

Complaint

63 F.T.C.

- (b) The debtor's wages attached;
- (c) The debtor's wages garnisheed.

4. Using forms or any other items of printed or written matter which simulate legal process.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission, Commissioner Anderson not participating.

IN THE MATTER OF
STANDARD MILLS, INC., ET AL.

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

Docket 8484. Complaint, May 2, 1962—Decision, Sept. 30, 1963

Order requiring New York City converter jobbers of upholstery fabric—buying from mills the raw, unbleached grey goods which they then contracted with finishing mills to color and pattern and finally sold to furniture manufacturers, department stores, decorators and upholsterers—to cease the unqualified use in their trade name of the word "Mills", and to accompany the name on letterheads, invoices and labels with the words "Converters, Jobbers, and Distributors of Fabrics—not Textile Manufacturers or Mill Owners" in type $\frac{3}{4}$ the size of that used in the trade name and immediately under the name; and with a choice of using the same qualification as a footnote, preceded by an *asterisk* on all other *printed* matter.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Standard Mills, Inc., a corporation, and Arthur J. Smith and Lloyd Smith, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said 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 Standard Mills, Inc., is a corporation, organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 461 Park Avenue South, New York, New York.

Respondents Arthur J. Smith and Lloyd Smith are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of textile fabrics to the upholstery trade including decorators and retail stores.

PAR. 3. In the course and conduct of their business, 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 thereof 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. 4. In the course and conduct of their business in soliciting the sale of, and selling, textile fabrics, respondents do business under the name of Standard Mills, Inc., and use that name on letterheads, invoices, labels and tags and in various advertisements of their products.

PAR. 5. Through the use of the word "Mills" as part of the respondents' corporate name, respondents represent that they own or operate mills or factories in which the textile fabrics sold by them are manufactured.

PAR. 6. Said representation is false, misleading and deceptive. In truth and in fact respondents do not own or operate or control the mills or factories in which the textile fabrics sold by them are manufactured but they buy said textile fabrics from others.

PAR. 7. There is a preference on the part of the purchasers to buy products, including textile fabrics, direct from factories or mills, believing that by so doing lower prices and other advantages thereby accrue to them.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of textile fabrics of the same general kind and nature as that sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the capacity and tendency to mislead purchasers into the erroneous and mistaken belief that said statements and repre-

Initial Decision

63 F.T.C.

sentations were, and are, true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a) (1) of the Federal Trade Commission Act.

Mr. Charles W. O'Connell for the Commission;
Mr. Lawrence G. Nusbaum, Jr., of New York, N.Y., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

OCTOBER 11, 1962

PRELIMINARY STATEMENT

The Federal Trade Commission seeks, in this proceeding under § 5 of the Federal Trade Commission Act¹ to compel respondents to abandon the name under which their business has been conducted since the year 1908 by deleting the word "Mills" from the corporate name "Standard Mills, Inc." The complaint, *inter alia*, alleges:

PARAGRAPH FIVE: Through the use of the word "Mills" as part of the respondents' corporate name, respondents represent that they own or operate mills or factories in which the textile fabrics sold by them are manufactured.

PARAGRAPH SIX: Said representation is false, misleading and deceptive. In truth and in fact respondents do not own or operate or control the mills or factories in which the textile fabrics sold by them are manufactured but they buy said textile fabrics from others.

PARAGRAPH SEVEN: There is a preference on the part of the purchasers to buy products, including textile fabrics, direct from factories or mills, believing that by so doing lower prices and other advantages thereby accrue to them * * *.

PARAGRAPH NINE: The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the capacity and tendency to mislead purchasers * * *.

On June 26, 1962, complaint counsel requested that official notice² be taken:

1. That the use of the word "mills" in a corporate or trade name constitutes a representation that the user owns and operates mills or factories in which products sold by it are manufactured.

¹ 15 U.S.C. § 45.

² See Federal Trade Commission's Rules of Practice for Adjudicative Proceedings Rule 4.8(5); Rule 4.12(c): "*Official Notice of Fact*. When any decision of a hearing examiner or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

978

Initial Decision

and

2. That a preference exists on the part of many purchasers to buy directly from mills or factories believing that by so doing lower prices and other advantages thereby accrue to them.

Complaint counsel relied upon a series of legal precedents commencing with *FTC v. Royal Milling Co.*, 288 U. S. 212 (1933); *FTC v. Mid West Mills, Inc.*, 90 F. 2d 723 (1937); *Bear Mill Mfg. Co. v. FTC*, 98 F. 2d 67 (1938); *Herzfeld v. FTC*, 140 F. 2d 207 (1944); *Rudin & Roth, et al. v. FTC*, 53 F.T.C. 207 (1956); *Deater Thread Mills, Inc., et al.*, 53 F.T.C. 59 (1956); *Amity Mills, Inc.*, 53 F.T.C. 74 (1956); *Wool Novelty Co., Inc., et al.*, 54 F.T.C. 1723 (1958). These decisions are discussed later herein.

On July 5, 1962, the hearing examiner signed and issued his Notice of Intention to Take Official Notice in substantially the form requested by complaint counsel but provided that upon making a timely motion as required by the Rules of the Commission respondents would be afforded an opportunity to disprove the noticed facts at the hearing. Respondents timely notified complaint counsel and the hearing examiner of their intention at the hearing to rebut or disprove the facts of which official notice had been taken. Respondents' answer denied the legally operative allegations in the complaint and the facts which had been officially noticed. The issue here is whether complaint counsel has in this record sustained the burden of proof imposed upon him when his sole evidence to prove the allegations in the complaint is the official notice taken of facts by the examiner, and respondents have nevertheless introduced uncontradicted reliable, probative and substantial evidence contrary to the noticed facts. The hearing examiner's act in taking official notice served only to shift the "burden of going forward" from complaint counsel to respondents. The "burden of proof," as distinguished from the burden of going forward, is always upon the proponent of any factual proposition.³ However, the facts which the examiner had officially noticed were not, by such official noticing, conclusively presumed to be true, but were subject to being contradicted by reliable, probative and substantial evidence. If respondents have contradicted the officially noticed facts by such evidence, and complaint

³ Section 7(c) of the Administrative Procedure Act provides: "* * * except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof * * * But * * * no * * * order shall be issued except * * * in accordance with reliable, probative and substantial evidence."

Section 4.12(a) of the Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission, effective June 1962, provides: "(a) *Burden of proof.* Counsel supporting the complaint shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with reference thereto."

Section 4.19(b) provides: "* * * Initial decisions shall be based upon a consideration of the whole record and supported by reliable, probative and substantial evidence."

Initial Decision

63 F.T.C.

counsel has adduced no evidence other than the technical noticing by the hearing examiner, complaint counsel has not sustained the burden of proof imposed upon him by the Administrative Procedure Act and the Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission. (See footnote 3.)

The record consists of the testimony of Arthur J. Smith, president of the corporate respondent, and its majority stockholder, who was the sole witness offered by complaint counsel, and Commission's Exhibits 1-A through 19. Respondents offered the testimony of Arthur Smith; Joseph Sanders, retired, who had been in the textile business for 60 years, and attested to Standard Mills' reputation for honesty and integrity; Morris Muster, a manufacturer of furniture who had been purchasing merchandise from the respondents for several years past and had been in the upholstery industry for 42 years; Sidney Kisner, for 13 years a buyer of upholstery goods for the upholstery department of Gimbels Department Store, 33rd and Broadway, New York City, and Lawrence G. Nusbaum, Jr., counsel for respondents.

This complaint issued May 2, 1962. A prehearing conference was held in New York City on July 9, 1962, and hearings were held in New York City also on July 11, 1962, and concluded on July 12, 1962. On the last day of the hearing, the hearing examiner suspended the proceedings for quite some time in order to afford complaint counsel an opportunity to offer evidence to rebut the proof offered by respondents. Complaint counsel did not offer any rebuttal evidence. The following colloquy appears in the record at page 213:

Hearing Examiner Gross. It is now 12:15 p.m. The last witness was excused at 11:35 a.m., at which time the respondent indicated that they were about ready to close their case-in-chief.

Counsel supporting the complaint informs me that he wants to have the Hearing Examiner and all of the parties, including the Court Reporter, stand by even though he doesn't have any witnesses available.

Mr. O'CONNELL. Let me explain that. I have been making a determined effort to contact witnesses.

Hearing Examiner Gross. But you cannot get anyone?

Mr. O'CONNELL. I have not gotten any so far, but I am still working on it.

Hearing Examiner Gross. Must we not assume that you simply cannot get them?

Mr. O'CONNELL. It might turn out that way.

Hearing Examiner Gross. We will come back here at 2 o'clock. We are recessed at this time until 2 p.m.

Proposed findings, conclusions and briefs have been filed. Based upon the entire record, including the exhibits, the examiner makes the findings and conclusions hereinafter set forth. Any finding

proposed by the parties which is not hereinafter made in the form proposed, or in substantially that form, hereby is rejected. The fact that no finding summarizes the evidence in the exact manner which the parties have requested does not mean that such evidence has not been considered. It means merely that the examiner deems the evidence as summarized in his findings to be sufficiently relevant, probative, substantial and material to dispose of the issues presented. All motions which have not previously been ruled upon, and which are not herein specifically ruled upon, are hereby overruled and denied.

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

FINDINGS OF FACT AND CONCLUSIONS

1. Respondent Standard Mills, Inc. (a New York corporation), at 461 Park Avenue South, New York, New York, was incorporated under the laws of the State of New York on August 6, 1934. It sells textile fabrics to furniture manufacturers, upholsterers, department stores and interior decorators located throughout the United States. The business since its founding in 1908 by Morris Simon and Joseph Heller has been carried on under the name "Standard Mills". The act of incorporating the company in August 1934, insofar as it is relevant to the issue in this proceeding, served only to add "Inc." to "Standard Mills", the business name which had been in use for 26 years prior thereto. Standard Mills, Inc., has been continuously and uninterruptedly in business as a converter jobber or distributor of textiles for a period in excess of 54 years, and during that time has earned and enjoyed a reputation for honesty and fair dealings with the people with whom it has done business.

2. All of the issued and outstanding shares of stock of Standard Mills are owned by respondent Arthur J. Smith, its president, and Lloyd Smith, his son, is vice president, in a ratio of 75% to 25% respectively.

3. Arthur J. Smith and Lloyd Smith formulate, direct and control the acts and practices of the corporate respondent. Arthur J. Smith, Lloyd Smith and Arthur's wife, Irene Smith, constitute the corporation's Board of Directors. Irene Smith is secretary-treasurer of the corporation (Tr. 14). The address of Lloyd Smith is the same as that of the corporate respondent. Arthur J. Smith resides at 1500 Bay Road, Miami Beach, Florida.

4. In the course and conduct of their business, 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 New York

