

IN THE MATTER OF
TARRA HALL CLOTHES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
THE WOOL PRODUCTS LABELING ACT

Docket C-2797. Consent Order, Feb. 24, 1976--Modifying Order, Oct. 27, 1992

This order reopens the proceeding and modifies the Commission's cease and desist order issued on Feb. 24, 1976 (87 FTC 294), by narrowing the conditions under which Abraham Cohen, former president of Tarra Hall Clothes, Inc., must post a bond before importing wool products. The Commission concluded that the petition to modify the order should be granted to require bonding only for importation of recycled wool products.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On May 1, 1992, Abraham Cohen ("Petitioner") filed a Petition to Reopen Proceeding and Modify Consent Order ("Petition") in Docket No. C-2797, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Sections 2.51 and 3.72 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51 and 3.72, to reopen and modify the consent order entered by the Commission on February 24, 1976 ("consent order"), as it applies to him individually.

The final order in this matter was the product of a consent agreement Tarra Hall Clothes, Inc. ("Tarra Hall") and its president and owner, Petitioner, entered into with the Commission to resolve charges that they had imported mislabeled fabrics containing wool in violation of the Wool Products Labeling Act of 1939 ("Wool Act"). Tarra Hall is an importer of wool blend fabrics and a manufacturer of

men's clothing.¹ The consent order was one of several other orders involving the misbranded importation of wool products² from a major textile center in Italy, the City of Prato.³ The consent order prohibits Tarra Hall and Petitioner from falsely and deceptively stamping, tagging, labeling, or otherwise identifying wool products, and from failing to securely affix to each product a stamp, tag, label or other means of identification showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Act. The consent order further prohibits the respondents from importing wool products except upon filing a bond with the Secretary of the Treasury.⁴ Petitioner requests that the Commission reopen and modify the consent order to remove the Petitioner from the coverage of the bond

¹ Shortly after the consent order became effective, Petitioner notified the Commission that he had sold his interest in Tarra Hall and had purchased an interest in another importer and manufacturer of men's clothing, Hartz & Co., Inc. ("Hartz"). Petitioner is president of Hartz, and he owns two thirds of the Class A common stock (the voting stock) and two thirds of the Class B common stock. As a result of the terms of the consent order, it applies to Hartz through the Petitioner.

² The term "wool product" is defined by the Wool Products Labeling Act of 1939 ("Wool Act") as any product containing wool or represented to contain wool. The Wool Act was amended in 1980 to substitute the word "recycled" for the words "reprocessed" and "reused." Recycled wool is wool that has been made into one product and then recycled into a second product. Accordingly, the order is modified by substituting the word "recycled" for "reprocessed" where appropriate.

³ See, e.g., *Norlic Import Co.*, 84 FTC 1173 (1974); *C. Itoh & Co. (America)*, 84 FTC 1187 (1974); *Bagatelle Int'l Ltd.*, 85 FTC 270 (1975); *Allora, Ltd.*, 86 FTC 283 (1975); *Texora Int'l Corp.*, 87 FTC 273 (1976); *Silton Brothers, Inc.*, 87 FTC 1335 (1976); and *Verrazzano Trading Corp.*, 91 FTC 888 (1978). The Prato mills produced recycled wool products made from shredding of miscellaneous cloth scraps, rags and textile byproducts and then weaving or felting new wool blend products from the fibers.

⁴ Section 8 of the Wool Act, 15 U.S.C. 68f, empowers the Commission to order importers of wool products to cease and desist from importing such products "except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of this Act." The bond is administered by the United States Customs Service, and it is subject to forfeiture if imported wool products are not labeled or otherwise identified in accordance with the Wool Act and the rules and regulations promulgated by the Commission under that Act.

requirement, or, alternatively, to require Petitioner to file a bond only with respect to the importation of recycled wool products.

The request to reopen and modify the consent order was placed on the public record on May 13, 1992, and a press release regarding the request was issued on the same day. The public comment period ended on June 12, 1992, and nine comments were filed, all in support of the Petition.⁵ For the reasons stated below, the Commission has determined to grant the Petition and limit the bond requirement to the importation of recycled wool products.

I. BACKGROUND

This is Petitioner's second petition to reopen and modify the consent order. On April 2, 1987, Petitioner filed a petition to reopen and modify the consent order to eliminate the bond requirement as it applied to him as an individual ("the 1987 Petition"). He did not alternatively petition the Commission to limit the scope of the bond requirement. Petitioner recited only two changes in circumstances of fact or law to support the 1987 Petition:

(1) Petitioner sold his interest in Tarra Hall in late 1976, and purchased a controlling interest in Hartz. He then instituted procedures at Hartz, including occasional testing of imported wool products, to ensure compliance with the consent order; and

(2) Petitioner contended that Commission policy on the imposition of bonds in Wool Act enforcement had changed, and after entry of the consent order, the Commission only required a bond in one other order, which involved more egregious circumstances.⁶

Petitioner further argued that public considerations warranted elimination of the bond requirement because it imposed an economic burden on Hartz and placed Hartz at a disadvantage to its competitors who did not have to pay for a bond. He also argued that the bond

⁵ Petitioner agreed to an extension of time to permit the Commission to consider his petition.

⁶ See *Verrazzano Trading Corp.*, 91 FTC 888 (1978).

requirement had served its purpose because he had absolutely complied with the order since it was issued.

The Commission denied the 1987 Petition on the ground that Petitioner had not demonstrated changed conditions of fact or law warranting the elimination of the bond requirement. The Commission also determined that Petitioner had not shown that the bond requirement imposed any specific injury or resulted in harm that reasonably could not have been anticipated when the consent order was entered.⁷

II. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be altered, modified or set aside if a respondent files a petition that makes a satisfactory showing that changed conditions of law or fact require the order to be altered, modified or set aside in whole or in part.⁸ A satisfactory showing sufficient to require reopening is made when a petition to reopen identifies significant changes in circumstances and shows that the changes

⁷ *Tarra Hall Clothes, Inc.*, Docket No. C-2797, Letter to Lawrence M. Garten, Esq. (November 25, 1987).

⁸ Section 5(b) provides, in part, that the Commission may modify a final order. Whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . . [T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codifie[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. 96-500, 96th Cong., 1st Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

eliminate the need for the order, or make continued application of the order inequitable or harmful to competition.⁹

In instances in which changed circumstances would not require reopening an order, under Section 5(b) the Commission may nevertheless modify an order when the Commission determines that the public interest requires it. Accordingly, Section 2.51 of the Commission's Rules of Practice invites a petitioner to demonstrate in the petition how the public interest warrants the requested reopening and modification.

Regardless of whether the modification is sought because of changed circumstances or because the public interest warrants it, under Section 5(b), the burden is on the petitioner to make a satisfactory showing for the Commission to reopen the order.¹⁰ The language of Section 5(b) plainly anticipates that the petition must make a satisfactory showing to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.¹¹ The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. This burden is a heavy one in view of the public interest in repose and finality of Commission orders.¹²

⁹ *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. See S. Rep. No. 96-500, 96th Cong., 1st Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardship).

¹⁰ See S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979).

¹¹ This legislative history to the amended Section 5(b) states:
[U]nmeritorious, time consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient. . . The Commission, to reemphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

¹² See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III. PETITIONER'S ARGUMENTS

The Petitioner raises two main arguments in support of his current Petition. First, the Petitioner argues that circumstances and facts have changed, making the bond requirement of the consent order no longer necessary to ensure compliance with the Wool Act. Petitioner states that his new company, Hartz, is larger and manufactures higher quality and higher priced clothing than Tarra Hall had produced.¹³ According to Petitioner, ninety percent of the piece goods Hartz imports constitute pure virgin wool, while the remaining ten percent are wool blends of the highest quality -- wool blended with silk, linen, or cashmere. Petitioner contends that Hartz no longer imports recycled wool products, nor does it obtain any wool products from the mill in Prato, Italy that supplied the wool products that were the subject of the original Commission complaint.

Petitioner also argues that Hartz carefully tests the fiber content of all imported wool products for which Hartz is the importer of record, including 100% of the wool products from Prato, Italy.¹⁴ Petitioner explains that because Tarra Hall was a smaller company, it did not have the resources Hartz has to conduct such testing. In addition, Petitioner points out that he has maintained a perfect record of compliance with the consent order.

Petitioner's second argument is that the public interest warrants modification of the consent order because the bond requirement places an unfair burden on him. He states that he currently must spend \$10,000 each year to secure a surety bond for compliance with the consent order. He further claims that since 1978, Hartz has spent approximately \$100,000 in compliance with the bond requirement,

¹³ Petitioner states that Hartz employs nearly 700 people in its factories in Maryland and Virginia, and has annual sales of about \$45 million. Petitioner also states that Hartz sells its products under such well-known trade names as GIVENCHY, TALLIA, OLIVER, and CHARLES JOURDAN, and the clothes are sold nationally by such retailers as Macy's, Raleigh's, and Neiman Marcus.

¹⁴ Petitioner's letter of June 18, 1992, describes the testing program as follows: The tests are conducted on the fabric in a random fashion, with about 25% of the fabrics ultimately being tested. However, with regard to the very limited quantity of fabric imported from the Prato region of Italy, 100% of those fabrics are tested for the reasons set forth in the Petition.

which outlay did not include administrative costs to Hartz resulting from compliance procedures. Petitioner maintains that this places the company at an unfair disadvantage with respect to his competitors, who do not have similar requirements, and is a stigma under which he and Hartz must continue to operate.

Finally, Petitioner argues that it is unfair for the Commission to continue to require the bond as to all wool products because the Commission has previously eliminated or modified the bond requirements that the Commission had imposed on three other fabric importers, Norlic Import Company,¹⁵ C. Itoh & Co., (America), Inc.,¹⁶ and Texora International Corporation.¹⁷ Petitioner argues that the Commission modified the orders in Norlic and Itoh because those companies no longer imported recycled wool products, and that the Commission modified the order in Texora because the company had set up a program for testing the fibers of its imported wool products.¹⁸ Consequently, Petitioner contends that fairness and the public interest mandate that the Commission should treat him similarly because he, too, no longer imports recycled wool products and now tests all wool products from Prato and about 25% of all other wool products on a randomly selected basis for which Hartz is the importer of record.

IV. PETITIONER HAS DEMONSTRATED THAT MODIFICATION OF THE ORDER IS IN THE PUBLIC INTEREST

As stated previously, Section 5(b) of the FTC Act requires Petitioner to make "a satisfactory showing that changed conditions of law or fact" require the order to be modified. Where changed circumstances would not require reopening an order, the Commission nevertheless may modify an order when the Commission determines that the public interest requires it.

¹⁵ *Norlic Import Co.*, 84 FTC 1173 (1974), modified, 91 FTC 112 (1978).

¹⁶ *C. Itoh & Co., (America)*, 84 FTC 1187 (1974), modified, 96 FTC 40 (1980).

¹⁷ *Texora Int'l Corp.*, 87 FTC 273 (1976), modified, 97 FTC 351 (1981).

¹⁸ In *Texora*, the Commission reopened and modified the order to substitute the wool product testing procedures for the bond requirement.

In the 1987 petition, Mr. Cohen had requested that the bonding requirement be entirely eliminated. As changed conditions of fact, Petitioner claimed that his company had instituted testing procedures and that the bond requirement imposed economic and competitive hardship. Petitioner also claimed that Commission policy on bonding requirements had changed. The Commission concluded that the above contentions did not establish sufficient changes of fact to warrant the requested order modification.

However, Petitioner now offers a number of new changed conditions of fact not presented in the 1987 petition. Petitioner observes that the subject of the Commission's complaint had been the mislabeling of recycled wool products purchased from the Prato, Italy region. Petitioner states that he now is president and an owner of a different company, Hartz, that does not purchase wool products from Tarra Hall's supplier in Italy and, in fact, does not import any of the recycled wool products and other types of fabrics that gave rise to the complaint. Petitioner claims that such facts, in conjunction with the company's testing program and other facts cited in the Petition, warrant modification of the bonding requirement.

The legal test regarding changed conditions of fact is whether such facts eliminate the need for the order, or make continued application of the order inequitable or harmful to competition. The changes in fact that Petitioner cites, standing alone, do not meet this test. At the time the order was entered, it was foreseeable that Petitioner might sell his interest in Tarra Hall and start or purchase an interest in another business such as Hartz. It also was foreseeable that Petitioner might institute procedures, such as the testing of imported wool products, to ensure compliance with the order. The Commission expects respondents to modify their practices so as to comply with an order.¹⁹ And finally, it was foreseeable that Petitioner might stop importing wool products from the troublesome supplier in Prato, Italy, or might cease importing recycled wool

¹⁹ Petitioner also offers as a changed condition of fact that the company has a perfect record of compliance with the order. The Commission disagrees that compliance with orders represents a change of fact. It is the responsibility of all respondents to comply with orders. However, a good record of compliance creates a favorable climate for the Commission's consideration of order modification petitions.

products altogether. The Commission nevertheless determined at the time the order was entered that the bond requirement was a prudent safeguard. Moreover, there is no guarantee that Hartz will continue its present testing safeguards or that it will never import lesser grades of wool products that might cause labeling problems.

Despite this absence of sufficient changes of fact, the Commission may still grant the petition on public interest grounds. Petitioner argues that economic and competitive hardship warrant reopening and modifying the order on public interest grounds.²⁰ The Commission is not persuaded by this claim. It is evident that the bond requirement has not prevented Hartz from successfully competing in the marketplace. Petitioner states that Hartz has annual sales of about \$45,000,000 and is one of the very few domestic clothing manufacturers making a profit at this time. It is doubtful that the \$10,000 in annual premiums that Petitioner pays for the bond is an economic or competitive hardship. Consequently, the Commission declines to modify the order on the basis that the order is against the public interest due to economic burden.

Economic and competitive hardship are not the only criteria the Commission may consider.²¹ The Commission also may examine the

²⁰ Although Petitioner also claims that the bond imposes a stigma upon him and his company, which is against the public interest, he offers no substantiation for his claim. To the contrary, the materials submitted with the petition indicate that Petitioner and Hartz enjoy a good reputation within the garment industry. Consequently, the Commission considers any stigma associated with the bonding requirement to have been negligible.

²¹ See, e.g., *American Home Products Corporation*, 103 FTC 528 (1984) (order reopened and modified on public interest grounds to bring petitioner's order into general parity with other similar Commission orders); *Redman Industries, Inc.*, 110 FTC 636, 640 (1988) (four orders reopened and vacated on public interest grounds because they contained remedies contemplated and rejected as not beneficial to consumers in connection with proposed rulemaking); *Liquid Air Corporation of North America* 111 FTC 135, 137 (1988) (order reopened and modified on public interest grounds because order's requirement of prior Commission approval of petitioner's acquisitions imposed substantial compliance costs and required prior approval for potential wholly internal activities); *Lenox, Incorporated*, 111 FTC 612, 620 (1989) (order reopened and modified in part on public interest grounds because order prohibited conduct that itself may not be unlawful and provision no longer necessary to ensure compliance).

entirety of the circumstances in each case to determine whether intrinsic fairness dictates that an order be modified.²² The new petition presents a significantly stronger case for order modification on fairness grounds than the 1987 Petition. With the addition of the facts that Petitioner does not sell recycled wool products, does not purchase such products from the mill that supplied the offending fabrics, and now requests in the alternative that the bond requirement merely be limited rather than eliminated, the Petition presents circumstances similar to those in *Norlic* and *C. Itoh*. In those cases, the petitioners similarly had ceased buying wool products from the offending mills in Prato, Italy and had ceased buying recycled wool products altogether. The Commission modified the orders in each case to apply the bonding requirement only to the importation of recycled wool products.²³

In sum, Petitioner, while not presenting changed facts that by themselves warrant an order modification, has demonstrated that a modification is in the public interest. This fairness consideration, when coupled with the changed facts noted above, justifies granting the limited modification requested.²⁴

²² See, e.g., *National Tea Company*, 111 FTC 109, 110 (1988)(order reopened and modified on public interest grounds because company had exited the geographic market and order requirements imposed substantial costs and put petitioner at disadvantage to competitors who were not under similar restraints); see also *American Home Products Corporation*, 103 FTC at 528.

²³ The Commission finds Petitioner's analogy to *Texora* less persuasive. The petition was similar to this case in that *Texora* claimed strict testing procedures as a changed condition of fact. Petitioner also points to his company's testing program. However, in *Texora* the Commission, while eliminating the bond requirement, also modified the order to make testing mandatory. Petitioner does not seek this substitution of a testing requirement for the current bond requirement. Consequently, testing by Hartz would remain voluntary and there is no guarantee that the company would continue this practice.

²⁴ This is not to suggest that an order modification is always warranted whenever the petitioner's order contains provisions that differ from those in orders covering its competitors. Nevertheless, maintaining a level playing field among competitors, to the extent practicable and justified by the facts, is of concern to the Commission. This concern is heightened where, as here, the order imposes affirmative obligations that go beyond prohibiting violative practices (in this case, a bond requirement) on only one of several members of an industry. The order provision at issue is not a core provision

Accordingly, the Commission grants Petitioner's alternative request that the order be modified to require bonding only with respect to the importation of recycled wool products. The Petitioner will continue to be bound by the order's general prohibitions against falsely labeling any wool products. In the event Petitioner again imports recycled wool products, he must obtain a bond to ensure those wool products are properly labeled.

V. CONCLUSION

The Commission concludes, in the public interest, that the Petition should be granted to require bonding only for importations of recycled wool products.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on February 24, 1976, is hereby modified to read as follows:

ORDER

It is ordered, That respondents Tarra Hall Clothes, Inc., a corporation, its successors and assigns, and its officers, and Abraham Cohen, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label or other means of identification showing in a clear

that directly prohibits deceptive practices or violations of a statute. Instead, the provision at issue is a perpetual bonding requirement in a non-fraud case.

and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondent Tarra Hall Clothes, Inc., a corporation, its successors and assigns, and its officers, representatives, agents, and employees directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from:

Importing or participating in the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

It is further ordered, That respondent Abraham Cohen, his representatives, agents, and employees, directly or through any corporation, subsidiary or division, or other device, do forthwith cease and desist from:

Importing or participating in the importation of recycled wool products into the United States except upon filing a bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents notify, by registered mail, each of their customers that purchased the wool products which gave rise to this complaint of the fact that such products were misbranded.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

Commissioner Azcuenaga concurring in the result only.

IN THE MATTER OF

POMPEIAN, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3402. Complaint, October 27, 1992--Decision, October 27, 1992

This consent order prohibits, among other things, the Maryland manufacturer of Pompeian Olive Oil from representing that eating olive oil lowers cholesterol more than eating vegetable oil, and is more heart healthy than eating vegetable oil, or that any edible oil has the relative or absolute ability to cause or contribute to any health benefit, or has a favorable impact on any physiologic function or risk factor for disease, unless the respondent has a reasonable basis consisting of competent and reliable scientific evidence that substantiates such representations.

Appearances

For the Commission: *Nancy S. Warder and Joel Winston.*

For the respondent: *Lloyd S. Mailman, Blum, Yumkas, Mailman, Gutman & Denick. P.A., Arlington, VA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pompeian, Inc. ("Pompeian" or "respondent"), a corporation, has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges;

PARAGRAPH 1. Pompeian is a Maryland corporation with its offices and principal place of business at 4201 Pulaski Highway, Baltimore, Maryland.

PAR. 2. Pompeian has advertised, offered for sale, sold, and distributed Pompeian Olive Oil, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.