

IN THE MATTER OF
ELLIOT KNITWEAR, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket 6637. Complaint, Sept. 17, 1956—Decision, April 25, 1958

Order requiring importers in New York City to cease violating the Wool Products Labeling Act by using the word "Cashmora" on tags, etc., on sweaters containing no cashmere fibers. *

Mr. S. F. House supporting the complaint.

Goldstein, Golenbock & Barell, by *Mr. Martin C. Barell* and *Mr. Jack Verschleiser*, of New York, N. Y., for respondents.

Before: *John Lewis*, hearing examiner.

INITIAL DECISION AS TO BALANCE OF PROCEEDING

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on September 17, 1956, charging them with having violated the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and the Federal Trade Commission Act, through various acts of misbranding wool products, including (1) labeling as "Pure Cashmere" sweaters containing a substantial quantity of fiber other than cashmere; (2) failing to show the name or the registration number of the manufacturer or other appropriate person on stamps, tags, or labels; (3) using the word "Angora," which is not the common generic name of the fiber referred to; (4) failing to indicate on labels and tags attached to sweaters that they were not manufactured by respondents; and (5) using the word "Cashmora" on labels attached to sweaters which contain no cashmere fiber. After being served with said complaint, respondents appeared by counsel and subsequently entered into an agreement containing a consent order to cease and desist, dated April 15, 1957, purporting to dispose of all of the issues in the proceeding as to all parties, except for the allegation of misbranding arising out of the use of the word "Cashmora." Said agreement was thereafter submitted to the undersigned who filed an initial decision on May 17, 1957, containing an order to cease and desist disposing of all

*Other allegations of the complaint were settled by consent order on June 25, 1957 (53 F.T.C. 1185).

of the issues covered by said agreement. Said initial decision became the decision of the Commission by order issued June 25, 1957.

With respect to the unresolved issue of misbranding arising out of respondents' use of the word "Cashmora" on stamps, tags or labels, a hearing was held in New York, N.Y., on June 17 and 18, 1957, before the undersigned hearing examiner, theretofore duly designated to hear this proceeding. Since respondents had not theretofore filed formal answer to the complaint, they were permitted at the outset of the hearing to make answer on the record with respect to the remaining issue. In substance, respondents admitted having used the word "Cashmora" on stamps, tags, or labels attached to certain of their products, the sale of such products in commerce, and the existence of substantial competition between themselves and other business organizations likewise engaged in the sale of such products in commerce, but denied that the use of such term on their products was in violation of the Wool Products Labeling Act and the rules and regulations promulgated thereunder or constituted unfair and deceptive acts and practices or unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act. At said hearing testimony and other evidence were offered in support of, and in opposition to, the allegations of the complaint not theretofore disposed of by agreement, the same being duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearing, and were afforded full opportunity to be heard and to examine and cross-examine witnesses.

At the close of the evidence in support of the complaint, counsel for respondents moved to dismiss the complaint upon the ground that there had been no showing of a violation of the Wool Products Labeling Act or that the public had in any way been deceived. Said motion was denied without prejudice. It was renewed at the close of all the evidence, based on the grounds previously indicated and on the additional ground that there was no showing that any deceptiveness in the use of the word "Cashmora" could not be cured by affixing an appropriate explanation to the label where it was used. Said motion to dismiss is disposed of in accordance with the findings, conclusions and order hereinabove made.

At the close of all the evidence the parties were granted leave to file proposed findings of fact, conclusions of law and a proposed order and/or supporting memoranda on or before August 1, 1957, which date was extended until August 12, 1957, on motion of counsel for respondents. Proposed findings of fact and conclusions of law, together with reasons in support thereof, have been filed by counsel

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supporting complaint. Counsel for respondents have filed a memorandum in support of their position, in lieu of proposed findings and conclusions. In their letter transmitting said memorandum counsel for respondents requested permission to make oral argument before the hearing examiner. In view of the fact that the issues are fully discussed in the proposed findings and supporting memorandum and in view of the relative simplicity of the issues of fact and law involved, it is the opinion of the hearing examiner that no useful purpose would be served by oral argument and the request therefor is accordingly denied. However, pursuant to oral telephonic request of counsel for respondents and confirmed by motion, respondents have been permitted to file a reply memorandum to the proposals of counsel supporting the complaint, which memorandum was filed on August 26, 1957. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as immaterial.

Upon the entire record in the case and from his observation of the witnesses, the undersigned finds that this proceeding is in the interest of the public and makes the following:

FINDINGS OF FACT

I. The Parties and Their Business

1. Elliot Knitwear, Inc., and Elliot Import Corp., are corporations, organized, existing, and doing business under and by virtue of the laws of the State of New York, and have their office and principal place of business at 105 Madison Avenue, New York, N.Y. Respondent Elliot Import Corp. is engaged in the business of importing various types of knitwear products from abroad, including sweaters which are imported from Japan. Respondent Elliot Knitwear, Inc., is engaged in the sale and distribution, within the United States, of sweaters and other knitwear products imported from abroad by respondent Elliot Import Corp. The individual respondent Herman Gross is the president of both corporate respondents and formulates, directs and controls the acts, policies and practices of said corporate respondents.

2. The respondents Herman Gross and Samuel I. Gross are individuals and copartners who trade and do business under the firm name of Elliot Glove Co. Said partnership is engaged principally in the sale and distribution of imported gloves. The office and principal place of business of the partnership is the same as that of the corporate respondents.

II. Interstate Commerce and Competition

1. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more particularly since January 1, 1953, the respondents have introduced, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said act, wool products, as "wool products" are defined therein. Among such wool products have been sweaters bearing the name "Cashmora" on the label thereof, substantial quantities of which sweaters have been sold to retail dealers located in various States of the United States, for resale to the consuming public.

2. In the course and conduct of their business, respondents in the sale of such wool products, including sweaters as aforesaid, are in direct and substantial competition, in commerce, with other corporations, firms and individuals likewise engaged in the sale of wool products, including sweaters.

III. The Alleged Illegal Practices

A. *The Issues*

1. The only substantive allegation of the complaint which was not disposed of by the agreement for consent order dated April 15, 1957, is that charging respondents with having misbranded certain of their sweaters by using the word "Cashmora" on labels attached to such sweaters. It is alleged that such word serves as a representation that the sweaters contain cashmere, whereas such is not the fact. This practice is alleged to be a violation of the Wool Products Labeling Act which provides, in section 4 (a) (1) thereof, that a wool product is misbranded if it is "falsely or deceptively stamped, tagged, labeled or otherwise identified," and of rule 30 of the rules and regulations promulgated under said act, which provides that products subject to the act shall not bear or use "any stamp, tag, label, mark, or representation which is false, misleading or deceptive in any respect." The use of the word "Cashmora" is also alleged to constitute an unfair and deceptive act and practice and an unfair method of competition under the Federal Trade Commission Act.

The case of counsel supporting the complaint rests primarily on the admitted fact that respondents used the name "Cashmora" on sweaters which moved in commerce, it being the contention of counsel supporting the complaint that the name is inherently misleading and deceptive by reason of the implication that the sweaters so labeled

contain cashmere. Counsel for respondents contend, on the other hand, that the name itself does not constitute a representation that the sweaters contain cashmere and that the record is lacking in substantial evidence that the name is misleading or deceptive.

2. In addition to the substantive issue presented with respect to whether the name "Cashmora" appearing on the labels of respondents' sweaters is deceptive, there is also presented a question as to the appropriate remedy to be used in the event such name is found to be deceptive. It is the position of counsel supporting the complaint that the proper remedy is an order which will prohibit entirely the use of the name "Cashmora" on sweaters which do not contain cashmere. The position of respondents is that even if the name can be held to be deceptive, the deception can be remedied by the use of appropriate language on the label indicating that the product does not contain cashmere, and that therefore the proper remedy is not a complete prohibition on the use of the word in question. Respondents contend that they have acquired a valuable property right in the name which justifies their continued use thereof with proper explanatory language on the label.

B. Background

1. Respondents first began importing sweaters around the middle of 1954. Such sweaters were made entirely or in substantial part from cashmere fiber,¹ which is obtained from the Kashmir goat whose habitat is the Himalayan Mountains of Asia. Cashmere fiber is characterized by its unusually soft and luxurious feel.

2. Due to the increasing demand for cashmere sweaters and the limited supply of genuine cashmere fiber, the price of such sweaters became so expensive, that respondents sought to develop a blend of fibers from which could be manufactured sweaters that would serve as a cashmere substitute. Because of the demand for a "cashmere type sweater" respondents felt, according to the testimony of respondent Herman Gross, that if they could develop a blend of animal fibers which would have a finish similar to cashmere, they would have a "poor man's cashmere." Such blends, called in the trade a fur blend, were not new at the time, the Italians having produced one using French Angora yarn but, according to respondent Herman Gross, it did not have the "look or feel of cashmere."

3. Respondent Herman Gross went to Japan during the summer of 1955 to try to get respondents' Japanese supplier to develop a fur

¹ The complaint also contains a charge that respondents labeled as "Pure Cashmere" sweaters containing substantial quantities of fiber other than cashmere. However, this charge has been disposed of by the agreement for consent order above referred to.

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blend which could serve as a cashmere substitute. As a result of such visit and further correspondence, the Japanese supplier produced what respondent Herman Gross characterized as "a cashmere-like fur blend," with a fiber content of 30 percent Angora rabbit and 70 percent lambs' wool. The sweater retailed at approximately \$10.95, which was approximately one-third of the price of a similar cashmere sweater.

4. There was also developed, as a result of the joint efforts of respondent Herman Gross and the Japanese supplier, a label to be affixed to the new sweaters. The label bore the word "Cashmora" in large script-like letters, underneath which, in smaller letters, were the words "By Elliot," and on the bottom of the label in still smaller letters the Wool Products Labeling Act registration number and the designation of fiber content: "30 percent Angora—70 percent Lambs Wool."

5. A relatively small order for 1,000 dozen sweaters was sent by respondents to their Japanese supplier around the end of July 1955, while the latter was still working on perfecting a satisfactory blend. Quantity shipments under the order did not begin until early in 1956, for sale during the spring season of that year.

6. Respondents were highly successful in disposing of all of the first order of the "Cashmora" sweaters. According to respondent Herman Gross the principal reason for their success with the sweaters was that "it meets the poor man's need for a cashmere type sweater." Because of the favorable reaction to the sweater, respondents increased their order to 10,000 dozen for delivery during 1956. Respondents also began to feature the name "Cashmora" in national advertising vehicles such as New Yorker magazine, Vogue and Harper's Bazaar, and the magazine section of the New York Times.

7. So successful were respondents' efforts in 1956 that they sold out substantially all of their "Cashmora" line and had to temporarily cease offering it for sale in September 1956, as compared to other type sweaters of which only 51 percent had been sold during a comparable period. Respondents stepped up their advertising campaign in 1957 and increased their order of "Cashmora" sweaters to 25,000 dozen.

8. The "Cashmora" sweater has been widely sold in retail establishments all over the United States, including a number of prominent department stores. Some of the stores have set up so-called Cashmora departments, with point-of-sale signs and copies of advertisements featuring the sweater in a separate part of the store.

9. The "Cashmora" label has appeared on substantially all of the particular blend of sweaters in question since early in 1956. How-

ever, the label was modified after discussion with Government representatives during the spring of 1956, so that the word "Angora" was changed to "Angora Rabbit" and the words "By Elliot" were changed to "Imported by Elliot."² Following the issuance of the complaint in this proceeding, the words "No Cashmere" were added to the portion of the label where the fiber content appears.

C. The Deceptive Character of the Name "Cashmora"

1. It is the considered opinion and finding of the undersigned that the name "Cashmora" appearing on the labels of respondents' sweaters constitutes a representation, or may reasonably be deemed to imply to members of the purchasing public, that such sweaters contain cashmere. Since the sweaters do not contain cashmere it is clear, and it is so found, that the representation thus made is false and that the use of the word "Cashmora" on respondents' sweaters is misleading and deceptive.

2. Respondents contend that there is no substantial evidence in the record to support such a finding because no evidence was offered by counsel supporting the complaint to establish (a) that the word "Cashmora" constitutes a representation that the product bearing it contains cashmere or (b) that the name is false, misleading or deceptive. Respondents' position, in effect, is that no finding of misrepresentation or deception can be made, absent witnesses who will testify as to the deceptive character of the name.

3. The basic test for measuring the deceptive character of a name or advertisement is its "capacity to deceive" (*FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81). The test, in effect, is "potential injury" to the public, as stated in the case which respondents themselves cite (*Jacob Siegel Co. v. FTC*, 150 F. 2d 751, reversed on other grounds, 327 U.S. 608), not actual injury. It is accordingly unnecessary to produce consumers who will testify as to their deception (*Charles of the Ritz Dist. Corp v. FTC*, 143 F. 2d 676, 680, C.A. 2, 1944; *Jacob Siegel Co. v. FTC*, *supra*).

4. In determining the capacity, tendency, or potentiality of a name or advertisement to deceive the standard of measurement is not what the careful, intelligent consumer would understand it to mean, but what impression it would produce on the average uninformed, unsophisticated, and sometimes careless member of the public. As

² The allegations of the complaint dealing with these two items of alleged misbranding were disposed of by the consent agreement previously referred to.

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stated in *Positive Products Co. v. FTC*, 132 F. 2d 165, 167 (C.A. 7, 1942):

The law is not made for experts but to protect the public—that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases do not stop to analyze but too often are governed by appearances and general impressions.

To the same effect see *Charles of the Ritz Dist. Corp v. FTC, supra*; *FTC v. Standard Educ. Soc.*, 302 U.S. 112, 116; and *Donaldson v. Read Magazine Inc.*, 333 U.S. 178, 189.

It is unnecessary, in this connection, to establish that a majority of the members of the public, or any specific proportion thereof, would be likely to be deceived. It is sufficient that some portion thereof, in excess of a de minimis quantity, may be deceived. *Prima Products Inc. v. FTC*, 209 F. 2d 405, 409 (C.A. 2, 1954).³ See also *Rhodes Pharmacal Co.*, 49 FTC 263, 283.

5. The question for determination here is whether there is any reasonable likelihood that a significant number of ordinary customers, including “the ignorant, the unthinking, and the credulous,” would be led to believe, from the name “Cashmora” on the labels of respondents’ sweaters, that the sweaters contain cashmere. Respondents argue strenuously that this determination cannot be made by the Commission unaided by witnesses who will in some way or other advise it what the public understanding is or is likely to be, or whether there is any reasonable likelihood of deception. With this, the undersigned cannot agree. As stated by the court of appeals in *E. F. Drew & Co., Inc. v. FTC*, 235 F. 2d 735, 741 (C.A. 2, 1956):

The Commission is not required to sample public opinion to determine what meaning is conveyed to the public by particular advertisements. *Zenith Radio Corporation v. Federal Trade Commission*, 7 Cir. 1944, 143 F. 2d 29, 31; see also *New American Library of World Literature v. Federal Trade Commission*, 2 Cir. 1954, 213 F. 2d 143, 145. The Commission, which is deemed to have expert experience in dealing with these matters, *Federal Trade Comm’n v. R. F. Keppel & Bro., Inc.*, 1934, 291 U.S. 304, 314, is entitled to draw upon its experience in order to determine, in the absence of consumer testimony, the natural and probable result of the use of advertising expressions. *Siegel Co. v. Federal Trade Comm’n*, 1946, 327 U.S. 608, 614; *Federal Trade Comm’n v. Hires Turner Glass Co.*, 3 Cir. 1935, 81 F. 2d 362, 364.

³ In the *Prima Products* case it was argued no person of average intelligence would understand that a product which was represented as “waterproofing” masonry structures would do so under any and all conditions of use. To this, the court stated:

“It matters not that persons of average intelligence would scarcely expect cinder blocks ‘waterproofed’ by ‘Aquella’ or any other industry product to be proof against the passage of a certain amount of moisture by capillarity. We cannot say that there may not be some who might expect masonry structures thus ‘waterproofed’ to remain absolutely dry under any and all conditions of water pressure from without.” [Emphasis supplied.]

To the same effect see *De Gorter v. FTC*, 244 F. 2d 270, 282 (C.A. 9, 1957).

While testimony of consumer witnesses and so-called experts has been held to be admissible in Commission proceedings, it is by no means a sine qua non to the establishment of a case of capacity to deceive. Where received, such evidence has been held not to override the inherent right of the Commission to determine the deceptive character of an advertisement from the advertisement itself and the circumstances attendant upon its use. Thus in *Rhodes Pharmacal Co. v. FTC*, 208 F. 2d 382, 387 (C.A. 7, 1953), the Commission was held to be justified in ignoring evidence of consumer understanding offered by respondents and to make its own determination of what impression an advertisement would have on the public. In the *Country Tweeds, Inc.*, case, Docket No. 5957, November 25, 1953, upon which respondents here place considerable reliance, the Commission held that the testimony of public witnesses, called by both Government counsel and respondents, as to their impression of the name used by respondents was "of doubtful probative value and of little assistance." It resolved the issue on the basis of the name itself and the circumstances surrounding its use. More recently, in the *Arrow Metal Products Corp.* case, Docket No. 6471, February 20, 1957, the Commission upheld its inherent right to determine the probable meaning conveyed to the public by a trade name and the deceptive potentialities thereof, without sampling public opinion, even though evidence of public understanding had been received into the record.

6. It is the opinion of the undersigned that based on the name itself and the context of its use, a reasoned judgment and finding can be made as to what ordinary members of the public would be likely to understand it to mean, without the calling of so-called public witnesses, actual consumers, or experts to testify as to their understanding or impression. In fact not only is the assistance of such witnesses not required here, but to produce such witnesses would be sheer superfluity.

Certainly if respondents had used the name "Cashmere" on their sweaters there would be no question but that it constituted a representation that the product contained cashmere fiber. The substitution of an "o" for the initial "e" in cashmere, and an "a" for the final "e," is hardly such a change that it can be held to destroy the obvious association of the name with cashmere. The finding of the Commission in the *Country Tweeds* case, *supra*, where the trade name "Kashmoor" on ladies' coats was involved, is particularly pertinent in this connection. After expressing its opinion as to the dubious

value of consumer testimony, which has been above adverted to, the Commission stated:

It seems clear that the name Kashmoor suggests the word cashmere, the two words being almost identical in sound. Further, the name Kashmoor closely resembles, not only in sound but in spelling as well, the word Kashmir, which is the name of one of the regions where the Cashmere goat is found.

While intent to deceive is not an element of the offense, it seems clear that respondents' entire effort here was directed toward creating an association between their product and cashmere. Admittedly they sought to develop a "cashmere type sweater," a "poor man's cashmere" (R. 34) because the genuine product which they had been handling had become too expensive. Other fur blends then on the market did not meet their requirements because they did not have the "look or feel of cashmere" (R. 35). The product which their Japanese supplier succeeded in developing had the "look and feel of cashmere" (R. 60). Respondents then proceeded to give the product a name bearing a striking similarity to the name of the product they were seeking to simulate. It cannot be assumed that the choice of this particular coined name was pure coincidence, having no connection with its resemblance to the word cashmere. Any doubt on this score is laid at rest by the testimony of respondents' sales manager who conceded that it was intended to associate their product with cashmere (R. 130). While he also denied that it was intended thereby to imply that the sweaters actually contained cashmere fiber, this is a distinction of such subtlety that all but the most astute of consumers would fail to appreciate it.

The meteoric rise in the sales of the Cashmora sweaters and the rapidity of their disposition, in sharp contrast to respondents' other line of sweaters, is mute testimony to the connotation which the public placed upon the name. While it may be that the product itself was an excellent one, it seems evident that a considerable portion of the success of the product lay in the name which respondents gave it. That the success of this name was not due to its sheer mellifluousness, but to the fact that it created in the mind of a fair segment of the purchasing public an association between respondents' cashmere-like product and the genuine product whose name it so closely resembles, would seem to be self-evident. The conclusion that this association was not merely of the general, amorphous character which respondents concededly were trying to create but involved, in a significant number of instances, an impression that respondents' product was composed, at least in part, of the genuine fibers would appear to be ineluctable.

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7. Respondents cite a number of factors which they contend establish that the name "Cashmora" is not deceptive. These include (a) the wide difference in price which exists between cashmere sweaters and respondents' product, (b) the actual wool content appears on the label, (c) the word cashmere has many meanings, (d) the lack of complaints about the name, and (e) that neither respondents nor their many customers would have sold the sweaters if they believed the name to be deceptive. The facts cited by respondents do not, in the opinion of the undersigned, disprove the deceptive character of the trade name used by them for the reasons which follow.

a. The fact that respondents' sweaters sell for about one-third the price of genuine cashmere sweaters hardly tends to disprove the deceptive character of their brand name. It is common knowledge that retail establishments periodically advertise well-known, expensive brands at far less than their normal price as loss leaders or in clearance or other sales. Hope springs eternally in the human breast, and human nature being what it is, many a housewife believes that she will be successful in obtaining a real bargain. Moreover, while some of the more sophisticated and better-informed members of the public might conclude that it was unlikely the sweaters were cashmere because of the disparity in price, there would undoubtedly be many others, more naive and credulous, who would believe that they were buying genuine cashmere sweaters at unusual bargain prices. Respondents' argument also presupposes that the public generally is fully informed as to all the nuances of price differences and that there would not be some who would not appreciate the significance of the fact that the price of respondents' sweaters is substantially lower than that of cashmere.

Since, as above indicated, it is the tendency to deceive which is proscribed, and involves consideration of the likely effect of a representation or name on the "ignorant, the unthinking and the credulous," it seems evident that the name "Cashmora" loses none of its deceptive character because some persons, more astute and careful, would think twice because of their knowledge of price differences. As stated by the Supreme Court in *FTC v. Standard Education Soc.*, 302 U.S. 112, 116:

* * * the fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced.

b. The fact that the wool content of "30 percent Angora Rabbit, 70 percent Lambs Wool" appears on the label likewise does not dispel the tendency of the name to deceive. The word "Cashmora" appears in large script-like letters, which dominate the whole label and immediately strike the eye. The designation of wool content appears on the bottom of the label in small, printed letters. It could obviously be overlooked by many persons who are not careful and observant. Also there would be many who while having heard of cashmere as a fine fiber, are not fully cognizant of its origin and would therefore not appreciate that angora and lambs wool do not constitute cashmere.⁴

While it may be that there would be many persons whose initial impression would be corrected after reading the wool content, there undoubtedly would be many others who would fail to notice it or appreciate its significance. The controlling consideration is the impression given by the label as a whole, when used on sweaters which feel and look like cashmere. Where the initial impression or the overall impression created by an advertisement is deceptive, the law is violated, even though the advertisement may be literally true or the true facts are later made known. *Rhodes Pharmacal Co. v. FTC*, 208 F. 2d 382, 387 (C.A. 7, 1953); *C. G. Optical Co.*, Docket No. 6260, January 18, 1957. In this case the overall impression created is clearly a deceptive one.

c. It is argued that there is no representation here that the sweaters contain cashmere fiber because the word cashmere has a broad, general connotation associated with softness of feel and touch. Respondents rely, in this connection, on the testimony of their sales manager that there are many coined words similar to cashmere, used on a variety of products, such as toilet tissue and paper towels, to create an impression of softness.

It is clear from the testimony of respondent Herman Gross himself that the primary and long-established meaning of the term cashmere is one associated with products made from the fiber of the Cashmere goat. While the products so made are characterized by unusual softness and fineness, there is no substantial evidence in the record of any accepted secondary meaning of the word associating

⁴ See in this connection *Atlantic Sponge & Chamois Corp.*, Docket No. 6162, Nov. 29, 1955, where the Commission stated:

"It is true that the ordinary customer often does not know the composition and method of manufacture of many things he buys. Nevertheless, he does know that over the years many products have acquired a well-known name and, in buying under that name, he usually assumes that it is the traditional and accepted product he is buying and not something else."

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it with a general quality of softness. Such a finding certainly cannot be based on the casual, inconclusive testimony of respondents' sales manager.⁵ The Commission, in the *Country Tweeds* case, *supra*, declined to find any secondary meaning of the word cashmere associating it with soft, fine fabrics generally, although the evidence there was stronger than that which appears in this case.

In any event, whatever may be the meaning or understanding of the word cashmere or coined words similar thereto, in connection with other commodities, when such term is used in connection with sweaters, particularly sweaters bearing a resemblance to those made from cashmere fiber, there is no doubt, and it is so found, that an appreciable segment of the purchasing public would assume that the product is made from cashmere fiber.

d. With respect to the matter of complaints, respondents rely on the fact that they have received no complaints from either consumers or their store customers. They also cite the fact that consumers who have seen respondents' advertisements have written to them in favorable terms and have frequently referred to the wool content of the sweaters, thus indicating they were aware the sweaters did not contain cashmere.

While the testimony with respect to the lack of complaints was received in evidence without objection, it is entirely irrelevant. Likewise irrelevant is evidence in the form of postcards and letters from consumers commenting favorably on respondents' product. In view of the obviously deceptive character of the name used by respondents, in the context of its use, the fact that respondents have many satisfied customers cannot insulate them from action by the Commission (*Independent Directory Corp. v. FTC*, 188 F. 2d 468, 470 (C.A. 2, 1951)).

Despite the general irrelevance of the evidence relied on by respondents, it may be observed that the fact some customers referred to the specific wool content of respondents' product, as appearing in an advertisement, does not necessarily establish they were aware it did not contain cashmere. As above indicated, this would presuppose an awareness on their part of what cashmere is comprised. Furthermore, in a number of instances the writers made no reference to wool content, indicating they had paid no particular attention to this portion of the advertisement.

⁵ See, in this connection, as to the high degree of proof necessary to establish the existence of a secondary meaning for a term, *C. Howard Hunt Pen Co. v. FTC*, 197 F. 2d 273, 280 (C.A. 3, 1952), *Atlantic Sponge & Chamois Corp.*, Docket No. 6162, Nov. 29, 1955; and *Vulcanized Rubber & Plastics Co.*, Docket No. 6222, April 26, 1957.

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e. Finally, the fact that respondents and many of their department store customers are "financially responsible organizations" and would not handle a product whose name they considered to be deceptive is wholly irrelevant. Congress, in its wisdom, conferred upon the Federal Trade Commission the function of passing upon the deceptive character of advertising. This function cannot be delegated to business firms, even to "financially responsible" ones. A determination of tendency to deceive must be made by the Commission, based on its expert judgment, and not on the opinions or financial soundness of the firms it was set up to regulate.

CONCLUDING FINDINGS

On the entire record, including the evidence above discussed and the reasonable inferences therefrom, it is concluded and found that by labeling or otherwise describing certain of their sweaters as "Cashmora," respondents have represented, directly or by implication, that said sweaters are composed, wholly or in substantial part, of cashmere fiber. It is further concluded and found that the labeling or otherwise describing of such sweaters as "Cashmora" by said respondents is false, misleading and deceptive in that such sweaters, while similar in appearance to sweaters made of genuine cashmere fiber, do not contain any cashmere fiber.

Since it has heretofore been found that respondents are in direct and substantial competition, in commerce, with other firms engaged in the sale of wool products, including sweaters, it may fairly be inferred that as a result of the practices hereinabove found, substantial trade in commerce has been and will be diverted to respondents from their competitors and that substantial injury has been and may continue to be done to competition in commerce.

CONCLUSION OF LAW

It is concluded that the use by respondents of the word "Cashmora" on tags, stamps, or labels attached to certain of their sweaters which do not contain cashmere constitutes the misbranding of wool products and that the introduction, sale and distribution of such products in commerce by respondents is a violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, including rule 30 of such rules and regulations, and that the labeling or otherwise describing of their sweaters as "Cashmora" by respondents constitutes a false and deceptive act and practice and an unfair

method of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

THE REMEDY

1. The use of the word "Cashmora" on the labels of respondents' sweaters having been found to have a tendency to mislead and deceive in violation of the Wool Products Labeling Act and the Federal Trade Commission Act, the question next presented is whether there should be a complete prohibition on the use of the word on products not containing cashmere or whether, as respondents contend, qualified use of the name should be permitted. Respondents' position, basically, is that they have acquired valuable property rights in the name "Cashmora," that under the Supreme Court's decision in the *Jacob Siegel* case (327 U.S. 608), the Commission is required to consider whether some remedy short of "excision" of such name would give adequate protection, and that since no evidence has been offered that excision is required, respondents should be permitted to use the name with appropriate explanatory language indicating that the product in question contains no cashmere.

2. The *Jacob Siegel* case does, as respondents contend, require that consideration be given to the question of whether a remedy short of excision is possible in order to salvage a valuable trade name or product name. It does not however require, as respondents appear to suggest, that specific affirmative evidence dealing with the question of remedy must be offered by Government counsel. The nature of the particular remedy to be utilized may be determined by the Commission on the basis of its expert judgment and generalized experience, and in the light of what measures are best suited to rectifying the unlawful practices found to exist. It is given wide latitude in fashioning a remedy and its judgment will not be disturbed unless clearly unreasonable. As stated in the *Siegel* case (p. 612):

The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

* * * The Commission is entitled not only to appraise the facts of the particular case and the dangers of the marketing methods employed (*Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 494), but to draw from its generalized experience. See *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 801-805. Its expert opinion is entitled to great weight in the reviewing courts.

An argument such as respondents have made here was disposed of most recently by the Eighth Circuit Court of Appeals in *Chain Institute, Inc. v. FTC*, July 3, 1957, where respondents had urged that there was no evidentiary basis for a particular paragraph (number 3) in the Commission's order. The court disposed of this contention as follows:

The question of the adequacy of the evidentiary basis for the third ordering paragraph as applied to all types of chains and to every petitioner, whether it had used all of the three delivered price systems or not, is, to say the least, debatable. But if the Commission honestly and justifiably believed that competition in the chain industry had been virtually destroyed by the conduct of petitioners and that the third ordering paragraph was necessary to restore competitive prices, we cannot say that the Commission's determination in that regard was purely arbitrary. The Commission, in cases such as this, is the trier of the facts, the appraiser of the credibility of witnesses, the weigher of evidence, the drawer of inferences, and, within broad limits, the prescriber of remedies for trade practices found by it to be unfair. Its determination as to the facts is as invulnerable to attack as is a jury verdict in a case triable by and properly submitted to a jury. It seems apparent that, unless a reviewing court can demonstrate that the Commission's order is legally or factually baseless, it may not be set aside. [Emphasis supplied.]

3. The Court in the *Jacob Siegel* case, in ordering the proceeding remanded to the Commission, did not rule that the Commission had committed error in prohibiting respondents from using the trade name there involved. It simply remanded the case for an administrative determination of the question whether a lesser remedy would be possible without sacrificing the ends of the law, since the Commission appeared not to have considered that question. The Court stated in this connection (pp. 613-614):

*[W]e do not reach the question whether the Commission would be warranted in holding that no qualifying language would eliminate the deception which it found lurking in the word Alpacuna. For the Commission seems not to have considered whether in that way the ends of the Act could be satisfied and the trade name at the same time saved. We find no indication that the Commission considered the possibility of such an accommodation. * * **

[T]he courts are not ready to pass on the question whether the limits of discretion have been exceeded in the choice of the remedy until the administrative determination is first made. [Emphasis supplied.]

4. In determining whether a remedy short of excision is proper, the fact that respondents have acquired a valuable property right in the trade name is not controlling. Such fact may be a justification for requiring the Commission to consider the feasibility of a lesser remedy but unless, as the Court stated above, "the ends of the act could be satisfied" the Commission is not required to save the

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trade name. It is elementary that the public interest takes precedence over any private property rights in conflict therewith. The basic question for determination, in this respect, is whether the deceptive character of the name "Cashmora" as used by respondents can be rectified by the use of explanatory, qualifying language. Unless it can, the fact that respondents may have acquired a valuable property right in the name is no consequence.

5. Following the issuance of the complaint herein, respondents modified their label by adding on the bottom thereof the words "No Cashmere" beneath the wool content designation of "30% Angora Rabbit" and "70% Lambs Wool." Presumably this is the type of explanatory or qualifying language which respondents consider would obviate any possible misunderstanding on the part of the public.

Despite the addition of the small printed words "No Cashmere," the word "Cashmora" appearing in large, script-like letters continues to dominate the sweater label. While possibly this situation could be alleviated somewhat by requiring that the words "No Cashmere" be in letters of equal size and prominence as Cashmora, there still remain too many opportunities for confusion. For example, the word "Cashmora" appears on the sweater box without qualification, which might give the prospective purchaser an initial impression of an association with cashmere. The so-called washing instruction card attached to the sweaters contains the legend:

Fine Imported
Cashmere
Cashmora
Lambswool

This could easily suggest to the uninitiated that Cashmora is a type of fabric like cashmere or a combination of cashmere and lambs wool.

The possibilities of continued confusion are enhanced by the fact that the sweaters are sold through retail establishments, some of which maintain so-called Cashmora departments with their own display and advertising material. Unless these stores are unusually careful in adding the words "No Cashmere" in large, conspicuous letters to all display material and the sales representations of store personnel are carefully controlled, the possibilities for deception would remain.

To permit respondents to continue using the name "Cashmora" would encourage others to use similar deceptive names, thereby aiding and abetting a trend from which the public must inevitably suffer. Thus, for example, one of respondents' competitors on the west coast

is now simulating respondents' "Cashmora," by the name "Cashroma" on sweaters. If the use of the name "Cashmora" is permissible, then presumably the same claim can be made for Cashroma, and a myriad of similar names limited only by man's ingenuity.

6. It is the considered opinion of the undersigned that the name "Cashmora" is so closely associated with the word "Cashmere" and the possibilities of abuse are so numerous and so real, that it would be frustrating the purposes of the Wool Products Labeling Act and the Federal Trade Commission Act to permit respondents to continue, in any form, to call their product by a name suggestive of a fiber of which it contains not a hair.

To permit respondents on the one hand to call their product "Cashmora" and on the other hand to place on the label the words "No Cashmere" is, in the opinion of the undersigned, to countenance a contradiction in terms. As the court stated in *FTC v. Army & Navy Trading Company*, 88 F. 2d 776, 780, in prohibiting the use of the words "Army and Navy" by a company which had no military connections and did not obtain all of its goods from such sources:

This single representation being untrue, it cannot be qualified; it can only be contradicted.

A similar ruling was made more recently by the Commission in *Arrow Metal Products Corporation*, Docket No. 6471, February 20, 1957, in which the product name "Porcenamel" was found by the Commission to be deceptive because of its tendency to lead members of the public to believe that respondents' product was made of "porcelain enamel." Respondents urged that they be permitted to continue to use the name with appropriate qualifying language to indicate that their product was not porcelain enamel. In holding that this was not an appropriate remedy the Commission stated:

"Porcenamel" is not porcelain enamel and, being a generically different product, has different characteristics as a finish. Hence, a requirement that qualifying or disclaimer language, in one or more respects, be set forth in advertising and on labels where that term appears, obviously would be attended by sales representations of a contradictory and confusing import. In our opinion, therefore, the hearing examiner correctly concluded that an absolute prohibition of the expression "Porcenamel" was required in the public interest.

The Commission has in numerous other cases prohibited outright the use of trade or product names suggesting that a product is made of something of which it is not. Thus, in *Harry Gemson*, 32 FTC 1311, the use of the name "Camelite" or any other term which includes the word "camel" or any colorable simulation thereof was prohibited on products not composed of camel's hair. In *S. Friedman & Sons*,

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Inc., 32 FTC 989, the use of such designations as "Sun Ray Cashmere" and "Sun Ray Cashmere DeLaine" was prohibited in connection with garments not composed of cashmere. In *Gladstone Brothers*, 37 FTC 645, the use of the word "Valcuna" was prohibited in connection with garments not made entirely of vicuna wool. In *Shepherd Knitwear Co.*, 45 FTC 1, the use of the word "Llamora" was prohibited in describing garments not made from llama wool.

Numerous court decisions have sustained the Commission's prohibition on the use of deceptive names. In *FTC v. Algoma Lumber Company*, 291 U.S. 67, the use of the term "white" to describe yellow pine was prohibited, even though qualified by the geographic descriptive word "California White Pine." In *Sea Island Thread Company v. FTC*, 22 F. 2d 1019, the use of the words "Satinsilk" and "Satin Silk" to describe a cotton thread was prohibited, even though qualified by the words "Mercerized Cotton." In *Masland Durable Leather Co. v. FTC*, 34 F. 2d 733, the use of the word "Durable Leather" was prohibited, as suggesting that the product was made of "durable leather," even though qualified by the words "Durable Leather Substitute." More recently, the Court of Appeals in *United States Navy Weekly, Inc. v. FTC*, 207 F. 2d 17 (C.A., D.C., 1953) upheld the Commission's conclusion that qualification or explanation that respondent's magazine entitled "United States Navy Magazine" was "Not owned by the Government" would not eliminate the tendency of the name to mislead and deceive.

7. Respondents suggest that the above authorities are not controlling since they either (a) were not proceedings under the Wool Act, (b) antedate the *Jacob Siegel* decision, or (c) involve the use "in the trade name of a product or item which was not contained in the item sold," unlike the instant case. None of these arguments has any merit for the following reasons:

a. The fact that none of the cases cited arises specifically under the Wool Act is of no consequence. Every act of mislabeling or deceptive labeling of wool products is, by the very terms of the Wool Products Labeling Act, also a violation of the Federal Trade Commission Act. The Wool Act is, if anything (as will hereafter appear), more stringent in its requirements with respect to the proper labeling of products. Consequently cases prohibiting the use of a deceptive name under the Federal Trade Commission Act would have a fortiori application in Wool Act proceedings.⁶

⁶ See *De Gorter v. FTC*, 244 F. 2d 270, where decisions under the Federal Trade Commission Act were held applicable to a Fur Products Labeling Act proceeding.

b. While some of the above decisions antedate the *Jacob Siegel* case, others, such as the *U.S. Navy Weekly* case, the *Shepherd Knitwear* case and the *Arrow Metal Products* case were decided subsequent to the *Siegel* case. In any event, there is nothing in the *Siegel* case which makes it mandatory on the Commission to permit the continued, albeit qualified, use of a deceptive trade name. While remanding the case to the Commission to consider whether qualified use of the name there involved was possible, the Court cited with approval the *Algoma Lumber* case (291 U.S. 67, 81-82) in which the Commission had determined that an absolute prohibition on the use of the deceptive name was the proper remedy.

c. The present case is similar to those above cited since, contrary to the contention of respondents, it does involve "the trade name of a product or item which was not contained in the item sold."⁷ While respondents deny that Cashmora suggests or implies cashmere, the undersigned has already found this to be the fact. A number of the cases above cited also involve a coined trade name suggestive of a fiber, finish, or other element not present in the item at issue, even though the precise name of the simulated genuine article was not used, e.g., Porcenamel, Camelite, Valcuna, Duraleather, and Llamora.

8. Respondents main argument that they should be permitted to continue to use the name Cashmora, with explanatory language, is based on the action taken by the Commission in the *Jacob Siegel* case, after the case was remanded to it, and the action later taken in the *Country Tweeds* case, based on the *Jacob Siegel* decision. The orders issued in these two cases permitted the qualified use of a trade name found to be deceptive. The action taken in these two cases, while persuasive, is not in the opinion of the undersigned controlling in the instant proceeding for the reasons hereinafter discussed.

In the *Siegel* case there was involved the brand name "Alpacuna" under which respondents advertised their coats. This was found to imply that the coats contained vicuna as well as alpaca fiber. While the coats did contain 50 percent alpaca fiber, they contained no vicuna. The Commission in its original decision (36 FTC 563) prohibited respondent from using the word "Alpacuna" or any similar name implying that their coats contained vicuna. After appeal, the Supreme Court remanded the proceeding for the purpose of having the Commission make an administrative determination whether a remedy short of excision would suffice. As has been noted above, the Court did not find that the Commission had committed error, but

⁷ Rebuttal brief of respondents, pp. 5-6.

remanded the proceeding because it felt the Commission should first make its own determination on the question. While the Court referred to the principle that a valuable trade name should be protected "if less drastic means will accomplish the result," it also emphasized the "wide latitude for judgment" reserved to the Commission in making its determination.

On the remand the Commission decided, with two of its five members dissenting, to permit continued use of the name Alpacuna, provided that the constituent fibers were designated in immediate connection therewith, in large and conspicuous letters (43 FTC 256). The majority opinion, by Commissioner Freer, indicated that it was of the opinion that the truthful and conspicuous disclosure of content fibers "in advertising the garments" would eliminate "in many instances" the deceptive impression received from the name and, more important, that the use of proper labels under the Wool Products Labeling Act would dispel "any remaining confusion."⁸

The majority opinion in the *Siegel* case appears to have been considerably influenced by the fact that the respondent had used the name in question for over thirteen years and by its feeling that the proper labeling of the garments, in accordance with the Wool Act, would reduce the probability of deception to a minimum. In the instant proceeding the questionable name has been used for a relatively brief period of time, and the very labels which the Commission in the *Siegel* case thought would dispel the confusion are the labels on which the confusing name appears. It may also be noted that the initial thrust of the name involved in the *Siegel* case was on a fiber of which the product contained 50 percent, viz., alpaca; whereas in the instant case the primary emphasis of the name is on a fiber of which there is not a hair to be found in respondents' sweaters. The name is clearly more deceptive and less subject to removal of the deception by explanation.

Aside from all other distinctions is the fact that the instant proceeding is brought under the Wool Products Labeling Act, based on a charge of mislabeling, whereas the *Siegel* case involved a false advertising charge under the FTC Act. The former act, in the opinion of the undersigned, requires a greater degree of precision in labeling than may be required under the latter act, and therefore a form of order in a false advertising case under the Federal Trade

⁸ The majority opinion states, in this latter respect (p. 263):

"Proper labels required by the Wool Products Labeling Act on the garments when sold and delivered to the consumer should dispel any remaining confusion or false impression persisting in the minds of those consumers who in a degree are inattentive or unanalytical or who may be characterized by the trade as 'impulse' buyers."

Commission Act permitting qualified use of a deceptive name may not be appropriate in a misbranding case under the Wool Act. The action taken by the Commission in the *Siegel* case, therefore has limited precedential value in the instant proceeding.

9. Respondents dispute the fact that there is any difference between what may be required in the labeling of a garment under the Wool Act from what may be permissible under the Federal Trade Commission Act. However, the legislative history of the Wool Act discloses that it was passed precisely because it was thought that the Federal Trade Commission Act was not sufficient to prevent the misbranding of wool products, and to insure a greater degree of accuracy in the labeling of such products.

The House committee specifically considered the objection that the proposed legislation was unnecessary since the Federal Trade Commission already had "ample power under existing law to deal with the unfair competition and deceptive acts and practices aimed at in the bill," and rejected it based on the testimony of Commission officials as to the inadequacy of existing legislation in coping with the evils in the industry.⁹

The Senate committee quoted with apparent approval the following statement of the Commission's Chief Counsel as to the need for the proposed legislation:¹⁰

Its purpose is to protect producers, manufacturers, and consumers from the unrevealed presence of substitutes and mixtures in woven or knitted fabrics and in garments or articles of apparel made therefrom. There is a decided need for such protection. *The fact that the composition of textile fabrics cannot be detected by most buyers facilitates misrepresentation and deceptive concealment to the injury both of the buyer and of the fair competitor. In recent years the development of synthetic fibers and of skillful methods of finishing cloth has increased the opportunity for unfair competitors to exploit the public by misstating the character of the goods they sell.* Moreover, in many cases false impressions are conveyed to the consumer not by affirmative misrepresentation but by misleading failure to supply needed information. For example, if men's suits look and feel like wool the customer may never inquire whether they contain some cotton or rayon. Similarly, if rayon goods produced by a well-known silk manufacturer are *sold under special names* at silk counters, it may be that although the consumer is not told that the product is silk she will infer that it is *from its appearance, the place at which it is sold, and the manufacturer's name.* Both the public and the more scrupulous competitors suffer from such practices.

The frequency with which such cases arise in the textile field makes it desirable that the Commission's present power to deal with specific instances of misrepresentation be supplemented by labeling requirements which will make misrepresentation more difficult. [Emphasis supplied.]

⁹ H.R. 907, 76th Cong., 1st sess., p. 7.

¹⁰ S. Rept. 1216, 75th Cong., 1st sess., p. 8.

The House committee likewise quoted with approval a statement by the Commission's Chief Counsel as to the purpose and need of the bill as follows:¹¹

The bill is designed to protect producers, manufacturers, distributors, and consumers from the unrevealed presence of shoddy, substitutes, and mixtures in spun, woven, knitted, felted, or otherwise manufactured wool products. The evils which it is the purpose of this bill to correct occur in connection with "wool" and "part wool" products and *in relation to fabrics and articles which simulate wool or part-wool products*. The evils to be corrected by the bill also relate to the unrevealed use or presence of reclaimed wool or shoddy in fabrics. In my opinion the bill, if enacted into law, will accomplish the desired purpose. [Emphasis supplied.]

The simulation of a particular kind of wool product by means of a coined product name would appear to be no different than simulation of wool products generally, as referred to above.

The objective which Congress was seeking to achieve was stated to be the "requiring [of] truth in fabrics or fiber identification, in order that the consumer might know what he was purchasing, and be protected insofar as law may be able to protect him * * *."¹² The type of consumer with whom Congress was concerned was¹³—

* * * the 90 percent of the American people who must, as the hearings disclose, purchase garment suits at a cost of \$25 or less. The legislation is not needed for people who can pay \$75 or \$100 for a suit of clothes. It is the workingman, the farmer, the millions of clerks and office workers, and the great miscellany of employment in the lower income brackets who need protection.

In the light of the foregoing it can hardly be argued that there is no difference between the requirements of the Wool Products Labeling Act and the Federal Trade Commission Act in the labeling of wool products. The former was obviously intended to fill in the gaps left by the latter and to require a higher degree of care and precision in labeling to the end, among others, that there would be no simulation of wool products generally or of particular kinds of wool products. The action of Congress in this respect was similar to that later taken when it passed the Fur Products Labeling Act to prevent the labeling of fur products with coined names not generally understood by the public, and the Oleomargarine Act to prevent the advertising of oleomargarine products under the guise of being dairy products. Addressing itself to a somewhat parallel

¹¹ H.R. 907, 76th Cong., 1st sess., p. 7.

¹² *Id.*, p. 6.

¹³ *Id.*, p. 7.

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contention under the latter act, the Commission in the *E. F. Drew & Co.* case, Docket No. 6126, May 5, 1955, stated:

If the amendment is to have any meaning we must conclude that it went beyond existing law which prohibited advertisements having the tendency and capacity to deceive, and reached a situation like the present where the suggestion that oleomargarine is a dairy product resulted from associating it with dairy terms.

To permit the labeling of a product with a coined name suggestive of a wool fiber which the product does not contain would, in the opinion of the undersigned, tend to seriously weaken the protection which the Wool Products Labeling Act was intended to provide for the very "miscellany of [consumers] in the lower income brackets" whom Congress intended to protect.¹⁴ It would, moreover, be contrary to rule 25 of the rules and regulations issued in the Wool Products Labeling Act which provides:

Words which constitute the name or designation of a fiber which is not present in the product shall not appear in or as a part of the listing or marking of required fiber content on the stamp, tag, label, or other mark of identification affixed to the wool product.

In the opinion of the undersigned the use of the word "Cashmora" (suggestive of cashmere) on respondents' labels, as well as any qualifying language referring to the lack of cashmere, would violate the letter and spirit of rule 25 and of the Wool Products Labeling Act.

10. As has been previously indicated, respondents also place considerable reliance on the *Country Tweeds* case, Docket No. 5957, November 25, 1953, in which the Commission permitted the continued use of the name "Kashmoor" in advertising and labeling women's coats, if accompanied by an explanation that the coats contained no cashmere. In that case the hearing examiner, while finding the name to be deceptive as implying that the coats contained cashmere, also found that there was a secondary meaning of cashmere, viz., a fine, soft dress fabric. Apparently influenced by this latter fact and relying on the *Siegel* decision, the examiner's order permitted continued use of the name Kashmoor with proper explanation.¹⁵ The Commission, while disagreeing with the examiner's finding of secondary meaning, adopted the order recommended by him.

¹⁴ H.R. 907, 76th Cong., 1st sess., p. 6.

¹⁵ The examiner stated in his decision that if cashmere meant solely the wool of the Kashmir goat "the absolute excision of the trade name would appear to be inescapable."

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In the opinion of the undersigned the action taken in the *Country Tweeds* case is not determinative of the action to be taken here. In the first place the name "Cashmora" is somewhat closer to the word cashmere, than is the name "Kashmoor," and is therefore less susceptible of explanation. Secondly the name there involved was in use by respondents for a period of approximately two years before it was challenged by the Commission and therefore respondents there may be deemed to have acquired a greater equity in the name than is present in the instant case, where the name was in use for a relatively brief period when it was challenged.¹⁶ Finally and most important, the *Country Tweeds* case involved a complaint brought under the Federal Trade Commission Act, while the instant proceeding involves the Wool Products Labeling Act as well. For the reasons above stated in connection with the *Siegel* case, orders permitting qualified use of a deceptive name under the former act have limited application to the latter act, where a matter of proper labeling is involved.

Respondents point out that in the *Country Tweeds* case the name Kashmoor was used on labels, as well as in advertising, and argue that the Commission in issuing its complaint under the Federal Trade Commission Act must have assumed that it could take effective action under that act to reach all the practices there charged. In answer to this contention it should be noted, firstly, that the labels there involved were not the labels affixed in compliance with the Wool Products Labeling Act.¹⁷ Secondly, and more important, the fact that the Commission did not see fit to also issue its complaint under the Wool Products Labeling Act in the *Country Tweeds* case, does not preclude the possibility that the Commission may have administratively determined since that time that a more effective order can be issued under the Wool Act, and estop it from seeking to take effective action under the latter act.

11. In addition to the *Jacob Siegel* and *Country Tweeds* cases, respondents also cite *Stratbury Manufacturing Co.*, 45 FTC 853, where the use of the registered trademark "Alpagora" was permitted in connection with the advertising of coats not containing substantial proportions of alpaca and angora, provided that the constituent fibers were clearly disclosed or it was disclosed that the registered trademark was not to be construed as relating to fiber content.

The Commission's action with respect to *Stratbury Manufacturing Co.* is not determinative of the form of the order to be utilized in

¹⁶ This point will be hereinafter discussed in greater detail.

¹⁷ See para. 5(b) of findings as to the facts in the *Country Tweeds* case.

the instant case. It did not involve a formal proceeding, based on the issuance of a formal complaint, but was embodied in a stipulation to cease and desist. The facts and circumstances which led the Commission to accept such stipulation, in lieu of issuing a formal complaint, do not appear and their application to the instant situation cannot therefore be determined.

However, the action of the Commission in accepting a stipulation in a nonformal matter has no substantial precedential significance in a formal, litigated proceeding. It certainly does not establish a binding precedent that the use of coined, deceptive names will generally be permitted if accompanied by explanatory language. Any doubt on this score is set at rest by the action taken by the Commission in a number of other proceedings which have been cited above, including particularly *Shepherd Knitwear Co., Inc.*, 45 FTC 1, which involved an order in a formal, litigated case issued almost simultaneously with the acceptance of the stipulation in the *Stratbury Manufacturing Co.* matter. The Commission in the *Shepherd Knitwear* case overruled the recommended order of its examiner which would have permitted the use of the term "Llamora" to designate products containing no llama wool, provided the constituent fibers were set forth in connection therewith, and it prohibited outright the use of that term to describe products not containing llama fiber.

Aside from all other factors and considerations, the *Stratbury Manufacturing Co.* situation may be distinguished on the ground that the proviso permitting continued use of the name Alpadora, with appropriate explanation, related to the use of the term in advertising, whereas the instant proceeding involves a charge of misbranding under the Wool Products Labeling Act as well.

12. Basic to any resolution of the question of whether respondents should be permitted to continue using the term "Cashmora" on a qualified basis is a finding that they have acquired valuable property rights therein arising out of substantial and extensive usage of the name, so as warrant their using it in the face of a finding that it is deceptive. Of course, the fact that a deceptive name has been in use for a long time does not necessarily entitle the user to continue using it even on a qualified basis.¹⁸ Unless the deception can be removed by explanation, long usage of the name is of no consequence. However, it is clear that unless a substantial equity in the name exists

¹⁸ As stated by Mr. Justice Cardozo in *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 80:

"There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for deception or mistake * * *."

there is no occasion for even considering whether the deceptive name is salvageable.¹⁹

Respondents contend that they have acquired valuable property rights in the name by virtue of substantial usage. In view of the finding already made by the undersigned that the name is inherently deceptive in the context of its use, and cannot be remedied by explanation, it would appear to be unnecessary to consider respondents' contention as to the existence of extenuating circumstance justifying consideration of whether the name can be salvaged. However, the undersigned has nevertheless considered respondents' contention in this respect and finds it to be without substantial merit.

Among the more salient facts and circumstances upon which respondents rely and which they contend establish a valuable equity in the name and their right to seek its continued use, with appropriate explanatory language, are the following: (a) The name has been in use for about 2 years; (b) they have sold substantial quantities of the sweaters, have advertised the name widely, and have committed themselves for additional substantial quantities of the sweater and for further advertising in 1957; and (c) that the name has become so well established that they would suffer severe financial loss if its use was not permitted. The contentions are considered seriatim below.

(a) Respondents contend that the name "Cashmora" has been in use for two years and hence that the factual situation is substantially identical to that in the *Country Tweeds* case, where respondent was found to have established a valuable property right in the name Kashmoor. Respondents conveniently overlook the fact that the name there involved was in use for approximately two years as of the time the complaint was issued, while the terminal date of the two-year period for which respondents here contend is that of the time of the hearing, some ten months after the date of the issuance of the complaint. Moreover, the record here establishes that respondents were advised as early as April 1, 1956, that the Commission considered their use of the name "Cashmora" to be objectionable.²⁰

¹⁹ This is conceded by respondents in the memorandum supporting their position where it is stated (p. 24):

"The respondents do not contend that the name 'CASHMORA' when first conceived had any possible standing, as such. Its value has arisen for the manifold reasons which are hereinafter set forth."

²⁰ In a conference held on April 1, 1956, between respondents' prior attorney and Commission representatives, respondents' attorney was advised that the use of the Cashmora labels, as well as other practices which gave rise to the complaint herein, were objectionable. While respondent Herman Gross denied that his then attorney had advised him that the Commission was questioning the use of the term Cashmora, it seems evident that he had at least constructive notice of this fact when this information was conveyed to his duly authorized attorney.

Respondents contend that they are justified in considering the period after the issuance of the complaint herein as extending the period of their bona fide usage of the name Cashmora. They rely, in this respect, on the fact that following the issuance of the complaint they entered into an agreement with counsel supporting the complaint, dated November 8, 1956, disposing of all the issues in this proceeding. One of the provisions of the order therein agreed upon permitted respondents to continue to use the term "Cashmora" provided its use was accompanied by words clearly and conspicuously stating that the fabric did not contain cashmere.

Due to the necessity for correcting typographical and other errors the agreement containing the aforesaid consent order was not transmitted to the undersigned until February 18, 1957. By order dated February 28, 1957, the undersigned rejected the aforesaid agreement because of the inclusion therein of the proviso in question permitting continued use of the name Cashmora.²¹

In the opinion of the undersigned, the fact that the abortive order which respondents agreed to in November 1956, permitted the continued use of the name "Cashmora" on a qualified basis does not enhance or extend respondents' equity or property right in the name Cashmora. The rules of the Commission provide that every agreement for consent order must be submitted to the hearing examiner for his approval and that the latter has the right to accept or reject such agreement, his decision in this respect being subject to joint appeal to the Commission by counsel for both sides. No such appeal was filed in this instance. In entering into the agreement, respondents and their counsel were fully mindful of the fact that such an agreement was one between themselves on the one hand and counsel supporting the complaint (a representative of the Commission's Bureau of Litigation) on the other hand, and could have validity only insofar as it was approved by hearing examiner and, ultimately, by the Commission. While respondents may not be criticized for their business judgment in determining to continue use of the name, in view of their hope that the agreement would be approved by a representative of the Commission acting in its judicial capacity, they cannot now seek to take advantage of the rejection of such agreement by

²¹ Ordinarily no mention is made in an initial decision of a rejected consent agreement since under the Commission's rules of practice such agreement does not become part of the official record. This provision in the rules was inserted primarily for the benefit of the respondent so that his offer of settlement would not be deemed to reflect any lack of merit in his defense. Reference is made above to the rejected agreement and to the undersigned's order of rejection because such facts were included in the record at the request of respondents, who apparently felt that such facts would be to their advantage in demonstrating a justification for continued usage of the name after the issuance of the complaint (R. 89-92).

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claiming that it enhanced or extended their property right in the name beyond the date of the issuance of the complaint.

In addition to seeking to extend the terminal date of their use of the name beyond the date it was challenged by the Commission, as part of their claim of 2 years' usage thereof, respondents have also sought to establish an initial date of use many months earlier than the date of its actual substantial use. Thus respondents contend that their first order for the Cashmora sweaters was placed on July 25, 1955, that the Cashmora label itself evolved in August 1955, and that sweaters bearing the labels were sold by sample to department and retail stores in September 1955, approximately a year before the complaint was issued. Respondents' contention in this respect is based on an erroneous and exaggerated version of the facts, as established by the reliable evidence in the record.

The record does reflect an order by respondents for 1,000 dozen sweaters, dated July 25, 1955. However, this order was not received by respondents' Japanese supplier until early in August and was for a blend of sweaters which did not yet bear the Cashmora labels. The record discloses that the order was placed, on an experimental basis, for an angora lambs wool blend and that during the late summer and fall of 1955 respondents' supplier was experimenting with this and other blends in an effort to produce a sweater with a cashmere-like feel.²²

The Cashmora label itself was not, as claimed by respondents, "evolved sometime in August 1955." While respondents' supplier did, on August 24, 1955, forward a sketch of a Cashmora label which it had prepared, various changes in the label were requested by respondents and it was not perfected and finally approved until the latter part of October 1955.²³ Likewise, respondents' claim that they began selling the Cashmora sweaters to the stores in September 1955, is not supported by the record. Respondents' supplier was still

²² The order, which is dated July 25, 1955, refers to the sweaters as bearing an "LAW" label, the latter being the initials of "Ladies' Angora Wool" (RX 13 and 14; R. 45). It was placed after the return of respondent Herman Gross from a trip to Japan in the summer of 1955. A letter from the supplier, dated July 26, 1955, indicates that they had not received any order and states that Gross had informed them that when he returned to New York he "would investigate the market for LAW and give us a PO [purchase order] * * * for 1,000 dozen." (RX 6 B, par. 7). Gross replied by letter dated August 1, 1955, stating that he had sent a purchase order for "1,000 dozen of LAW" on July 25th and that the Japanese supplier should receive it around August 5 (RX 1 A, par. 5). In the same letter he stated that he hoped to promote the "LAW" sweater "in view of the unsettled situation regarding LCX", i.e., a 90 percent cashmere, 10 percent wool blend (R. 46, S2). Further correspondence between the parties during August and September indicates they were experimenting with colors, as well as with other blends which would result in a sweater with a "more cashmere like feeling" (RX 2 B, par. 11; RX 3 C, par. 24, 25; RX 8, par. 1; and RX 10).

²³ RX 7 B, par. 10; RX 4 A, par. 3; RX 4 B; RX 12 B, par. 12; and RX 5 A, par. 6.

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experimenting with colors in September, and the label itself was not finally approved until the end of October 1955.²⁴ The earliest date on which it is probable that sweaters bearing the Cashmora label were exhibited to retailers is the latter part of October 1955 or sometime in November 1955. More important, however, is the fact that the sweaters did not reach the United States in any substantial quantities until early in 1956 and were not sold in substantial quantities to the public, bearing the Cashmora label, until the spring of 1956.²⁵

It seems evident from the foregoing that the period which elapsed between the time sweaters bearing the Cashmora label were sold in any substantial quantities and the time when the Commission challenged the use of the label was a matter of weeks, or at most, months, rather than years. This is so whether the date of the Commission's challenge is deemed to be April 1, 1956, when it so advised respondents' attorney, or September 1956, when it issued the complaint in this proceeding. Under these circumstances respondents can hardly claim long and extensive usage of the name, as in the *Jacob Siegel* case (13 years), or even bring themselves within the briefer period of usage which existed in *Country Tweeds* case.

(b) The evidence as to respondents' commitments and liabilities incurred in connection with the sale of the Cashmora sweaters likewise fails to establish the existence of extenuating circumstances of such a nature as to justify respondents' continued use of the deceptive name, contrary to the public interest.

Respondents' initial order for 1,000 dozen, which was more or less a trial run for the sweaters, was disposed of within a relatively short time after it was offered to the public. The second, and somewhat more substantial order, for 10,000 dozen was disposed of almost in its entirety by September 1956. The third and presently outstanding order for 25,000 dozen sweaters was placed after the issuance of the complaint herein. Respondents' justification for placing this

²⁴ By letter dated August 29, 1955, respondents' supplier advised that it was forwarding color swatches for the "LAW" sweater, and it was still working on some of the colors with which it was not satisfied (RX 8, par. 1). By letter dated September 17, 1955, the supplier advised respondents that the labels, modified in accordance with respondents' request, would not be ready for insertion on the sample sweaters, but would be air mailed for attachment by respondents (RX 12 B, par. 12). Respondents' letter of October 25, 1955, indicates that the new labels were not received until some time in October (RX 5 A, par. 6).

²⁵ Respondent Herman Gross testified that the sweaters "should have been delivered in October, November and December, but were late and I was unable to make decent sized deliveries until January" (R. 59). At another point he testified that sweaters bearing the Cashmora label were delivered in "Spring, 1956" (R. 68).

last order is that it was done after the consent agreement had been entered into. Respondents contend that it would result in financial catastrophe if they could not dispose of these sweaters with the Cashmora label.

The undersigned has heretofore indicated his view that the fact respondents saw fit to make additional commitments on the basis of a consent agreement which required further approval does not create any additional property right or equity on their part. Aside from this, however, the problem which respondents have sought to pose, arising from their outstanding order for 25,000 dozen sweaters, is more apparent than real. The order for these sweaters was placed in November 1956, and at the time of the hearing in this proceeding 90 percent of the sweaters had been received. If respondents' experience in the 1956 season is any criterion these sweaters have by this time been largely disposed of. Allowing for the time of any possible appeal, or only for the usual sixty-day period of compliance provided for in orders of the Commission in the event no appeal were taken, it seems obvious that the balance of the year 1957 will have elapsed and any sweaters still remaining will long since have been sold. This would appear to be the short answer to the problem posed by respondents unless, of course, they seek to take advantage of the period during which this matter has been under consideration before the examiner to make additional commitments for Cashmora sweaters.

Respondents also cite the fact that their Japanese supplier made substantial commitments based on the expectation of continuing orders for the Cashmora sweaters, by erecting a \$300,000 to \$400,000 addition to its plant, and that they would lose face with him if such orders were discontinued. The short answer to this is that the financial commitments of respondents' supplier is not a relevant factor in this proceeding. Aside from this, however, the facts are not as respondents endeavor to make them out to be. The fact is that respondents' supplier began to erect the additional facilities before it had made any shipments of the Cashmora sweaters and before it was even apparent that the Cashmora sweaters would be a success. It seems evident that the expectation of orders for the Cashmora sweaters was not a material factor in the expansion plans.²⁶

²⁶ In a letter dated September 12, 1955, the supplier advised respondents that "our dyeing factory and the construction of our four-storied ferro concrete building are now in progress" (RX 11 A). It is obvious from the context that the construction of these facilities was due to a desire on the part of the supplier to improve its efficiency and possibly serve respondents' needs better in general, rather than because of the limited order for 1,000 sweaters, which was then being handled on an experimental basis.

Respondents also cite their expenditures and commitments for advertising in connection with the Cashmora sweaters. Thus they point out that they spent \$25,000 in advertising the product in 1956, and have committed themselves for an additional \$50,000 in 1957, with advertisements in such publications as the New Yorker magazine, Vogue, Harper's Bazaar and the magazine section of the New York Times.

It should be noted, in this connection, that the first national advertisement utilized by respondents was an advertisement in the New York Times magazine section in August 1956, about a month prior to the issuance of the complaint. The advertisements in Vogue and New Yorker magazines did not appear until after the issuance of the complaint, viz., in February 1957. Additional advertisements are for insertion in the fall of 1957.

It is apparent that the bulk of respondents' advertising expenditures were made after the issuance of the complaint herein. The facts with respect thereto are not such as to create any unusual extenuating circumstances entitling respondents to special consideration. In fact by the time the order in this proceeding becomes final respondents will have received the full benefit of such advertisements.

(c) Respondents contend that the failure to permit them to continue using the name Cashmora will result in a loss of "continuity" with respect to the name of a product which they have already sold in substantial quantities and which has been well advertised.

In the opinion of the undersigned the period of usage here involved, the quantity sold and the amount of advertising done are not such as to have established the name in the public eye to the extent that there would be any serious loss of continuity, as far as the public is concerned, if the product were offered under another name. In any event, if the undersigned were to accept the testimony of respondent Herman Gross literally, the success which respondents have had in the sale of the sweaters has been due to the fact that the sweaters are a "good value," and the fact that they bear the name Cashmora has not been an important factor (R. 60). On this basis there should be no reason why respondents should not continue to sell their sweaters successfully, without the name Cashmora. On the other hand if the name has been an important factor, it must be because, as the undersigned has found, it has been a deceptive factor in inducing sales. If this is the case there is no reason to permit the continuance of such deception.

The loss of "continuity" with which respondents appear to be primarily concerned is that relative to their retail stores outlets, rather

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than the public generally. According to respondents' sales manager, inability to use the name Cashmora would result in the loss of one-half of respondents' retail outlets. He conceded, however, that in time the retailers would accept them under another name.

In the view of the undersigned, the fears thus expressed were somewhat exaggerated. There is nothing to prevent respondents from advising their retail dealers that the same sweater is being marketed under a new name. If the product is as excellent as is claimed, there should be no difficulty in persuading the bulk of the dealers to continue to handle it. The only serious objection which might arise would be from those dealers who prefer to continue to associate the product with cashmere, as a selling inducement. The possible objections of this class of dealers cannot, of course, be considered a justification for permitting continued use of the deceptive name.

CONCLUSIONS AS TO THE REMEDY

1. While it is the policy of the law to protect valuable trade or product names, that policy must be accommodated to the fundamental policy under the Federal Trade Commission Act "of preventing unfair or deceptive trade practices." Unless the "ends of the act [can] be satisfied," the Commission is not required to permit continued use of a deceptive name (*Jacob Siegel v. FTC*, 327 U.S. 608, 612, 613).

2. In this proceeding the name "Cashmora" is so inherently deceptive in the context and circumstances of its use, that qualification or explanation on the labels of respondents' sweaters to the effect that such sweaters do not contain cashmere would not substantially remove the tendency and capacity of such name to deceive. Consequently, if this were solely a proceeding under the Federal Trade Commission Act, a complete prohibition of the name on products not made or composed of cashmere would be the appropriate remedy.

3. The requirements of the Wool Products Labeling Act are stricter and more precise than those under the Federal Trade Commission Act with respect to the proper labeling of wool products. Since this is also a proceeding under the Wool Products Labeling Act, a fortiori it would not be appropriate to permit respondents to label their product with a name suggestive of wool fiber of which it is not composed.

4. The Commission's action in the *Jacob Siegel* case (43 FTC 256) and the *Country Tweeds* case (Docket No. 5957, Nov. 25, 1953), in permitting continued use of a deceptive name with qualifying or explanatory language, is not applicable to the instant proceeding because of the differences in the facts and names involved, and because those

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cases did not involve violations of the Wool Products Labeling Act.

5. In any event, the name here at issue was in use for so brief a time before it was challenged by the Commission, that it can hardly be said that respondents acquired a valuable property right therein under circumstances of such a bona fide or extenuating nature as to justify jeopardizing enforcement of either the Federal Trade Commission Act or Wool Products Labeling Act by permitting its continuation even on a qualified basis.

ORDER

It is ordered, That the respondents Elliot Knitwear, Inc., and Elliot Import Corp., both corporations, and their officers, and Herman Gross, individually and as an officer of said corporations, and respondents' respective agents, representatives, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of wool products, as "wool products" are defined in and subject to the Wool Products Labeling Act, do forthwith cease and desist from misbranding such products by using the word "Cashmora" or any word of similar import on any stamp, tag or label attached to any wool product that is not made or composed of cashmere; *Provided, however*, That this shall not be construed as prohibiting use of the word "Cashmora" on a stamp, tag or label attached to a wool product composed in substantial part of cashmere if such word is accompanied by a clear and conspicuous statement of the percentage by weight of the cashmere contained therein.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The complaint in this matter charges respondents with violating the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder through various acts of misbranding wool products. All issues except one have been previously disposed of in the hearing examiner's initial decision filed May 17, 1957, which was based upon an agreement containing a consent order to cease and desist. This became the decision of the Commission on June 25, 1957. The unresolved issue is that with respect to the allegation of misbranding arising out of the use of the trade name "Cashmora."

After hearings were held in due course covering the remaining issue, the examiner filed his initial decision as to the balance of the

proceeding on October 18, 1957. He found in substance that respondents' use of the trade name "Cashmora" in labeling or otherwise describing certain of their sweaters constitutes a representation which is false, misleading and deceptive. Holding that respondents were in violation of the Act and Rules and Regulations as charged in this connection, he ordered them to cease and desist from such practices. Respondents have appealed from the initial decision of October 18, 1957.

There is no serious dispute over the facts. Before the importation of the sweater products involved in this proceeding, respondents had been importing sweaters made entirely or substantially of cashmere fiber. This fiber is obtained from the Cashmere goat found in the Himalayan Mountains and is noted for its softness and luxurious feel. In recent years there has been an increase in the demand for sportswear and sweaters generally, and a particular increase in the demand for sweaters made of cashmere fiber. Because of the limitations in supply, this has caused such price increases in cashmere sweaters as to put them out of reach of many potential purchasers. Cashmere sweaters recently sold for about \$30 in the United States. Respondents therefore sought a substitute blend of fibers which would have the desirable characteristics of cashmere but which could be sold at a more reasonable price. Such a blend was developed by Japanese suppliers sometime in 1955. There was no cashmere in the blend. It consisted of 30 percent Angora rabbit and 70 percent lamb's wool. The sweaters made from this blend, with special manufacturing techniques, had the "look and feel of cashmere." They sold to the consumer for about one-third the price of a comparable sweater made of cashmere. It was in connection with the sale of these sweaters that respondents adopted the trade name "Cashmora."

"Cashmora" sweaters were first delivered to retailers in the United States in January, 1956, but they were not sold in substantial quantities until the spring season of 1956. The response of purchasers was overwhelming; orders were completely sold out. The total dollar volume of "Cashmora" sweaters sold in 1956 in the United States was \$750,000. "Cashmora" sweaters ordered for delivery in 1957 were valued at \$3,000,000.

The first national advertisement featuring the name "Cashmora" appeared in the New York Times in August 1956. Later, advertisements were placed in various national publications. Amounts expended for advertising were \$25,000 in 1956 and \$50,000 in 1957.

Respondents, though they concede that "Cashmora" sweaters contain no cashmere, strongly urge that the record is deficient as to proof

(1) that the use of the name "Cashmora" serves as a representation that the product so labeled contains cashmere, and (2) that, as used, the name "Cashmora" is false, misleading and deceptive.

In this matter there has been no testimony by consumers as to the probable impression gained by the public from the trade name "Cashmora." However, it is not necessary that the Commission sample public opinion to determine what meaning is conveyed to the public by particular representations. *E. F. Drew & Co., Inc. v. FTC*, 235, F. 2d 735, 741 (2d Cir. 1956); *Zenith Radio Corp. v. FTC*, 143 F. 2d 29, 31 (7th Cir. 1944). Moreover, the record need not show actual deception; it is sufficient that the representation has the capacity to deceive. *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *E. F. Drew & Co., Inc. v. FTC*, *supra*.

In this instance the name "Cashmora" has been used in the labeling and in the advertising of sweaters which contain no cashmere but have the look and feel of cashmere. Where there is such a close association between a genuine product and one which simulates the genuine, very little is needed for there to be a tendency to mislead the public: in this instance, certainly not more than some small suggestion. Out of the myriad of coined names which respondents might have used, they adopted the name "Cashmora," which differs from "cashmere" only in a substitution of an "o" for the initial "e" and an "a" for the final "e". It is so close to the word "cashmere" that it can easily be mistaken for "cashmere," particularly in the context and in the circumstances in which it is used. Such a name clearly supplies the suggestion that respondents' products contain cashmere. The record demonstrates the heavy consumer preference for sweaters made of cashmere, and it is a fair inference from the record that respondents, by the use of "Cashmora," were trading on the good will which had been built up for the genuine textile.

The immediate and spectacular success in the sale of "Cashmora" sweaters, particularly in contrast to the depression in sales which respondents experienced in their other sweater lines, can be regarded as some indication of the deceptive capacity of the name. The circumstances shown amply support the examiner's findings and conclusions that the name "Cashmora" appearing on the labels of respondents' sweaters constitutes a representation, or may reasonably be deemed to imply to members of the purchasing public, that such sweaters contain cashmere and that, because they contain no cashmere, the representation so made is false, misleading and deceptive.

The other principal issue raised on this appeal has to do with the choice of remedy. Respondents insist that it should not be complete

excision. In support of their position they cite cases such as *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946), and *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933). It is, of course, true that in these decisions the Supreme Court held that trade names are valuable business assets whose destruction should not be ordered "if less drastic means will accomplish the same result." We observe that both holdings involved trade names which were not wholly false but which rather could be taken in either a true or a false sense and hence were susceptible of full clarification through an appended legend. But neither opinion disavowed the well-established principle that flat contradictions of completely false designations are inadequate and inappropriate to correct deception. In *FTC v. Army and Navy Trading Co.*, 88 F. 2d 776, 779-80, 66 App. D.C. 394, 397-8 (1937), the Court said:

* * * in these cases the selection of qualifying words effective to eliminate deception was feasible because the names involved made separate and distinct representations in respect of the origin and characteristics of single products, some of which representations were true and some of which were untrue. Therefore, qualifying words could be chosen which would eliminate any deceptive representations and leave standing the truthful ones alone. Thus in *Federal Trade Commission v. Royal Milling Co.* [288 U.S. 212 (1933)], the qualifying words "Not Grinders of Wheat" indicated definitely that the grain from which the flour is made did not originate with, i.e., was not ground by, the Royal Milling Co., but left standing the representation that the flour was mixed and blended by that company; and in the other three cases, the qualifying words clearly eliminated the deceptive representations of what the characteristics of the products were not, but left standing the true representations as to what the characteristics were. The qualifying words suggested for use in the instant case would not have the effect of wholly eliminating the deception. * * * This single representation [that the major portion of the merchandise offered for sale is in some sense Army and Navy goods] being untrue, it cannot be qualified; it can only be contradicted. The cases urged by the Trading Co. and above discussed, justify qualification of a trade name where qualification is possible; they do not justify contradiction.

With due deference to the *Siegel* enjoinder that trade names should not be destroyed where less drastic means will accomplish the same result, we are mindful that in the same decision the Supreme Court ruled that the question of whether deception in a trade name can be eliminated by qualifying language is primarily for the Commission to determine and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." Because the term "Cashmora" implies, altogether contrary to fact, that the sweaters so marked are composed of cashmere wool, we hold that it cannot be cured by qualification. Respondents began to use the name only a few months before the Commission's

investigator first advised them that the use of the term "Cashmora" to describe a noncashmere product was of doubtful legality. Thus they are hardly in a position to contend that this trade name has acquired value as a commercial symbol through long use. What is more, "long use of a misleading brand can vest no right in the user." *El Moro Cigar Co. v. FTC*, 107 F. 2d 429, 431 (4th Cir. 1939); see also *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 79 (1934). There is nothing in the *Siegel* decision to the contrary, and in view of the judicial precedents cited our holding in the matter of *Country Tweeds, Inc.*, Docket No. 5957 (1953), cannot be taken as dispositive of the instant point.

An additional question raised on this appeal is whether the hearing examiner erred in suggesting that even if an order permitting a qualified use of a deceptive trade name would be appropriate in the disposition of a case instituted solely under the Federal Trade Commission Act, such an order would not be appropriate in a case brought under the Wool Products Labeling Act. He apparently had in mind the type of case where, as here, the deceptive name representing a certain fiber is used on a product containing none of such fiber, and in which the question is whether the continued use of the name of such product should be permitted with appropriate explanatory language. In our view of this case, elimination of the potential deception found in the respondents' use of the name "Cashmora" on products containing no cashmere would require complete excision in regard to such use even under the Federal Trade Commission Act. Thus, it is not necessary to rule on the existence of possible differences in the discretion the Commission may exercise in its selection of appropriate remedies to correct deception under these acts, and we express no opinion on this subject. To the extent that the initial decision may imply that there is some difference, we do not adopt it as our own.

The order contained in the initial decision is inappropriate, we believe, in several respects.

For one thing, Samuel I. Gross, a respondent in this proceeding named individually and as a copartner in the Elliot Glove Co., is improperly included in the order. The record shows that this company is a partnership which distributes wool and other types of gloves to retail and other establishments and that it does not handle sweaters. It further appears that the trade name "Cashmora" was used only with reference to sweaters. Since the Elliot Glove Co. did not deal in sweaters, the record will not support a finding that Samuel I. Gross, shown to be connected only with that company,

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has violated the act as charged in connection with the use of "Cashmora."

Moreover, the complaint does not allege nor did the hearing examiner find that respondents' use of the word "Cashmora" was deceptive except as used in labeling wool products containing no cashmere. It is not believed, therefore, that an order in this matter should prohibit the use of "Cashmora" on wool products composed in part of cashmere, if it is a substantial part, although this apparently would be the result under the examiner's order. On the other hand, an unqualified use of "Cashmora" on wool products containing cashmere but not composed wholly of cashmere might lead to deception of the public since this would suggest a product made of 100 percent cashmere. Accordingly, a proper order, while not prohibiting the use of "Cashmora" on a wool product composed in substantial part of cashmere, should provide that, if so used, there be an appropriate disclosure of the percentage of cashmere fiber contained in such product.

The order contained in the initial decision will therefore be modified to conform to the views herein expressed.

Respondents' appeal is denied.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the above-named respondents from the initial decision of the hearing examiner filed October 18, 1957, and upon the briefs and oral argument in support of and in opposition to the appeal; and the Commission having rendered its decision denying the respondents' appeal and directing modification of the said initial decision in conformity with the Commission's opinion:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That the respondents Elliot Knitwear, Inc., and Elliot Import Corp., both corporations, and their officers, and Herman Gross, individually and as an officer of said corporations, and respondents' respective agents, representatives, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of wool products, as "wool products" are defined in and subject to the Wool Products Labeling Act, do forthwith cease and desist from misbranding such

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products by using the word "Cashmora" or any word of similar import on any stamp, tag, or label attached to any wool product that is not made or composed of cashmere; *Provided, however,* That this shall not be construed as prohibiting use of the word "Cashmora" on a stamp, tag or label attached to a wool product composed in substantial part of cashmere if such word is accompanied by a clear and conspicuous statement of the percentage by weight of the cashmere contained therein.

It is further ordered, That the respondents, Elliot Knitwear, Inc., and Elliot Import Corp., both corporations, and Herman Gross, individually and as an officer of said corporations, 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 the order to cease and desist.

It is further ordered, That the said initial decision, as modified, is hereby adopted as the decision, of the Commission.

IN THE MATTER OF
MEYRICH TEXTILE CO.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket 6985. Complaint, Dec. 13, 1957—Decision, Apr. 26, 1958

Consent order requiring a manufacturer of wool products in New York City to cease violating the Wool Products Labeling Act by labeling as "100% Wool Except of Ornamentation", interlining materials which consisted of reprocessed wool or reprocessed wool and nonwoolen fibers; by failing to label certain wool products as required; and by misrepresenting wool products in sales invoices, shipping memoranda, and letters to garment manufacturers as "100% Stitched Wool" and "100% Wool."

Garland S. Ferguson, Esq., for the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued December 13, 1957, charges the respondent above named with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and of the rules and regulations promulgated under authority of the said Wool Products Labeling Act, in connection with the introduction or manufacture for introduction into commerce, sale, offering for sale, transportation and distribution, and delivery for shipment in commerce of interlinings or other wool products in commerce, as "commerce" is defined in said Acts.

After the issuance of said complaint respondent, on January 29, 1958, entered into an agreement for a consent order with counsel in support of the complaint, disposing of all of the issues in this proceeding, which agreement was duly approved by the director and assistant director of the Bureau of Litigation of the Federal Trade Commission. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

By the terms of said agreement, the respondent admitted all of the jurisdictional allegations of the complaint and agreed that the record herein may be taken as though the Commission had made findings of jurisdictional facts in accordance with such allegations. By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission,