goods introduced into commerce. Some fabrics are labeled in Italy by Lanificio Walter Banci, but if a backing is to be bonded to the fabric after importation, the label is affixed by the bonder (Banci 612-14; Gordon 446). The fiber content is ordinarily shown on the invoices and related shipping documents (CXs 57 D-E, 58 D-E, 59 D-E).

The witness from Lincoln Processing Corporation, which bonded

"(a) A textile fiber product which contains more than one fiber shall not be deemed to be misbranded as to fiber content percentages if the percentages by weight of any fibers present in the total fiber content of the product, exclusive of permissive ornamentation, do not deviate or vary from the percentages stated on the label in excess of 3% of the total fiber weight of the product. For example, where the label indicates that a particular fiber is present in the amount of 40%, the amount of such fiber present may vary from a minimum of 37% of the total fiber weight of such product to a maximum of 43% of the total fiber weight of such product.

"(b) Where the percentage of any fiber or fibers contained in a textile fiber product deviates or varies from the percentage stated on the label by more than the tolerance or variation provided in subsection (a) of this Rule, such product shall be misbranded unless the person charged proves that the entire deviation or variation from the fiber content percentages stated on the label resulted from unavoidable variations in manufacture and despite the exercise of due care." (16 CFR 303.43.)

fabrics for Verrazzano and Lanificio Tuscania, did not know the source of the fiber-content information placed on the labels prepared by Lincoln (Kivor 616-19, 631).

Further information respecting labeling will be developed in connection with the findings of fact relating to the specific fabrics alleged to have been wrongfully labeled.

Four of the questioned fabrics (CXs 1, 11, 12 and 15) are attributable to Verrazzano and respondent Walter Banci. As to these, the factual allegations are found to be supported by the evidence, although there remains the legal question whether the misbranding is within the coverage of the Wool Act (*infra*, p. 661). The fifth fabric (CX 24) is attributable to both Datini and Verrazzano, as well as to Mr. Banci, but the evidence is insufficient to support a finding of violation. The essential facts relating to each are set forth below:

CX 1

CX 1 is a swatch from a "Milo" fabric shipped by Verrazzano in June 1966 to Slifka Fabrics, New York City. This swatch was obtained in January 1967 by a Commission investigator, who also identified a hand-tag attached to the role of fabric that listed the fiber content (CX 2). The Verrazzano invoice reflecting the sale to Slifka (CX 3) listed the same fiber composition as shown on CX 2 and also certified that the fiber content indicated in the invoice "appears on all hang-tags." This certification bears the signature of Walter Banci on behalf of Verrazzano. (Rose 160-68; Tr. 414-15.)

CX 1 was tested by Fabric Research Laboratories, Inc. (CX 36 A-G; Golub 225), this fabric being identified in the report as Sample 2 (Slifka Exhibit A). The fiber content shown on CX 2 and CX 3 and the fiber content shown by testing are compared below:

Hang-tag and invoice (CXs 2, 3):		Percent
Reprocessed wool.....		70
Fur fibers.....		15
Nylon.....		10
Other fibers (unknown fibers).....		5
Test report (CX 36 F):		
Wool.....		82.9
Fur (chiefly rabbit type).....		11.0
Nylon.....		5.3
Other fiber (cotton and man-made).....		0.8

CX 11 and CX 12

CX 11 and CX 12 are swatches of fabric sold by Verrazzano to Tunxis Sportswear, Inc., New London, Connecticut. CX 11 is a

sample of "Napoli Melton" sold to Tunxis in early 1968. CX 12 is a sample of the "Larry" style sold to Tunxis in late 1967. The samples were obtained by a Commission investigator in the course of a routine inspection of Tunxis in June 1968. The investigator did not obtain the hang-tags attached to the bolts of fabric from which the swatches were cut, but he copied the information as to each on separate inspection forms. Each hang-tag bore a registered identification number that is conceded to be the registered identification number of Verrazzano. Tunxis officials also identified Verrazzano as the supplier, and invoices were later obtained showing the shipments from Verrazzano to Tunxis. (Moody 322-69; Detz 454-63; Parker 373-83; CXs 43, 44, 13 A, 14 A.) Each of the invoices (CXs 13 A, 14 A) guaranteed compliance with the Wool Products Labeling Act.^{3a}

Although respondents contend that "there is considerable question as to the labeling and identity of CX 11 and CX 12 and as to their connection with respondents" (RML 28-33, 2-3), the record as a whole leaves no doubt as to the identity of the fabrics, the fiber content information on the tags, or the responsibility of Verrazzano therefor. There would have been more certainty if the hang-tags had been physically obtained rather than copied, but there is no basis for finding that any mistake was made either in the identification of the fabrics or the copying of the fiber-content information and the registered identification number from the hang-tags. Similarly, the fact that part of each inspection form (CX 43 and CX 44) was written in ink and part was written in blue pencil or blue crayon does not discredit the accuracy of the information shown on the forms, even though the investigator could not remember why he had used two different writing instruments to record the information (Moody 335, 349-55, 362-63).

Moreover, it does not appear to the examiner that the partial misidentification of the "Larry" style raises any serious problem with respect to CX 12. The style as handwritten at the top of CX 44 appears to be "Larry," but the handwriting is such that it is readily misread as "Lang." This is apparently what happened when the investigator wrote "Lang" as the style in the middle of CX 44 and

^{3a} In explaining its delay in paying Interstate Factors for the Napoli fabric (CX 11), Tunxis stated that it was "having problems with the material and payment is being withheld pending investigation by Verrazzano Trading" (CX 13 B), but no testimony was adduced to show whether or not the "problems" related to fiber content.

Initial Decision

78 F.T.C.

likewise on the identifying label that he placed on CX 12 (Moody 363-64).⁴

Respondents also rely on a conflict between the testimony of the investigator and the Tunxis employee concerning the identity of the person who actually cut the swatches from the fabrics in question (RML 32). Whereas the investigator testified that the samples were cut for him by a Mr. Stern, who died in December 1968, the Tunxis employee who was called as a witness testified that he "believed" that he got the sample swatches—that he "helped get them" at the request of Mr. Stern (Moody 325, 353; Detz 457-58). This is a minor detail, and the nature of the conflict is such that, in the examiner's opinion, it does not discredit the testimony of the investigator.

Finally, respondent Walter Banci expressed doubt that CXs 11 and 12 were fabrics manufactured by his mill. Although he testified that CX 11 appeared to him to be of American origin, he conceded the possibility that the fabric was manufactured by his mill, and also that it could have been erroneously labeled as containing silk. He expressed greater certainty that CX 12 was not manufactured by his mill but was made by a Prato competitor. (Tr. 780-E-781, 806)

On consideration of the foregoing, the examiner finds that CX 11 and CX 12 and their labeling have been sufficiently connected to respondents. A comparison between the fiber-content information on the tags and the fiber content disclosed by testing follows:

As to CX 11:

Hang-tag and invoice (CXs 43, 13 A):		Percent
Reprocessed wool	-----	87
Silk	-----	13
Test report (CX 36 F):		
Wool	-----	84.3
Nylon	-----	12.9
Other fiber (acrylic, polyester, cotton)	-----	2.8
Test report (RX 3):		
Woolen fibers and silk	-----	Test a 85.4 Test b 84.8
Other fibers	-----	14.6 15.2

As to CX 12:

Hang-tag and invoice (CXs 44, 14 A):		Percent
Reprocessed wool	-----	70
Fur fiber	-----	15
Nylon	-----	10
Other fibers	-----	5

⁴ In expressing doubt as to the reliability of the information on CX 43 and CX 44, respondents note (RML 32) that a similar form purportedly prepared by another investigator had been prepared by someone else (Gevarter 424-25, 428-29). However, this

Initial Decision

Test Report (CX 36 F):		Percent
Wool.....	46.2	
Fur (chiefly rabbit type).....	11.9	
Nylon.....	11.3	
Other fiber.....	30.4	
(consisting of 12.9 percent cotton and viscose, 11 percent polyester, 6.5 percent miscellaneous other fiber, with 0.2 percent fly fiber lost during analyses).		
Test Report (RX 1):		Test a
Acetate.....	5.1	
Woolen fibers and fur.....	62.7	
Nylon.....	10.0	
Other fibers.....	22.2	
		Test b
Acetate.....	5.0	
Woolen fibers and fur.....	62.0	
Nylon.....	9.7	
Other fibers.....	23.3	

CX 15

CX 15 is a swatch of "Mel" fabric obtained by a Commission investigator from United Manufacturing Co., Marlboro, Mass. The hang-tag, attached to CX 15, bears the registered identification number of Verrazzano. Invoices and related documents (CXs 16-23) trace the shipment of the goods from Verrazzano to United through C. Haedke & Co., Inc., New York City. Each of the Verrazzano invoices (CXs 22 A-C) contains a guarantee of compliance with the Wool Act and certifies that the indicated fiber composition "appears on all Hang-Tags." (Parker 383-92; Tr. 399-400, 413-14; Gevarter 417-19). The fiber-content claims and the test results for CX 15 are as follows:

Hang-tag and invoices: ⁵		Test a
Reprocessed wool.....	70	
Fur fibers.....	15	
Nylon.....	10	
Other fibers (unknown fibers).....	5	
Test Report (CX 37):		
Woolen fibers and fur.....	80.6	
Nylon.....	8.0	
Other fibers.....	11.4	
		Test b
Woolen fibers and fur.....	80.7	
Nylon.....	7.7	
Other fibers.....	11.6	

circumstance does not discredit the sworn testimony of Mr. Moody that he had in fact prepared and signed CX 43 and CX 44 and that all the entries had been made by him (Tr. 335, 350, 360, 362).

⁵ The hang-tag is affixed to CX 15, and the invoices are CXs 22 A-C.

CX 24

Although the record shows that a swatch of "Vienna" fabric (CX 24) was grossly misbranded (CX 36 F), there is no evidence clearly linking this piece of fabric with sales in commerce, and there is testimony that it was simply a sample that was never used to promote or effect sales in commerce (Gordon 442-44, 449-50). The evidence respecting the Vienna fabric is of such a nature that it does not warrant a finding of violation.

CX 24 was obtained by a Commission investigator from Berkshire-Cerey, Inc., New York City, a sales agent for Datini, in the course of a special inspection on August 20, 1968. He did not take the fiber-content tag attached to the bolt of fabric from which CX 24 was cut but copied the information, including the registered identification number of Verrazzano. The fabric was labeled 40% wool, 20% nylon, 20% linen, 20% cotton. The investigator also noted the presence of a "Drava Foam" fabric labeled as 50% wool, 30% nylon, 20% linen. The investigator subsequently returned to Berkshire-Cerey in July 1969 to obtain invoices showing sales and shipments of the Vienna fabric. Except for the fact that the style designation was the same, these documents (CXs 25-31) were not connected with the CX-24 fabric; actually, they showed a different fiber content—50% wool, 30% rayon, 20% linen—corresponding to the fiber content of the Drava fabric. (Gevarter 420, 423-35; RX 4 A-J) The fiber content of CX 24 as shown by the label and the fiber content disclosed by testing are compared as follows:

Label (RX 4 G-H):	Percent
Wool.....	40
Nylon.....	20
Linen.....	20
Cotton.....	20
Test Report (CX 36 F):	
Nylon.....	26.6
Wool.....	25.6
Flax.....	23.8
Cotton.....	6.5
Other fibers.....	17.5
(chiefly acrylic and polyester.)	

As a witness in support of the complaint, Barnett Gordon, the president of Berkshire-Cerey, testified that the fabric from which CX 24 was cut was only a sample and that Berkshire-Cerey had

⁶ Although the record contains invoices for the Vienna fabric, there is no basis, other than the style designation, and the identity of the claimed fiber content, for connecting any invoice with the fabric exemplified by CX 24.

never sold a Vienna fabric labeled as containing 40% wool, 20% nylon, 20% linen, 20% cotton. He stated that his customers objected to a fabric containing four fibers and that he requested that the number be reduced to three so that the fabric would comprise 50% wool, 30% nylon, and 20% linen. (Tr. 442-44, 449-50.) However, this testimony regarding such a change in the fiber content of the Vienna fabric at that time is inconsistent with Mr. Gordon's statement that the Vienna fabric and the Drava fabric were "the same thing," the name having been changed because the fabric was being sold in two consecutive seasons (Tr. 440). Moreover, respondent Walter Banci referred to Drava and Vienna as "two different tweeds" (Tr. 584).

Although both Mr. Banci and Mr. Gordon doubted that there could be fabrics of different fiber composition manufactured and sold under the same style designation (Tr. 441, 571-72), the fact is that respondents imported considerable quantities of Vienna fabric between July 1968 and September 1968, some of which was represented on invoices and related documents as comprising 40% wool, 20% nylon, 20% linen, 20% cotton, while other shipments purportedly involved a fabric containing 50% reprocessed wool, 30% nylon, and 20% linen (CXs D-E and 59 D-E; Shea 675-91).

Respondents contend (RML 27) that "the shipment of fabric from which the sample [CX 24] must have been taken contained only 110 2/8 yards of fabric valued at \$110.25 * * * because the said importation documents in possession of the Bureau [of Customs] showed that as the only shipment of that type of fabric imported prior to August 24, 1968."⁷ Actually, there were two importations of Vienna fabric in July 1968, and as to both of them, the fiber content was indicated as 50% reprocessed wool, 20% linen, 30% nylon (Shea 686-88).

The record thus establishes that respondents imported quantities of the Vienna fabric as to which the represented fiber content varied. However, there is no showing that the fabric exemplified by CX 24 was representative of any of these goods. Aside from the Vienna fabric sold through Berkshire-Cerey (CXs 25-31) and the shipments covered by CXs 58 A-H and 59 A-H, showing sales to Russ Togs, Inc., Long Island City, New York (CXs 58 D, 59 D), the disposition of the imported Vienna fabric remains essentially unclear (Banci 532, 568-73, 583-84, 609-10). In any event, there is no proof that any Vienna fabric of the actual fiber composition of

⁷ CX 24 had been picked up at Berkshire-Cerey on August 20, 1968 (RX 4 C; investigator's identification tag affixed to CX 24).

CX 24—whatever its label—was sold by respondents. The fact that there were imports and sales of Vienna fabrics represented as having the same fiber content as CX 24 does not, under the circumstances here, permit an inference that they were misbranded.

Despite some confusion, the testimony of complaint counsel's own witness, Mr. Gordon, warrants a finding that CX 24 was cut from a sample run of fabric, the labeling and content of which was not representative of any fabric sold by Berkshire-Cerey to customers on behalf of Datini; that the challenged representations as to the fiber content were not relied upon by customers, who, in fact, required that the fiber content be other than that indicated on the label; that the purpose of the sample was merely to give customers an idea of what the fabric would be like; and that all of the Vienna fabric actually sold to customers of Berkshire-Cerey had a different fiber content and was so labeled (Gordon 442-44; 450; CXs 25-31). Mr. Gordon's explanation that CX 24 was representative only of an experimental sample fabric is bolstered by the fact that although CX 24 was obtained during a "general inspection," emphasis was on "how the sample fabrics being used to effect or promote sales of products in commerce are being labeled. . . ." This was acknowledged by the investigator, but he had "no idea" whether the bolt of fabric from which he obtained CX 24 was used for sample purposes. (RX 4 A; Gevarter 431-32.)

Even if CX 24 did relate only to a sample fabric, complaint counsel still contend (CPF 37) that there was a violation, citing Rule 22 of the Rules and Regulations under the Wool Products Labeling Act, as follows:

Where samples, swatches or specimens of wool products subject to the act [are] used to promote or effect sales of such wool products in commerce, said samples, swatches and specimens, as well as the products themselves, shall be labeled or marked to show their respective fiber contents and other information required by law. (16 CFR § 300.22.)

Complaint counsel rely (CRB 8) on the case of *G. Sherman Corp.*, 56 F.T.C. 783 (1960), as precedent. But the instant case is clearly distinguishable. In the *Sherman case*, it was undisputed that "many" different sample swatches were misbranded. And, although the customers knew that the swatches were labeled only as to "probable" fiber content, it was not disputed that the swatches were used to promote or effect sales of *such* wool products (56 F.T.C. at 785). Here (while there may be basis for skepticism), the uncontradicted testimony of the Government's own witness was that the sample was not used for that purpose—that customers placed no reliance upon the labeled fiber content (*supra*, pp. 654-55).

Finally, although the record supports complaint counsel's contention that "[t]housands of yards" of the Vienna fabric were sold (CRB 8), it fails to connect such sales with CX 24. There has been a failure of proof here, just as in *Bon Dana Sportswear Co.*, 48 F.T.C. 1592, 1594-95 (1952), where the Commission found that it was "possible" but "not . . . proved" that there was a connection between a "few dozen" misbranded sample skirts and a large volume of sales. So here, it is possible but not proved that there was a connection between this one isolated sample (CX 24) and a large volume of the Vienna fabric. This is not enough to support a finding of violation.

Thus, except in the case of CX 24, there is *prima facie* proof of misstatements in labels and in invoices regarding the fiber content of wool products introduced and sold in commerce. However, respondents have presented several defenses in urging that the complaint be dismissed, and those defenses, as well as the application of the law to the practices found in this Section III, will be considered in the Summary, Analysis, and Conclusions (*infra*, p. 661). Meanwhile, findings are next presented respecting alleged violations of the Textile Fiber Products Identification Act.

B. Under the Textile Fiber Products Identification Act

Only two fabric samples were introduced purporting to show violations of the Textile Fiber Products Identification Act. One fabric, exemplified by CX 4, involves Lanificio Tuscania, while the other, exemplified by CX 32, relates to Datini. Respondents contend that "None of the purported violations relate to Verrazzano" (RML 3), but it has already been established that Verrazzano is the importer of record for all the fabrics involved in this proceeding (*supra*, p. 664). The salient facts respecting each of the challenged fabrics are set forth below.

CX 4

CX 4 is a sample of "Concerto" fabric obtained from Magic Sportswear, Inc., New York City, in July 1968 by a Commission investigator. The fabric had been imported through Verrazzano and sold on behalf of Lanificio Tascania through Maylis Associates as selling agents after a backing had been attached by Lincoln Processing Corp. The fabric from which CX 4 was cut bore no fiber-content label, but Magic Sportswear personnel said that Maylis Associates had furnished a hang-tag (CX 8 A-B) to be attached to the fabric. (Rose 170-191; Coleman 192-98; Banci 561-63, 568; Kivor 616-22; 631-36; CXs 5-8, 10, 54-57.) The fiber-content in-

Initial Decision

78 F.T.C.

formation on CX 8 A-B, bearing the name of Maylis Associates, is compared below with the fiber content of CX 4 as shown by testing:

		Percent—	
		Test a	Test b
Hang-tag and invoice (CXs 7, 8 A-B):			
Acrylic.....			75
Fur.....			15
Nylon.....			10
Test Report (CX 39):			
Acrylic.....	78.2	78.4	
Fur fibers.....	8.1	8.3	
Nylon.....	6.5	6.5	
Other fibers.....	7.2	6.8	

Respondents do not challenge the foregoing facts or the extensive documentation set forth by complaint counsel respecting CX 4 (CPF 41-43) but contend that because the prime seller is shown to be the Italian entity Lanificio Tuscania, CX 4 has not been properly connected to respondents (RML 4). This contention has already been essentially disposed of in the earlier findings relating to Verrazzano and respondent Walter Banci (*supra*, pp. 643-46). These findings also dispose of the further argument that Mr. Banci may not be held responsible as agent for acts or omissions of his principal, Lanificio Tuscania, which principal is not subject to the jurisdiction of the Commission (RML 37-39). Mr. Banci is more than an agent of Lanificio Tuscania and is subject to Commission jurisdiction as one exercising direction and control within the United States.

Respondents make the further argument that the questioned label (CX 8 A-B) bears only the name of Maylis Associates and that, although "Maylis is the selling agent for goods of Lanificio Tuscania, misbranding of these goods was certainly not within the scope of their authorized agency, and any such acts should not be attributed to Lanificio Tuscania, let alone to another agent, Walter Banci" (RML 39). This argument is also rejected. Maylis was the selling agent for both Verrazzano and Lanificio Tuscania and, realistically, for Walter Banci as well (*supra*, pp. 643-46). Thus, respondents Verrazzano and Walter Banci may properly be held accountable for the acts and practices of their selling agent.

The examiner thus finds that CX 4 has been sufficiently connected to respondents Verrazzano and Walter Banci.

A question arises, however, whether the labeling should be held to be a violation of the Textile Act. According to the test, the fabric contained a greater amount of its principal component, acrylic, than

represented on the label. Whereas the acrylic content was labeled as 75%, the tests showed more than 78% acrylic. The fur content was approximately half of that claimed on the label (8% actual as against 15% claimed); the nylon content was 3.5% under the 10% claimed in the label; and the fabric contained approximately 7% other fibers, the presence of which had not been disclosed on the label.

The misbranding of CX 4 appears to be a technical violation at worst. In view of the fact that the representation concerning the principal component was essentially correct; that some manufacturing variations are likely to occur in the blending of fur fibers and such man-made fibers as nylon; that a 3% tolerance is allowed; and that there is a reasonable possibility of testing variances, the labeling of CX 4, standing alone, should not be held to be a violation of the Textile Fiber Products Identification Act. (See RML 24-26.)⁸

CX 32

Respondents have raised no issue concerning the responsibility of Datini for the "Berk" fabric (exemplified by CX 32) that was sold through Berkshire-Cerey. The swatch was identified by a Commission investigator, together with invoices and related documents showing the seller as Datini (Gevarter 420-22; Gordon 439; CXs 33-35). The label attached to CX 32 shows the fiber content as 82% Acrylic and 18% Ramie.⁹ The tests initially relied on by complaint counsel (CX 38) showed the fiber content of CX 32 as follows:

	Percent—	
	Test a	Test b
Label and Invoices ¹⁰ :		
Acrylic.....		82
Ramie.....		18
Test Report (CX 38):		
Acrylic.....	74.7	74.6
Other fibers (mostly bast).....	25.3	25.4

However, complaint counsel joined in a stipulation to the effect that CX 32 was retested, using different techniques, and that these later tests showed the fiber content to be within 3 percent of the

⁸ In view of the disposition here being made of the charges under the Textile Act, it is unnecessary to discuss, with respect to that Act, the statistical and probability theories relied on by respondents in the cited pages. The examiner notes, however, that he is not relying on the indented Tanner quotation at the bottom of RML 24.

⁹ The term "Ramie" is not explained in the record, but the dictionary indicates that it is a linen-like fiber of an Asian plant (Webster's New International Dictionary, Second Edition), and two of the invoices show the fiber content as including 18% linen (CXs 34-35).

¹⁰ The label is attached to CX 32, and the invoices are CXs 33-35.

fiber content shown on the label (Tr. 665, 667), so that the label information is within the tolerance provided by the Act and by Rule 43 of the Commission's Rules and Regulations (*supra*, p. 648). The results of the later tests are in the record as CX 60.¹¹ two of these tests, including one conducted according to specifications furnished by the United States Testing Company, showed the fiber content as 83.4% acrylic and 16.6% other fibers. Another test showed the fiber content as 80.4% acrylic and 19.6% other fibers, and a re-run of the original test method showed 79.9% acrylic and 20.1% other fibers.

Nevertheless, although complaint counsel conceded that CX 60 "placed the fiber content of CX 32 close to that set out on the fiber content label," they contend that "the only reasonable conclusion" that can be drawn "is that variations in the test results are due to lack of homogeneity in the fabric and therefore such fabrics could not produce consistent [test] results" (CPF 44-45). This contention is rejected as lacking any evidentiary basis, and the finding must be that CX 32 was labeled within the allowed tolerance, so that no violation has been proved with respect to it.

Conclusory Finding

Of the two fabrics allegedly labeled and invoiced in violation of the Textile Fiber Products Identification Act, one (CX 32) has been shown, on retesting, to have been labeled within the permissible tolerance, and the other (CX 4) to involve borderline misbranding—a technical violation. The record thus does not contain substantial evidence of violation sufficient to warrant the entry of an order to cease and desist.

IV. The Charges Under the Federal Trade Commission Act

Technically, the record affords basis for a finding that in the course and conduct of their business in commerce, respondents Verazzano and Walter Banci¹² have made statements on invoices to their customers misrepresenting the fiber content of certain of their products, as alleged in Paragraph Eight of the complaint. Such misrepresentations included statements as to the fiber content of CX 1 on CX 3 (*supra*, p. 650); of CX 11 on CX 13 A; of CX 12 on CX

¹¹ In the retesting of CX 32, the solvents used for cleaning and removal of the backing glue were changed, and a different reagent was also used in the chemical analysis. (Compare CX 60 with the Rosenberg testimony at Tr. 303-05, 308-11, 316-17; see CPF 44-45, RRB 13-15.)

¹² With CX 24 out of the picture (*supra*, pp. 654-55), there is no invoice involving Datini.

14 A (*supra*, pp. 650-53); and of CX 15 on CXs 22 A-C (*supra*, p. 653). In truth and in fact, the invoiced products contained substantially different amounts and types of fibers than represented.

As a matter of law, these acts and practices of the respondent were and are all to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. However, the question whether this warrants an order to cease and desist will be considered in the Summary, Analysis, and Conclusions that follow:

SUMMARY, ANALYSIS, AND CONCLUSIONS

In addition to questioning the sufficiency of the evidence connecting some of the fabrics or labels with respondents—a matter resolved by the findings in Section III (*supra*)—respondents have urged a 4-point defense, as follows:

1. Inaccurate label statements as to non-wool fibers contained in a part-wool product do not violate the Wool Products Labeling Act, nor does understatement of the wool content.

2. The deviations shown between label representations and actual fiber content are within reasonable tolerances, considering unavoidable variations in manufacture and the lack of precision in fabric testing.

3. The challenged fabrics do not constitute a representative sampling of respondents' goods.

4. Respondents should be allowed an opportunity to dispose of any labeling discrepancies on an informal non-adjudicatory basis.

These defenses will be considered in the summary and analysis that follow:

I. Wool Act Charges

The most troublesome question presented on this record is whether the failure to accurately list on labels the non-wool content of a part-wool product constitutes a violation of the Wool Products Labeling Act. A subsidiary or related question is whether an understatement in labeling of the wool content of a part-wool product and the consequent overstatement of the presence of non-wool fibers constitute a violation of the Act.

Were it not for the case of *Marcus v. FTC*, 354 F. 2d 85 (2d Cir. 1965), the examiner would have little doubt that the answer to both questions is yes. However, in the *Marcus* case, the Court clearly

held that "if the percentage of wool is correctly stated, the Act is not concerned with the accuracy of statements about other constituent fibers" and that, moreover, understatement of the wool content does not constitute a violation (354 F. 2d, at 87-88).

With all due deference to the Court, the examiner believes the language of the Wool Act, including the preamble and, more particularly §§ 4a(1) and (2) (15 U.S.C. § 68b (a) (1) and (2)), is so clear and unambiguous as to make resort to legislative history unnecessary and that, in any event, the legislative history is not such as to require the Court to hold as it did.

However, no petition for certiorari was filed on the Supreme Court, nor does it appear that the Commission or any court has taken a contrary view since the *Marcus* decision, except that the Commission has issued numerous consent orders containing the statutory language of § 4a (2), thus purporting to require the accurate disclosure of non-wool fibers in part-wool products.

Complaint counsel have cited two Commission cases that are in conflict with *Marcus* in holding that the Wool Act is not concerned merely with the correct labeling of *woolen* fibers, and, in this respect, only insofar as the amount of wool is not *overstated*, but that it requires a correct statement of the woolen fibers present in a wool product, does not allow understatement of the wool content, and requires a correct statement of the names and percentages of all non-woolen fibers present in amounts of 55% or more: *Vikingo, Ltd.*, 63 F.T.C. 152, 158 (1963), and *Sacks Woolen Co., Inc.*, 61, F.T.C. 1226, 1231-33, 1236 (1962). However, it will be noted that both of these cases antedate the *Marcus* decision. They were cited to the *Marcus* Court, as was their rationale, but the Court squarely rejected the Commission's interpretation.

The examiner recognizes the anomaly that whereas the Textile Fiber Products Identification Act requires the accurate labeling of the fiber content of textile products generally, it specifically exempts products subject to the Wool Products Labeling Act (15 U.S.C. § 370(h)). In other words, there would be no specific regulation of fibers other than wool once the product contained some wool and was therefore subject to the provisions of the Wool Act and not of the Textile Act. The possibility of such a statutory hiatus was not mentioned in the Commission's brief, nor did the Court discuss it. However, the brief did cite the *Vikingo* case (*supra*), where the hearing examiner specifically called attention to this anomaly (63 F.T.C. at 1558). At any rate, the Court commented in *Marcus*: "There are, of course, other acts, for example, § 5(a)(1)

of the Federal Trade Commission Act, under which deceptive practices as to constituent fibers can be controlled" (354 F. 2d, at 88, n. 4).

In the circumstances outlined, in a case where respondents are within the jurisdiction of the Second Circuit, the examiner is constrained to view the *Marcus* case as a controlling precedent by which he must be bound.

This means, then that CX 1, CX 11, CX 12, and CX 15 are not misbranded under the Wool Act by reason of misstatements of their non-wool content, nor is CX 1 misbranded by reason of the understatement of its wool content.

There remains the question whether the misstatements of the wool content at CX 11, CX 12, and CX 15 are actionable.

The wool content of CX 11, as shown by testing, was within 2.7% of the represented wool content of 87%. This can hardly be held to constitute actionable misbranding. Such a deviation is excusable as due to unavoidable manufacturing variations or as within the margin of testing error (*Marcus v. FTC*, 354 F. 2d 85, 89 (2d Cir. 1965); *Beacon Manufacturing Co.*, 46 F.T.C. 1073, 1075-77; see *Striar* 127, *Grimwade* 207; CX 36 F-G).

CX 15, which was labeled as containing 70% wool, 15% fur, 10% nylon, and 5% other fibers, contained 4.3% less wool and fur combined than the 85% represented by the label. However, the test failed to show the percentage of wool content separately, so that there is no proof that it did not contain the stated 70%.

This leaves only one clear case of misbranding—CX 12 which was labeled as containing 70% wool, but actually contained only 46.2% wool, or 23.8% less than stated. Here again, the *Marcus* case is controlling. One instance of misbranding does not provide a substantial basis for the issuance of an order to cease and desist (*Marcus v. FTC*, 354 F. 2d 85, 89 (2d Cir. 1965)).

In view of this determination respecting the misbranding charge, the charge of furnishing false guarantees must necessarily fail too.

II. Textile Act Charges

The charges of misbranding and false invoicing under the Textile Fiber Products Identification Act must be dismissed for lack of substantial proof of violation (*supra*, pp. 657-60).

III. Federal Trade Commission Act Charges

With the proof of violation of both the Wool Act and the Textile Act having been found insufficient, on the facts and on the law,

the next question is whether an order should be entered against false invoicing under the Federal Trade Commission Act. The examiner is of the opinion that, as a matter of discretion, it would be incongruous to enter such an order in the circumstances presented by this record.

The main thrust of this proceeding involved alleged violations of the Wool Act and of the Textile Act; and the Federal Trade Commission Act charge of false invoicing was concededly auxiliary to the Wool Act allegations. With the principal thrust blunted by the facts and the law, there is at least some question whether the auxiliary charge should stand.

It is true that respondents have misrepresented the fiber content of their products, and the dismissal of the Wool Act charges is partly on technical grounds. Nevertheless, an attitude here that half a loaf is better than none would have a dog-in-the-manger aspect that the examiner finds inappropriate on this record.

The circumstances that have led the examiner to this conclusion include the following:

With perhaps one or two exceptions, the misrepresentations are not flagrant and may be accounted for, at least in part, by unavoidable manufacturing variations, by isolated error,¹³ or by the margin of error involved in testing.¹⁴

Regarding the Wool Act defense of unavoidable manufacturing variations, which may be applied to the related charge of false invoicing under the Federal Trade Commission Act, the examiner assumes, without deciding, that deviations of up to 5 percent are within the exculpatory provision of Section 4(a)(2) of the Wool Act, as interpreted by the *Marcus* decision. In *Marcus*, the Court seemed to read into the proviso a virtually automatic tolerance of at least 5 percent. (*Marcus v. FTC*, 354 F. 2d 85, at 89; compare Hearing Examiner's Initial Decision (June 9, 1964) in the *Marcus* case, *sub. nom. Stanton Blanket Co.*, D. 8610, slip opinion, p. 10; Final Order, December 18, 1964 [66 F.T.C. 1290]; see *Beacon Manufacturing Co.*, 46 F.T.C. 1073, 1075 (1949); *cf. Alscap, Inc.*, 60 F.T.C. 275 (1962), and *Milwaukee Allied Mills, Inc.*, 55 F.T.C. 1530, 1540 (1959); see, in this record, Striar 127; Grimwade 207.)

The testimony of Mr. Banci and respondents' expert Professor Rota (Tr. 746, *et seq.*; 787 *et seq.*; 998-1935) indicates that Mr. Banci's mill and other mills in Prato, Italy, have experienced dif-

¹³ For example, CX 11; see Banci 780 E-H, 806. Compare *Becon Manufacturing Co.*, 46 F.T.C. 1073, 1075 (1949).

¹⁴ See CX 36-G.

difficulties in achieving homogeneity of fabrics, particularly in multiple-component blends involving reprocessed and reused wool, fur fibers, and synthetic fibers, and that efforts are being made to find solutions to such problems. But on the basis of their testimony and in the light of the testimony of the American manufacturers, as well as Dr. Golub, there might be doubt, absent the *Marcus* ruling, that the difficulties of achieving a product of such homogeneity that it may be properly labeled are due to unavoidable manufacturing variations. Mr. Banci's mill has elected to use large high-speed machinery to achieve greater production, and such size and speed have been blamed for the lack of homogeneity in certain fabrics. Although the Italian manufacturers may face certain problems to which the American manufacturers are not subject, the record indicates that there are machines and processes available, or that the existing Italian machines and processes may be modified, so as to achieve sufficient homogeneity that acceptable labeling may be achieved. However, it does appear that respondents are endeavoring to overcome these difficulties and that they exercise due care (*id.*).

The fabrics involved in this proceeding do not constitute a representative random sampling,¹⁵ and there is evidence that many other samples were tested by the Government and apparently found acceptable (Rose 186-88-A; Moody 370; Shea 693). The examiner does not mean to suggest that respondents may be excused from misrepresentation of some fabrics because others are properly represented. But the evidence here falls far short of permitting any inference that respondents have engaged in deliberate misrepresentation or in actionably careless misrepresentation.¹⁶

On the basis of the evidence and from his observation of respondent Walter Banci as a witness, the examiner is convinced of the good faith of the respondents.

The record indicates that Mr. Banci declined to sign a consent order in the spring of 1968 (Tr. 665) on the basis that he was not

¹⁵ In the view taken by the examiner, it is unnecessary to consider the statistical and probability concepts developed on this record regarding the adequacy or the fairness of the product sampling involved here (Terzuoli 860 *et seq.*; Tanner 1112 *et seq.*). Without any criticism of the witness intended, it may be noted that the testimony of Mr. Tanner loses much of its force by virtue of the fact that some of his assumptions were not well-founded. In any event, the examiner rejects respondents' contentions regarding the extent of sampling required. The law does not require such a degree of scientific sampling as to prove that a substantial portion of a respondent's goods is misrepresented. It is sufficient if the evidence shows some pattern of violation, ruling out some aberrant discrepancy produced and caught by chance.

¹⁶ Of course, the absence of such factors does not constitute any legal defense (*Smith-line Coats*, 45 F.T.C. 79, 87 (1949)), but it is relevant to the question whether the public interest requires entry of an order.

aware of any misbranding on the part of respondents and that he was unable to ascertain with any exactitude the basis of the Commission's belief that respondents had violated the law. There is record support for the contention of respondents that at the time of the consent negotiations, the Commission's staff did not have substantial evidence of actionable violations requiring formal complaint proceedings rather than the voluntary and cooperative compliance procedures customary in such instances. It appears that at the time of the consent negotiations, the only examples of alleged violations consisted of matters that complaint counsel considered unworthy of introduction in this record.¹⁷

Moreover, Mr. Banci testified (Tr. 782-83), without contradiction or challenge, that he volunteered to cooperate with the Commission in any reasonable way designed to assure proper labeling of respondents' imported goods, even to the point of paying for Commission inspections of his factory in Italy.

Respondents, in their submittals at the close of this case, continue to express a willingness to cooperate in voluntary enforcement procedures. They state:

Respondents stand ready to fully cooperate with the Commission and will, as they have done throughout this proceeding, reveal any information and take any steps which may be reasonably required by the Commission. (RML 5-6.)

... Respondents are anxious to avoid future difficulties under the Textile Act as well as under the Wool Act. Respondents will cooperate in a voluntary enforcement procedure but are anxious to avoid the stigma of a formal Commission order. (RML 42.)

In view of these considerations, it appears to the examiner that the public interest would be served by dismissing the invoicing charges under the Federal Trade Commission Act on condition that respondents Verrazzano and Walter Banci engage in cooperative compliance procedures with the Commission's staff. (See *R. H. Macy & Co., Inc.*, D. 8650 Final Order, Nov. 29, 1967) [72 F.T.C. 894].)

¹⁷ Banci 781-86; see Rose 186-88. The test reports relied on by complaint counsel (CXs 36-39), as well as other test reports relating to the fabrics in this case (RXs 1-3) were dated subsequent to the consent negotiations.

At the outset of this proceeding, in response to an order for a more definite statement, complaint counsel listed four fabrics as illustrative of the misbranding of products labeled as 70% reprocessed wool, 20% linen, 5% nylon, 5% other fibers, as alleged in Paragraph Three of the complaint. (See "Answer in Response to Respondents' Motion for a More Definite Statement . . ." filed December 9, 1969, subparagraphs 1-3 of Paragraph One.) However, none of these samples or test reports were offered in evidence by complaint counsel. Three of the test reports relating to these samples are in the record as RXs 10-12 (see also Appendix A of respondents' Memorandum of Law). Apparently complaint counsel did not consider the minor discrepancies shown as constituting violations since, as noted by the laboratory report on two of the fabrics, testing had shown them to be "approx. as labeled" (RXs 11-12).

If, however, the Commission should disagree and should conclude that an order is warranted, the examiner respectfully suggests that the proposed order be modified so that it does not purport to cover labeling.

The order proposed by complaint counsel (CPF 47) and the proposed order attached to the complaint would require respondents to "cease and desist from misrepresenting the character or amount of the constituent fibers contained in such products on invoices or shipping memoranda applicable thereto, or in any other manner."

Literally read, the last phrase of this order would prohibit *any* misrepresentation of the character or amount of the fiber content, including that set forth in labeling.

However, misrepresentation in labeling was charged as a violation of the Wool Products Labeling Act, and that charge has been dismissed by the examiner. If the examiner's dismissal of the Wool Act charges as to labeling is upheld, it is submitted that the Federal Trade Commission Act order—if entered—should not purport to run against labeling.

IV. Conclusions

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. At all times relevant to this proceeding, respondents have been engaged in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, the Textile Fiber Products Identification Act, and the Federal Trade Commission Act. They have imported, introduced into commerce, offered for sale, and sold wool products and textile fiber products, as those terms are defined in the Wool Act and the Textile Act.

3. The complaint herein states a cause of action, but, under applicable law and precedent, the record lacks substantial evidence that respondents violated either the Wool Products Labeling Act of 1939 or the Textile Fiber Products Identification Act.

4. The charge of violating the Federal Trade Commission Act should be dismissed as to respondent Francesco Datini, Inc., for failure of proof.

5. As a matter of law, the invoicing practices of Verrazzano Trading Corporation and Walter Banci constituted unfair methods of competition and unfair and deceptive acts and practices, within the meaning of the Federal Trade Commission Act, but the public interest does not require the entry of an order to cease and desist in this respect. The charges under the Federal Trade Commission

Opinion

78 F.T.C.

Act should be dismissed on condition that respondents Verrazzano and Walter Banci engage in cooperative compliance procedures with the Commission's staff.

ORDER

It is ordered, That the complaint herein, insofar as it charges violations of the Wool Products Labeling Act of 1939 and of the Textile Fiber Products Identification Act, be, and it hereby is, dismissed as to all respondents.

It is further ordered, That the invoicing charge under the Federal Trade Commission Act be, and it hereby is, dismissed as to Francesco Datini, Inc., for failure of proof.

It is further ordered, That the charge of false invoicing under the Federal Trade Commission Act be, and it hereby is, dismissed as to Verrazzano Trading Corporation and Walter Banci; *on condition, however*, that such respondents engage in cooperative compliance procedures with the Commission's staff.

It is further ordered, That Verrazzano Trading Corporation, a corporation, trading under its own name, or as Lan Etruria, or under any other name, and Walter Banci, individually, or as agent for Verrazzano Trading Corporation, for Lanificio Tuscania, or for any other entity, corporate or otherwise, shall, within sixty (60) days after the effective date of this order, file with the Commission a report in writing, signed by the respondents named in this order, setting forth in detail the manner and form in which the provisions of this order relating to cooperative compliance have been complied with and the manner in which such informal enforcement procedures will ensure compliance with the provisions of Section 5(a)(1) of the Federal Trade Commission Act.

OPINION OF THE COMMISSION

APRIL 13, 1971

By DENNISON, *Commissioner*:

This is an appeal by complaint counsel from the decision of the hearing examiner dismissing the complaint.

The relationship between the various respondents and the agencies which act on their behalf is set forth in detail in the initial decision. Suffice it to say here that the whole complex of the corporations and related entities amounts to an integrated family-owned business designed to sell in the United States fabrics manufactured in a mill located in Prato, Italy, which is owned by respondent Walter Banci,

who also controls the Verrazzano Trading Corporation which imports these fabrics into this country. According to the complaint, labels and invoices as to certain of these imported fabrics did not disclose the true percentage of fibers by weight. The complaint charges respondents with violations of misbranding under Sections 4(a)(1) and (2) of the Wool Products Labeling Act, 15 U.S.C. 68b, and Sections 4(a) and (b) of the Textile Fiber Products Identification Act, 15 U.S.C. 70b. Respondents are also charged with providing false quarantees in violation of these Acts and supplying false invoices in violation of the Federal Trade Commission Act.

Respondents denied the charges and further asserted that any violations were the result of unavoidable manufacturing variations and were of *de minimis* proportions in view of the total amount of sales of respondents.

I. Allegations of Misbranding under the Wool Products Labeling Act

Labels that had been attached to five fabrics subject to the Wool Act were placed in the record, together with evidence that the labels did not represent the true fiber content as disclosed by a later testing of samples of the fabric. The examiner held that as a matter of law the evidence as to three of these five fabrics did not constitute violations of the Wool Act because, although there was a variance between the label and the actual fiber content, the wool content was not less than that stated on the labels or was otherwise within permissible tolerances.

Thus physical exhibit CX 1 was labeled "70% reprocessed wool, 15% fur fibers, 10% nylon and 5% other fibers", whereas according to the tests it contained 82.9% wool, 11.0% fur, 5.3% nylon, and 0.8% other fibers.

CX 15 was labeled "70% reprocessed wool, 15% fur fibers, 10% nylon and 5% other fibers", although according to a laboratory test it contained 80.6% woolen fibers and fur, 8.0% nylon, and 11.4% other fibers.

The label on the third fabric, CX 11, represents it to contain "87% wool, 13% silk", although according to a test report this overstated the correct amount of wool by 2.7%.¹ The remaining fiber content consisted of 12.9% nylon and 2.8% other fiber.

¹ Other tests placed in the record by respondents place the overstatement as low as 1.6%. The Commission has recognized, as allowable, deviations up to 5% when such deviations are due from unavoidable variations in manufacture despite the exercise of due care by the manufacturer. See *Alscap, Inc.*, 60 F.T.C. 275, 283 (1962); *Beacon Manufacturing Co.*, 46 F.T.C. 1073 (1949).

The examiner rejected these exhibits as constituting evidence of misbranding under the Wool Act. Although expressing his belief that a substantial understatement of wool content should be deemed a violation of the Act, if for no other reason than that the remaining constituent fibers would consequently be overstated, the examiner ruled that he was bound by the decision in *Marcus v. Federal Trade Commission*, 354 F. 2d 85 (2d Cir. 1965). The court held in that case that an *excess* of wool content as compared to that listed on the label does not constitute a violation of the Wool Act. The court further held that "if the percentage of wool is correctly stated, the Act is not concerned with the accuracy of statements about other constituent fibers." (354 F. 2d at 87-88.)

Despite this clear ruling of the Court of Appeals for the Second Circuit, complaint counsel urge that we overrule the examiner on this point. They contend that such a construction of the Wool Act is contrary to the express wording of the statute, pointing out that Section 4(a)(2) of the Act provides that a wool product "shall be misbranded" if a stamp, tag, or label is not affixed to the wool product and does not show—

(A) the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) *each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; and (5) the aggregate of all other fibers . . .* (emphasis added).²

Complaint counsel note that under the *Marcus* rule there would be no violation of the Wool Act if, *e.g.*, a fabric tag reads "70% wool, 30% silk" but the item actually contains 70% wool and some other fiber that is cheaper than silk. A consumer might desire or need to know which non-wool ingredient is actually present and in what amount, not only to determine the quality of the product, but for other reasons such as for the purpose of dry cleaning or washing the fabric in a proper manner. Such misbranding if it occurred on a non-wool textile item would be amenable to corrective action under the Textile Fiber Products Identification Act passed in 1958. But "textile products" as defined for purposes of labeling requirements under that Act "[do] not include a product required to be labeled under the Wool Products Labeling Act of 1939." See 15 U.S.C.

² The above-quoted statutory text is immediately followed with a proviso that deviation in percentages shall not be misbranding under that section if the person charged with misbranding proves such deviation "resulted from unavoidable variations in manufacture and despite the exercise of due care to make accurate the statements on such stamp, tag, etc." In addition to relying on *Marcus*, respondents assert that the deviations here were unavoidable variations in manufacture within the meaning of this proviso. In light of our disposition of this case we do not reach this issue.

70(h). Complaint counsel persuasively argue that in enacting the Textile Fiber Products Identification Act, Congress presumed that the Wool Products Labeling Act required not only that wool fibers, but all constituent fibers constituting 5% or more of the fabric, be shown correctly on items subject to the Wool Act. Thus the *Marcus* ruling creates the anomalous situation that there would be no regulation of fibers other than wool if the product contains any wool, but there is regulation of such fibers if the product does not contain wool.

Nevertheless, these considerations were available to and presumably passed upon by the court in the *Marcus* case.³ Respondents do considerable business within the Second Circuit, and can therefore appeal any order in this case to the Court of Appeals, for that Circuit. Although we disagree with that court's holding in *Marcus*, upon the record in this case the doctrine of *stare decisis* persuades us to dismiss the charges in the complaint insofar as they are based on instances where the wool content of fabrics was understated.⁴

This is not to say that this agency is powerless to protect consumers from false labeling practices which, although technically not actionable under the Wool Act because of the *Marcus* rule, are nevertheless shown to be misleading to buyers in a material way. The court in *Marcus* indicated that the Commission could proceed under the Federal Trade Commission Act if statements as to the other constituent fibers result in "deception."⁵ However, the instant case was tried on the theory that the fabrics were "mislabeled" in the sense that the labels were *per se* violations of Section 4 of the Wool Act, just as the Commission's order in the *Marcus* case rested on what were thought to be the technical requirements of that Act.

In addition to the above three fabrics rejected as evidence of misbranding under the Wool Act, complaint counsel rely on two

³ Complaint counsel state that the Commission's brief to the court in the *Marcus* case failed to point out that the construction urged by *Marcus* would create an incongruous discrepancy in many instances between labeling requirements for fabrics containing wool and fabrics not containing wool. Although the court did not refer to this point in its opinion and it may be true this consideration was not presented to it, the doctrine of *stare decisis* still is applicable since the argument clearly could have been made to it. Although the Commission requested the Solicitor General of the United States to file a petition for certiorari in the Supreme Court, this request was denied.

⁴ Whether an agency having nationwide jurisdiction is invariably obligated to follow a court precedent in a case which may be reviewed by the same court does not appear completely settled. Compare *W. T. Smith Lumber Co. v. NLRB*, 246 F. 2d 129 (5th Cir. 1957) with *Stacy Mfg. Co. v. Commissioner*, 237 F. 2d 605 (6th Cir. 1956.) But clearly this is the general rule and we do not view the instant case as a suitable vehicle to ask the Second Circuit to reconsider its *Marcus* decision.

⁵ The court observed (354 F. 2d at 88n.4):

"There are, of course, other acts, for example § 5(a)(1) of the Federal Trade Commission Act, under which deceptive practices as to constituent fibers can be controlled."

additional samples of fabrics which, in contrast to the foregoing, the wool content was not as great as stated on the label. The first of these is CX 24, a swatch taken from a "sample" fabric to which was attached a tag representing the fiber content to be "40% wool, 20% nylon, 20% linen, and 20% cotton." The test report shows substantial deviation from this as it indicates the presence of 25.6% wool, 26.6% nylon, 23.8% flax, 6.5% cotton, and 17.5% other fibers (chiefly acrylic and polyester).

Respondents argue that they were not responsible for the particular label found on this exhibit, and that in any event it was taken from a short sample run of a fabric which itself was never sold in commerce but was used to demonstrate to buyers the style of a similar but different material. The examiner agreed with the latter argument, finding that the challenged representations as to fiber content were not relied upon by customers. This is supported by testimony of complaint counsel's own witness, the president of one of respondents' sales agencies (Tr. 444). There is also evidence, accepted by the examiner, that the fabric sold as a result of this sample had a different fiber content and was so labeled, and that in fact the customers required that the fiber content be other than that indicated on the label of this sample (Tr. 444).⁶

It is true, as complaint counsel point out, that the sample itself was "introduced" and "transported" in commerce and is therefore technically subject to the Act (see 15 U.S.C. 68a) and that Rule 22 of the Rules and Regulations under the Wool Act provides:

Where samples, swatches or specimens of wool products subject to the act were used to promote or effect sales of such wool products in commerce, said samples, swatches and specimens, as well as the products themselves, shall be labeled or marked to show their respective fiber contents and other information required by law.

However, that Rule was obviously designed with the object of preventing mislabeling of sample swatches which are used to promote or effect sales of the same fabric. Where it affirmatively appears that the sample was used to demonstrate only the style of a different fabric which is separately and properly labeled, and where there is no connection shown between such sample and any mislabeled fabric actually sold in commerce, we think the public interest has not been affected in a way that would justify an order to cease and desist. See *Dana Sportswear Co.*, 48 F.T.C. 1592, 1594-95 (1952), dismissing charges under the Wool Act on similar considerations.

⁶ There is also evidence that a sample or pilot run of fabric, as this fabric was, is more likely to vary greatly in composition.

The last remaining fabric relied upon by complaint counsel to support the Wool Act charge of misbranding is CX 12. This fabric was labeled as containing 70% wool, but actually contained only 46.2% wool—clearly a substantial deviation. Respondent Walter Banci in testimony denied that this fabric was manufactured by his mill and expressed the opinion that it was made by a competitor in Prato, Italy. Respondents contend that, in any case, one example of a misbranded fabric is insufficient to warrant issuance of an order. The examiner, although finding the fabric to be Banci's, dismissed the charge on the latter ground, again relying on *Marcus v. Federal Trade Commission*, *supra*.

In the *Marcus* case, five blankets manufactured by Marcus were in the record. Two contained more wool than the petitioner had claimed on labels. Two others had less wool than was indicated on the label, but the variation was deemed minimal by the court. In the case of only one blanket did the overstatement of wool show a substantial variation (a discrepancy of 14.2% to 14.3%). Although it was entirely possible that that blanket was one among a large number of blankets made from the same material and similarly mislabeled, the court laid down the rule that "a deficiency of one of five blankets tested does not constitute substantial evidence of misbranding" (354 F. 2d at 87).⁷

The court, in ruling that a deficiency in one of five blankets tested did not constitute an actionable violation, noted that the sampling was small in view of the fact that Marcus had sold over one million blankets during the years under investigation. Similarly, in the instant case the examiner found that between 1965 and 1969 Walter Banci has exported to the United States approximately 20 million yards of various fabrics with sales in the millions of dollars. Complaint counsel argue that although CX 12 is a sample of one fabric, that fabric may have been produced in substantial quantities and widely distributed in a mislabeled condition. Nevertheless our attention has not been drawn to any evidence indicating the amount of the CX 12 fabric that was manufactured or sold. Also, as the examiner found, there is no evidence permitting an inference that respondents have engaged in deliberate misrepresentation. In the absence of such evidence, or evidence of violations of the Act as to more than one fabric, we think that the single instance of mis-

⁷ Later in the opinion, the court in a similar vein ruled that the single false invoice did not provide substantial evidence of "deceptive acts or practices" under Section 5 of the Federal Trade Commission Act (354 F. 2d at 89-90).

branding represented by CX 12 is not sufficient to meet the quantum of proof required under *Marcus*. See also *Stanrich Mills Corp.*, 50 F.T.C. 1120 (1954).

In view of the failure of proof as to the misbranding charges, we agree with the examiner that the charges of furnishing false guarantees must fail too.

II. Allegations of Misbranding under the Textile Fiber Products Identification Act

Two fabric samples were introduced to prove violations of the Textile Fiber Products Identification Act. The examiner held that these samples did not constitute substantial evidence of a violation of that Act.

CX 4 was labeled as containing "75% acrylic, 15% fur, 10% nylon." Two tests were run on this sample. One showed the presence of 78.2% acrylic, 8.1% fur fibers, 6.5% nylon, and 7.2% other fibers; the other was quite close to these figures. The examiner held: "In view of the fact that the representation concerning the principal component was essentially correct; that some manufacturing variations are likely to occur in the blending of fur fibers and such man-made fibers as nylon; that a 3% tolerance is allowed; and that there is a reasonable possibility of testing variances, the labeling of CX 4, standing alone, should not be held to be a violation of the Textile Fiber Products Identification Act." We find no reason to disagree with this conclusion.

Although initial tests of the other fabric, CX 32, indicated this fabric was mislabeled, subsequent tests using somewhat different techniques (not challenged by complaint counsel) showed the fiber content to be within 3% of the fiber content shown on the label, so that the label information is within the tolerance allowed by the Act and the regulations issued thereunder. 15 U.S.C. 70b(b)(2); 16 C.F.R. 303.43(a).

Since one of the two fabrics under consideration was found upon retesting to be within the permissible tolerance and the other to involve only a borderline case of misbranding, the record does not contain substantial evidence of an actionable violation of the Act.

In view of the failure of proof as to the labeling charges in this case, we agree with the examiner that the entry of an order as to the alleged false invoice practices of respondents is not warranted and that these charges as to respondents Verrazzano and Walter

Banci should be dismissed on the condition that they endeavor to engage in cooperative compliance procedures with the Commission's staff, a condition to which their counsel has stipulated.

III. Motion to Reopen

Subsequent to the oral argument before the Commission in this matter, complaint counsel filed a motion on March 26, 1971, to reopen the record in this case pursuant to Section 3.71 of the Commission's Rules of Practice on the ground of newly discovered evidence. In view of the fact that considerable effort has been expended by the respondents in defending against the evidence already relied upon by complaint counsel, that an initial decision containing an exhaustive analysis of the record has been filed by the examiner, and that any such newly discovered evidence can be used in any new administrative proceeding that may be warranted, the motion to reopen will be denied.

An appropriate order accompanies this opinion, in which Commissioner MacIntyre does not concur.

FINAL ORDER

This matter is before the Commission upon appeal of complaint counsel from the hearing examiner's initial decision dismissing the complaint herein; and

The Commission having considered the record and the briefs and oral arguments of the parties, and having determined for the reasons set forth in the accompanying opinion that the initial decision should be affirmed,

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

It is further ordered, That compliant counsel's motion to reopen the record in this proceeding to present new evidence pursuant to Section 3.71 of the Commission's Rules of Practice, which motion was filed on March 26, 1971, subsequent to the oral argument in this matter, be, and it hereby is, denied without prejudice to the right to use such evidence in any future proceeding that may be warranted.

It is further ordered, That the initial decision and order of the hearing examiner be, and they hereby are, adopted as the decision and order of the Commission.

Commissioner MacIntyre not concurring.

Complaint

78 F.T.C.

IN THE MATTER OF

BELL & HOWELL COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
TRUTH IN LENDING AND THE FEDERAL TRADE COMMISSION ACTS

Docket C-1902. Complaint, Apr. 20, 1971—Decision, Apr. 20, 1971

Consent order requiring a Chicago, Ill., seller of motion picture equipment to cease violating the Truth in Lending Act by failing to make all disclosures required by Regulation Z of said Act on one side of a page of the instrument, failing to disclose the "total of payments," and failing to state in required terms the cash price, the down payment, the number and due dates of the payments, the amount of the finance charge and the deferred payment price.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Bell & Howell Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and implementing regulation, 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 Bell & Howell Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 7100 McCormick Road, Chicago, Illinois.

PAR. 2. Respondent, by and through its division known as the Robert Maxwell Company, is now, and for some time has been, engaged in the advertising, offering for sale and sale of motion picture equipment to the public.

PAR. 3. In the ordinary course of its aforesaid business, respondent, by and through its division the Robert Maxwell Company, regularly extends consumer credit, as "consumer credit" is defined in Regulation 2, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of its aforesaid business, and in connection with its credit sales, as "credit sale" is defined in Regulation Z, respondent, by and through the