

Decision

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, Oct. 24, 1961*

Order—following remand of a review proceeding by the Court of Appeals for the Second Circuit for additional evidence to support a finding that “the label as a whole is deceptive”**—requiring New York City distributors of wool products, including sweaters, to cease violating the Wool Products Labeling Act by using the word “Cashmora” on labels, etc., attached to any wool product containing no cashmere but permitting its use on woolens containing a substantial amount of cashmere if accompanied by clear disclosure of the percentage of cashmere content.

Messrs. S. F. House and Charles W. O’Connell supporting the complaint.

Golenbock & Barell, by Mr. Martin C. Barell, of New York, N.Y., for respondents.

SUPPLEMENTAL INITIAL DECISION ON REMAND OF PROCEEDING BEFORE
JOHN LEWIS, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

This proceeding is before the hearing examiner for decision on a remand from the United States Court of Appeals, for the Second Circuit. The complaint herein was issued September 17, 1956, and charged respondents with various acts of misbranding of wool products in violation of the Wool Products Labeling Act of 1939, the Rules and Regulations promulgated thereunder and the Federal Trade Commission Act. All of the charges, except one, were disposed of by an agreement containing a consent order which was embodied in an initial decision of this hearing examiner, filed May 17, 1957, said decision becoming the decision of the Commission by order issued June 25, 1957. The remaining charge, involving respondents’ use of the word “Cashmora” on tags, stamps or labels attached to certain of their products, was the subject of hearings at which evidence was offered in support of and in opposition to the allegations of the complaint. An initial decision disposing of this charge was filed by the examiner on October 17, 1957, in which respondents were found to have violated the law as charged and were ordered to cease and desist therefrom.

*Amended Sept. 8, 1960. Charges in the original complaint were disposed of by two separate orders—53 F.T.C. 1185 and 54 F.T.C. 1398.

**266 F. 2d 787, 6 S. & D. 566.

Said initial decision, with certain modifications, was adopted as the decision of the Commission by order issued April 25, 1958.

Following the filing of a petition by respondents to review and set aside the order of the Commission, the Court of Appeals for the Second Circuit on May 6, 1959, remanded the proceeding to the Commission for further evidence as to whether respondents' labels containing the name "Cashmora" were deceptive, and as to the choice of the remedy to be applied in the event deception was established. The proceeding was thereafter reopened and remanded to the undersigned hearing examiner by order of the Commission issued November 9, 1959, to receive additional evidence on these two questions. Prior to the taking of additional testimony, counsel supporting the complaint moved that the complaint be amended, so as to also charge respondents with a violation of Rule 25 of the Rules and Regulations issued under the Wool Products Labeling Act, through the use of the word "Cashmora." Said motion was granted, without objection from respondents, by order of the undersigned dated September 8, 1960. Thereafter additional evidence in support of the complaint was offered by counsel supporting the complaint at hearings held in New York, New York and Washington, D.C., on September 15, 1960, and October 18, 1960, respectively. Respondents were represented by counsel at the hearing held in New York, New York, and were afforded full opportunity to be heard and to examine and cross-examine witnesses. However, they elected not to be present or represented at the hearing held in Washington, D.C., on October 18, 1960, although given due notice of said hearing. No additional evidence in opposition to the complaint was offered by respondents on the remand of this proceeding.

Proposed findings of fact and conclusions of law were filed by counsel supporting the complaint, supplementing those originally filed herein. Respondents filed a memorandum in support of their position; in lieu of proposed findings and conclusions, supplementing the memoranda previously filed on their behalf herein. Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

This initial decision is intended to supplement that heretofore filed the hearing examiner on October 18, 1957. The basic facts as to the nature of respondents' business, their engagement in interstate commerce and competition with others, and their use of the name "Cashmora" are set forth in said initial decision, and will not be referred to further herein, except as may be necessary to an understanding and resolution of the issues which were remanded.

Upon the supplemented record in this proceeding, the hearing examiner again finds that this proceeding is in the interest of the public, and based on such record, including his observation of the witnesses, makes the following:

SUPPLEMENTAL FINDINGS OF FACT

A. The Issues

1. As heretofore found, respondents¹ use the name "Cashmora" in connection with the sale of sweaters manufactured in Japan in accordance with their specifications. Such name is used on labels which are sewn into the back of the necks of said sweaters, on tags containing washing instructions which are attached to the sweaters, on the cardboard boxes in which the sweaters are packaged, and in advertising such sweaters in newspapers and magazines. On labels used by respondents prior to the issuance of the complaint the word "Cashmora" appeared in large, script-like letters on the upper portion of the label, and the lower portion of the label contained a statement of fiber content. The label read:

Full Fashioned
CASHMORA
By Elliot
30% Angora Rabbit² 70% Lambs Wool
Imported Hand Finished
WPL 7709

Sometime after the issuance of the complaint in this proceeding, the label was modified by adding the words "No Cashmere" below the statement of fiber content. As thus modified, the lower part of the label reads:

Hand 30% Angora Rabbit
Finished 70% Lambs Wool
WPL 12371 No Cashmere

The word "Cashmora" continues to be used on the upper part of the label in large, script-letters, considerably larger and more prominent than the statement of fiber content and the words "No Cashmere".

The cardboard tags attached to the sweaters, which include washing instructions and are referred to in the trade as "hang tags", contain the following legend on the back thereof:

Fine Imported
Cashmere
Cashmora
Lambs Wool

¹ Reference to respondents herein does not include Samuel I. Gross, individually and as a co-partner in Elliot Glove Company, who was heretofore dismissed from the proceeding by the Commission.

² An earlier form of the label did not use the word "Rabbit" following "30% Angora".

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The version of the tags which was in use up to the time of the issuance of the complaint contained the following statement on the front thereof:

Elliot

Cashmora

The boxes in which the sweaters are packed contain the name "Cashmora", without any statement of fiber content.

2. In his earlier initial decision, the examiner found that the name "Cashmora", used in connection with respondents' sweaters, would give the impression to members of the purchasing public that such sweaters contained cashmere and that the name was, therefore, false, misleading and deceptive since the sweaters admittedly contain no cashmere. This finding was based not merely on the label itself, but on the context of its use, including admissions made by respondents' own witnesses. Thus, the evidence disclosed that there was a heavy consumer demand and preference for cashmere sweaters, that because of the price rise in such sweaters respondents sought to develop (in cooperation with its Japanese mill supplier) a less expensive fur-blend sweater which had the "look and feel of cashmere", that the sweaters which were developed enjoyed a rapid and phenomenal increase in sales compared to other fur blends sold by respondents, that such increase was attributed by respondent Herman Gross to the fact that the sweaters in question met the "poor man's need for a cashmere type sweater", and that in choosing the name Cashmora for their sweaters respondents intended to associate their product with cashmere and the qualities of the genuine product, albeit not to imply that they actually contained cashmere fiber. While there was no direct evidence of consumer deception, the examiner held that this was unnecessary since the basic fact to be established was the tendency and capacity of the name to deceive, rather than actual deception, and that this could be determined without consumer-type testimony or other direct evidence of deception.

3. The court of appeals, applying a concept which is generally associated with the antitrust or antimonopoly field of jurisprudence, held that the Commission had erroneously found the name Cashmora to be "deceptive *per se*". It stated that while "[u]nder ordinary circumstances, the word 'Cashmora' without more might well be considered deceptive *per se* * * * this hardly can be said of the label in the present case" in view of the fact that it contains a statement of "content specification". The court cited, in this connection, the holding of the Commission in the *Jacob Siegel* case (43 FTC 256), in which it had found that the deceptive character of the coined name "Alpacuna" could be cured by a specification of fiber content on the label, and concluded that the fiber specification on the label here involved

"precludes the Commission from holding the label here used deceptive *per se*."

Actually, the finding that the label here involved is deceptive was not a "per se" finding, i.e., one based solely on the label itself. As indicated above, there was additional evidence in the record on which this finding was based. However, for present purposes the examiner will assume that the court took such evidence into consideration in its ultimate holding that "in view of the specification of the actual contents of the product", additional evidence was required in order to support a finding that "the label as a whole is deceptive". Presumably the additional evidence envisioned by the court is evidence of a more direct nature than that in the record, which would establish that the name is deceptive despite the specification of fiber content on the label.

4. Upon the remand of the proceeding, further evidence purporting to show the deceptive character of the name "Cashmora" was adduced by counsel supporting the complaint. The additional evidence consisted of (a) testimony by ten buyers, merchandise managers and other representatives of department stores and apparel and sportswear specialty shops in New York, New York,³ Union City and Elizabeth, New Jersey, and Washington, D.C., (b) testimony by a consumer relations counselor and (c) a survey conducted among female college students at two universities in the Washington, D.C., metropolitan area. No further evidence was offered on behalf of respondents. The issue now presented is whether the additional evidence adduced by counsel supporting the complaint is sufficient, together with that already in the record, to establish that respondents' use of the name "Cashmora" is false, misleading and deceptive, as charged in the complaint.

5. A further issue presented relates to the proper remedy to be utilized in the event the name "Cashmora" is found to be deceptive. In the initial phase of this proceeding respondents had urged that if the word "Cashmora" was found to be deceptive, there should be no absolute prohibition on its use, but that they should be permitted to use it with appropriate qualification or explanation. In his original decision herein, the examiner found that the name "Cashmora" was so inherently deceptive that its further use should not be permitted even on a qualified basis, and that the only appropriate remedy was that of complete excision. The Commission concurred in this conclusion, and adopted the examiner's proposed order to this effect, with slight modification. The court of appeals, in its opinion, indicated that "the addition to the label of the phrase 'contains no cashmere' might

³ It was stipulated that three additional store representatives from New York City would testify substantially as did those who testified from that area.

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well be a permissible and sufficient remedy, if the Commission finds that the label as presently composed is in fact deceptive." However, in view of the fact that further evidence adduced on the issue of deception might have a bearing on the choice of a remedy, the court elected to make no "final ruling" on this issue.

6. It is the position of counsel supporting the complaint that the additional evidence adduced by him, particularly that of the buyers and merchandise managers of mercantile establishments and the consumer relations counselor, not only establishes the deceptive character of the name, but also supports the conclusion that the remedy of excision is the only appropriate remedy in this case. No further evidence on this issue was offered by respondents. The issue thus presented is whether the additional evidence adduced by counsel supporting the complaint is sufficient, together with that already in the record, to require an absolute prohibition on the use of the name "Cashmora", if it is found to be deceptive, or whether continued use of the name, with appropriate qualification, should be permitted.

B. The Issue of Deception

The Expert Testimony

1. As above indicated, upon the remand of this proceeding counsel supporting the complaint offered the testimony of a number of buyers, merchandise managers and other persons experienced in the buying habits of consumers, with particular reference to the manner in which members of the buying public read labels and are familiar with the fiber contents of articles of apparel, including sweaters. The testimony given by these witnesses was based on an examination of two of respondents' Cashmora sweaters, one containing the name Cashmora and a statement of fiber content on the label (CX 2), and the other containing the additional words "No Cashmere", below the statement of fiber content (RX 25). The rule of separation of witnesses was invoked, and none of the witnesses was permitted to hear the testimony of any of the other witnesses. The store witnesses represented a broad cross-section of mercantile establishments, catering to persons in the upper income bracket as well as persons of modest circumstances. The consumer relations counselor was a person with training and experience in consumer psychology, who had written numerous articles on the subject, had worked with consumer groups, and had been retained by business organizations to advise on consumer attitudes.

2. It was the unanimous opinion of these witnesses that most consumers would receive the impression that respondents' sweaters were made of, or contained, cashmere. According to their testimony most

consumers do not stop to read the fine print on labels and, because of the similarity in appearance of respondents' sweaters to cashmere sweaters and the close resemblance of the name "Cashmora" to the word cashmere, they would be led to believe that the sweaters were cashmere or contained some cashmere fiber. In fact, according to some of these witnesses, there would be members of the purchasing public who would actually mistake the word "Cashmora" for "Cashmere" upon a quick look and without the use of their reading glasses. One of the so-called experts testified that she herself would mistake "Cashmora" for "Cashmere" without her glasses (R. 165). Another testified that upon being shown one of the sweaters in the store by a Commission representative (whom she apparently mistook for a salesman) she advised him that, "I am not interested in another cashmere sweater." She explained the reason for her confusion as follows (R. 471): "When I glanced, I saw 'Cash' and I didn't go any further, at a quick glance."⁴

3. Aside from the fact that most or many consumers do not bother to read labels carefully, even those who do read the statement of fiber content will not necessarily have the initial impression of a number of them, that the sweaters contain or are made of cashmere, rectified. The testimony of the expert witnesses establishes that there are many consumers who do not know what cashmere is. They may know that it is a fine, soft, desirable fiber, but they do not know that it comes from the fiber of the Kashmir goat or what it consists of. The mere fact that the labels contain the statement of fiber content, "30% Angora Rabbit, 70% Lambs Wool", would not necessarily clear up the confusion resulting from the use of the name "Cashmora" and from the sweaters' similarity in appearance to genuine cashmere sweaters. Several of the witnesses testified that with the turnover in store personnel, some of the sales clerks would themselves be confused, and would be unable to give a satisfactory explanation to customers who might ask questions about the fiber content after reading the label. In fact, there was testimony that the stock clerks might mistakenly place the sweaters in with cashmere sweaters, and they would be sold as such (R. 473).

4. Even the words "No Cashmere", which respondents placed on the label following the issuance of the complaint in this proceeding, would not result in clearing up the confusion inherent in respondents' use of the name "Cashmora", according to most of the witnesses. In the first place, many consumers would fail to read the entire label, so as to take note of the words "No Cashmere". Furthermore, those

⁴ After the witness' mistake was explained to her, she showed the sweater to two of her employees to obtain their reaction. Both of them likewise thought the sweater was cashmere.

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that did would, in a number of instances, fail to observe the word "No". According to several of the witnesses, the expression "No Cashmere" actually increased the confusion. As one of them stated, "the more you add the word 'cashmere' the more confusing it is" (R. 475). Appearing immediately below "30% Angora Rabbit" and "70% Lambs Fool", the impression which some members of the public would gain was that the label read "Angora Rabbit", "Lambs Wool" and "Cashmere", as indicative of the fiber content. The reason why many people would be apt to overlook the word "No", as explained by several of the witnesses, is that the average person in reading a label expects to find an affirmative statement of what the product *is* or what it *does* contain, not a negative statement of what it is *not* or what it does *not* contain. "Positive identification", as one of the witnesses stated, "is far more important than negative identification" (R. 337).

5. A number of the witnesses testified that the impression the sweaters were made of cashmere or contained cashmere was enhanced by the manner in which the labels were worded and also by the wording of the so-called hang tags. Thus, they stated that the labels resembled those used on more expensive sweaters, particularly cashmere sweaters, which typically contain the statement "Full Fashioned", and that the printing was more elaborate than that usually found on sweaters in that price range. They also referred to the statement on the hang tag "Fine Imported Cashmere", in close proximity to "Cashmora" and "Lambswool", as implying that the sweaters were made of cashmere or were a combination of cashmere and some other fiber, possibly lambs wool.

6. Respondents have placed considerable reliance on the fact that their sweaters sell in a much lower price range than genuine cashmere sweaters, as negating the possibility of confusion. As explained by respondent Herman Gross in his initial testimony in this proceeding (R. 56):

[T]he price is so different that it would be preposterous for anyone to think they were getting cashmere. You just don't get cashmere sweaters at this price [\$10.95].

However, according to the plausible and credited testimony of the expert witnesses called in support of the complaint there are cheaper-grade cashmere sweaters which sell at prices comparable to those of respondents, and many of the stores sell their more expensive sweaters at substantial price reductions during periodic sales and clearances. Furthermore, according to the testimony of the same witness, a significant part of the public is not sufficiently sophisticated to be able to distinguish between fabrics on the basis of price range and is, more-

over, always hopeful that they will be able to get a bargain. Moreover, the fact that better-grade cashmeres generally sell in a higher price bracket might simply lead those who are aware of such price differences to believe that respondents' sweaters are part cashmere, rather than pure cashmere.

7. Respondents suggest that there is some possible infirmity in the testimony of the store representatives who testified in support of the complaint because "these witnesses came from stores which did not sell Cashmora sweaters." However, there was no showing that the stores where they were employed had been adversely affected by competition with respondents, nor is there any other evidence from which bias on their part may be inferred. Their testimony indicated a general familiarity with consumer buying habits and practices in the reading of labels, even though they themselves had not previously handled respondents' sweaters, and was buttressed by their own personal reactions in observing respondents' sweaters and labels.

Respondents also refer to the stipulation in the original record, to the effect that if representatives of three of the stores which handled respondents' sweaters had been called, they would have testified that they "would not have purchased the sweaters if they believed the name in any manner deceptive", and that no complaints had been received from customers (R. 128). This argument has already been discussed in the examiner's earlier decision. However, it may be noted here that the broadly-worded stipulation concerning the beliefs of these persons, does not require that the detailed, specific and convincing testimony of the witnesses called in support of the complaint be disregarded. Although afforded an opportunity to present testimony of a similar nature after the court of appeals' remand had brought the issues more sharply into focus, respondents elected not to do so.

The Survey

8. Any doubt which may exist as to the reliability of the testimony of the expert witnesses called in support of the complaint, that a significant portion of the public would be led to believe that respondents' sweaters are made of or contain cashmere, is set at rest by the survey in evidence of the actual reactions of persons to whom respondents' sweaters were exhibited. The survey was conducted under the auspices of a professor in the Department of Psychology at the University of Maryland, who had previously conducted other consumer surveys. The reactions to respondents' sweaters and labels were obtained from 60 female students, selected at random and divided equally between the University of Maryland and American University. The students were interviewed by a graduate student and a senior student, respectively, at each university, neither of whom was advised as to

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the purpose of the survey. The students were shown one of respondents' sweaters containing a label similar to those in evidence, and were asked various questions to elicit their reactions. The labels on the sweaters all contained the name Cashmora, a statement of the fiber content and also the additional legend "No Cashmere", in letters similar in size to the statement of fiber content.

9. In response to the general questions as to (1) what they thought of the sweater and (2) whether they would be interested in buying it, 12 per cent and 15 per cent, respectively, of the students referred to the fact that the sweater contained cashmere, in expressing their opinion of the sweater and whether they would be interested in buying one. Upon being asked the further specific question as to what kind of material they thought it was made from, 22 percent said that they thought it was made of cashmere. While the students were not specifically asked whether their answers were based on the wording of the label or the appearance of the sweater, approximately 70 per cent of those who thought the sweaters were cashmere referred to the label as the source of their information. These students represented 13 per cent of the total number of students interviewed.

10. In evaluating the results of the survey, it may be noted that the students interviewed represented a somewhat better educated, and more sophisticated, group of women than would be apt to be found among average store customers. It is significant, in this connection, that a much higher percentage of the girls interviewed at the University of Maryland were under the impression that the sweaters contained cashmere than was the case at American University.⁵ The University of Maryland is a state university and its students represent a broad cross section of the various areas of the state, both rural and urban. American University, on the other hand, is a privately-endowed institution, and a substantial part of its student body comes from the Washington, D.C. metropolitan area and from the cosmopolitan areas of New York City and northern New Jersey. The University of Maryland student body is obviously closer in composition to the general population of women than is that at American University. It is also to be noted that the circumstances under which both groups of women examined the sweaters, viz, in the relaxed atmosphere of their dormitory rooms, were more conducive to a careful examination of the sweaters than would be the case in the hustle and bustle of a department store.

11. There is no doubt as to the basic reliability of the survey offered by counsel supporting the complaint, and as to the fact that it establishes that respondents' labels, when viewed as a whole, are deceptive,

⁵ Thirty-seven percent of the students interviewed at the University of Maryland thought the sweaters were cashmere, as compared to 7 percent at American University.

even though they contain a statement of fiber content and a disclaimer as to any cashmere content. There is every reason to believe that if a similar survey were conducted among a typical group of consumers, including "the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions" (*Positive Products Co. v. FTC*, 132 F. 2d 165, 167) an even higher percentage of those interviewed would perceive respondents' sweaters as containing cashmere.

Respondents argue that the survey offered by counsel supporting the complaint is subject to objection as being hearsay. Aside from the fact that no objection to its introduction into evidence was made by respondents, it is well established that such surveys are admissible to establish the public's reaction to, or impressions received from, labels or advertising (*Arrow Metal Products Corp. v. FTC*, 249 F. 2d 83, CA 3, 1957). Respondents also suggest that the numerous letters which they received from satisfied customers constitute more reliable evidence than a survey. Such letters, as indicated in the examiner's earlier decision herein, are irrelevant. The fact that many of respondents' customers are satisfied or have not complained does not establish what impression they received from the labels at the time of purchase. Furthermore, as indicated in the examiner's earlier decision, it is not necessary to establish that all or even a majority of consumers were or would be deceived. If there are "some" members of the public who are likely to be deceived, the statutory test has been met (*Prima Products, Inc. v. FTC*, 209 F. 2d 405, 409). The survey evidence certainly establishes that a portion of the public, considerably in excess of de minimis quantities, is likely to be deceived.

Concluding Finding

12. The evidence in the record prior to the remand of this proceeding established that respondents had deliberately set about to associate their product with cashmere and had scored an immediate and spectacular success in the sale thereof. It was inferred and found that this success was due, in significant part, to the fact that the public had accepted the more obvious connotation of the name chosen by respondents, viz, that their product was made of or contained cashmere, rather than the more subtle one which respondents' claimed to have intended, viz, merely that their product "has a cashmere like feeling" (R. 139). Although there was no direct evidence as to what impression respondents' use of the name Cashmora would have on the public, it was inferred and found from the label and the context of its use that it would be apt to create the impression that the product was made of or contained cashmere.

The matter need no longer rest on inference or the Commission's expertise. It is now unmistakably clear, from the evidence developed since the remand of the proceeding, that a significant portion of the purchasing public would be apt to believe from respondents' labels as a whole, in the context of their use, that the sweaters to which they are affixed are made of or contain cashmere. This impression would exist despite the fact that the labels contain a statement of fiber, and despite the fact that labels used since the issuance of the complaint contain a disclaimer of cashmere content. It is accordingly concluded and found that respondents' labels as a whole are false, misleading and deceptive in that respondents' sweaters labeled Cashmora are not made of and do not contain any cashmere fiber.

C. The Appropriate Remedy

1. Respondents' labels containing the name Cashmora having been found to be deceptive, the next question presented concerns the appropriate remedy to be adopted. Reduced to its essence, the issue presented is whether complete excision of the name should be ordered or whether respondents should be permitted to use it if accompanied by qualifying or explanatory language. Respondents, of course, urge that they should be permitted to continue using the name on their labels provided they add qualifying language such as "contains no cashmere", which the court of appeals indicated "might well be a permissible and sufficient remedy".

2. Before considering the suggestion made by respondents, it should be noted that the court of appeals, as previously noted, made "no final holding" on this issue. Its statement that the addition of the language in question "might well be a permissible * * * remedy" was made on the basis of "the present record", and the court recognized that the "further evidence adduced [on the remand] may have a bearing on the choice of remedy". The examiner is, of course, aware of the principle referred to by the court of appeals, that complete excision of a trade name "should not be ordered if less drastic means will accomplish the same result" (*FTC v. Royal Milling Co.*, 288 U.S. 212, 217). However, where there is a reasonable likelihood that the name will continue to deceive the public, even though accompanied by explanatory language, it is quite clear that private property rights must give way to the public interest.

3. On the record now before him the examiner is convinced and finds that a complete prohibition on the use of the name Cashmora on products which do not contain cashmere is the only proper remedy to be adopted. The testimony and evidence discussed above, which establish the deceptive character and tendencies inherent in the name

Cashmora, also establish that a significant degree of deception will remain even with the addition of qualifying or explanatory language on the label. Thus, as already noted, the very labels which gave rise to the false impression, that the sweaters to which they are affixed contain cashmere, include both a statement of fiber content and a disclaimer of cashmere content. It is true that the statement of disclaimer on the labels in question reads, "No Cashmere", rather than "Contains No Cashmere" (as suggested by the court of appeals). However, on the basis of the purport of the testimony regarding the casual manner in which the public reads labels and the lack of effectiveness of disclaimer statements, and the fact that in some instances the witnesses' testimony (in response to questions addressed to them on cross-examination by counsel for respondents) specifically included the statement "Contains No Cashmere", it is clear that the latter type of disclaimer would be no more effective in eliminating confusion than is "No Cashmere".

4. Respondents suggest that the testimony and evidence offered in support of the complaint not be accepted because it is at variance with the decision of the Supreme Court in that *Jacob Siegel* case and with the Commission's decision in the *Country Tweeds* case, in which continued use of the names Alpacuna and Kashmoor, respectively, was permitted with additional explanatory language. There is no necessary conflict between the two situations since they are not in pari materia. The witnesses in the present case were testifying to matters of fact lying within their own personal knowledge and experience, whereas the form of the orders in the *Jacob Siegel* and *Country Tweeds* cases involved policy determinations of a judicial or quasi-judicial nature based on the records in those cases.

5. The fact that the Commission (not the Supreme Court as stated by respondents) permitted the qualified use of the name Alpacuna in the *Jacob Siegel* case (43 FTC 256) ⁶ and the name Kashmoor in the *Country Tweeds* case (50 FTC 470), does not constitute a holding that excision is not a proper remedy, as a matter of law, in cases involving coined names of a deceptive character. Overlooking the fact that the orders in the two cases relied on by respondents actually differed from one another (the order in *Jacob Siegel* requiring a statement of fiber content and that in *Country Tweeds* providing for a statement of disclaimer), it does not follow that either remedy is

⁶ As noted in the examiner's earlier decision, the Supreme Court in the *Jacob Siegel* case (327 U.S. 608, 613) did "not reach the question whether the Commission would be warranted in holding that no qualifying language would eliminate the deception" since the Commission had not considered the feasibility of such a remedy. The case was accordingly remanded for such purpose. The Court did, however, emphasize the "wide latitude for judgment" in the fashioning of a remedy which the Commission had as an "expert body", and that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist" (at 612).

appropriate here. In the light of the fact that the label in the instant case actually contained both types of statement, but has nevertheless been found to give rise to the impression that the sweaters contain cashmere, it seems evident that the orders adopted in those cases are not appropriate here.

6. While, as above noted, it is not proper to compare the factual testimony of the witnesses in the present case with the policy conclusions reached by the Commission in the *Jacob Siegel* and *Country Tweeds* cases, the testimony of the witnesses here actually affords a basis for distinguishing this case from the Commission's earlier holdings. During the course of the cross-examination of these witnesses, in which counsel for respondents sought to establish that their testimony was at odds with the holdings in the other cases, a number of them expressed the opinion that the names Alpacuna and Kashmoor are more susceptible of explanation than is Cashmora. In the case of the name Alpacuna, the garments actually contained 50 percent Alpaca, and the deceptive part of the name was the latter part. Several of the witnesses indicated that it was the initial part of the name, which would have the greater impact on the public, and that there would be fewer persons who would associate the last part of the name with vicuna. They were therefore of the opinion that the name was more susceptible of explanation than Cashmora, where the primary emphasis was on "Cash", implying cashmere of which there was none in the product. Similarly there was testimony that, graphically, Kashmoor resembles Kashmir, the home of the goat from which the fiber comes, but that the public is not generally familiar with this spelling and would not associate it with the word cashmere as readily as they would the word Cashmora.

Respondents argue that the explanation of these witnesses should not be accepted because the court of appeals in its decision here "knew no distinction as to the degree of deceptiveness". The fact that the testimony reveals a difference in the degree of deceptiveness involves a matter of fact, not a matter of law, and there is no necessary conflict between such testimony and the court's holding. As already indicated, the court of appeals actually made no "final holding". The opinion it expressed was based on the record before it, which has since been considerably amplified. That the testimony of the so-called expert witnesses, a number of whom were subjected to strenuous cross-examination, is worthy of credit is clear not only from the nature and quality of their testimony (including their demeanor in testifying), but from the corroboration which it received from the survey evidence. As previously noted, the young ladies involved in the survey were shown sweaters containing both a statement of fiber content and a

disclaimer of cashmere content. Yet a substantial number of them thought the sweaters were made of or contained cashmere. Several of the experts were themselves confused by the labels and received the initial impression that the sweaters were cashmere.

7. Respondents' repeated emphasis on the decisions in the *Jacob Siegel* and *Country Tweeds* cases is bottomed on the basic assumption that the principle of stare decisis is applicable in administrative proceedings. However, it is now generally accepted that administrative agencies are not bound by precedent in the same sense as are courts of law, but that they may exercise discretion and ingenuity in working out a solution in each new case on the basis of the facts of that case and in the light of their accumulated experience.⁷ If the Commission had strictly followed the principle of stare decisis it would not have permitted the qualified use of the name Kashmoor in the *Country Tweeds* case, since it had 15 years earlier ordered an absolute prohibition on the use of the identical name in *Cohen Bros. Corp.*, 27 FTC 923. The Commission having made an allowable judgment with respect to remedy in the light of the then existing situation in *Country Tweeds*, may now choose a different remedy in a case involving a somewhat different name if it feels it necessary to do so on the basis of the facts before it, and in order to protect the public interest.

8. While the record clearly establishes that it is not in the public interest to permit continued use of the present label, despite the fact that it includes a statement of fiber content and the disclaimer "No Cashmere", respondents suggest that if the disclaimer statement appeared in larger letters it might dispel the confusion presently attached to the Cashmora label. Counsel for respondents suggested this same possibility during the cross-examination of a number of the witnesses who testified as to the deceptive impression conveyed by the label. While several of the witnesses indicated that it would help if the words "No Cashmere" or a similar phrase appeared more prominently on the label, it was the consensus of the testimony that an appreciable degree of confusion would still remain. This was due to the fact that a significant part of the public does not read labels carefully. Also, in view of the fact that the public is not accustomed to seeing negative statements on a label, there would be consumers who, in reading the label hurriedly, would actually read it as "Cashmora-Cashmere". There was also testimony that a single word, such as "Cashmora", has a greater impact on the public mind than a phrase or group of words, particularly where they contain a negative statement.

9. To the extent that the witnesses indicated that the addition of

⁷ *Shawmut Association v. SEC*, 146 F. 2d 791 (CA 1, 1945), *Kentucky Broadcasting Corp. v. FCC*, 174 F. 2d 38 (DC Cir, 1949), and *FCC v. WOKO, Inc.*, 329 U.S. 223. See generally Cooper, *Administrative Agencies and the Courts*, 238-241 (1951).

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the words "No Cashmere" in larger letters might be helpful, they generally did so in the context that it was an improvement over the existing label if it were imperative that the name Cashmora be retained. However, they indicated that it would be preferable to cease using such coined names, since they add to the public's confusion and misunderstanding about the diverse fibers on the market, and help destroy its confidence in labels. As stated by one of them (R. 264-265):

Well, I think that there are millions of these names around and I think they are very confusing. In my opinion these names are picked out with a purpose. We have a lot of names like "Vicunara" and "Vicusela", and a play on the names of expensive fibers, things which I think tend to confuse the public greatly. * * * I do believe that this kind of stuff just confuses the issue tremendously, and I think it then, perhaps, undermines the public's confidence in all kinds of labels.

While the court of appeals expressed doubt as to the application of the contradiction doctrine (as referred to in such cases as *FTC v. Algoma Lumber Co.*, 291 U.S. 67; and *FTC v. Army & Navy Trading Co.*, 88 F. 2d 776), in view of the fact that respondents here were not actually using the precise name cashmere, it may be noted that several of the witnesses indicated that the word Cashmora was so close to cashmere that to permit its use with the statement "No Cashmere" actually involved a contradiction in terms. Thus, one of them testified (R. 292):

It is a very ambiguous and contradictory thing, to begin with, with a "no cashmere" and the name "Cashmora", to my mind.

As expressed by another (R. 185):

Well, the name "Cashmora" to me looks like cashmere. Actually, you are using the name inferring anyway, that it is cashmere. You are trying to get around it by putting "no cashmere" on the label. It hasn't [got] it. You are going around the bush on it.

Respondents suggest that this testimony should be disregarded since it conflicts with the opinion of the court of appeals. However, the examiner doubts that the observation by the court of appeals, based on the record then before it, was intended to take precedence over testimony reflecting the actual reactions and factual opinions of persons whose livelihood depends on their familiarity with the public's buying habits and attitudes.

Concluding Finding

10. It is the conclusion and finding of the examiner, based on the record as a whole, that the public interest requires an absolute prohibition on the use of the name Cashmora on sweaters not containing a substantial portion of cashmere fiber. The name, as heretofore found, is basically deceptive, and no method has been suggested by which

such deception can be eliminated to an extent that the public interest will not be materially jeopardized. Aside from all other considerations, and to the extent that long, unchallenged usage may sometimes justify some accommodation of the Commission's basic obligation to protect the public, the period of unchallenged usage here is so brief as not to warrant any deviation from the remedy otherwise called for by the facts.⁸

C. The Application of Rule 25

1. The original complaint, insofar as it involved respondents' use of the word Cashmora, was based on an alleged violation of Rule 30 of the Rules and Regulations promulgated under the Wool Products Labeling Act. This rule prohibits the use of any stamp, tag or label "which is false, misleading, or deceptive in any respect". Since the Federal Trade Commission Act likewise covers advertising or representations which are false, misleading or deceptive, and since the Wool Products Labeling Act specifically provides that the misbranding of a wool product in violation of that Act or its Rules and Regulations shall also constitute an unfair and deceptive act or practice within the meaning of the Federal Trade Commission Act, the examiner in his original decision found that respondents had violated both the Federal Trade Commission Act and the Wool Act and the Rules and Regulations promulgated under the latter Act.

2. While the complaint did not originally charge a violation of Rule 25 of the Rules and Regulations promulgated under the Wool Act, the examiner, in his original decision, cited that section as indicative of a Commission policy not to countenance the use of trade names on labels which are suggestive of fibers not contained in the product. Rule 25 provides that:

Words which constitute the name or designation of a fiber which is not present in the product shall not appear in or as 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.

Although not specifically pleaded, the examiner regarded Rule 25 merely as a particularization of the type of conduct which would be proscribed under the broader language of Rule 30, prohibiting the use of labels which are false, misleading or deceptive. Counsel supporting the complaint, apparently out of an abundance of caution, have now caused the complaint to be amended, so as to specifically charge a violation of Rule 25, as well as Rule 30.

⁸ As noted in the examiner's earlier decision (at 32) the period which elapsed between the time respondents' Cashmora sweaters first came on the market and the date when the Commission challenged the use of the name involves a matter of weeks or at most a few months.

3. In his original decision the examiner cited the legislative history of the Wool Act, as indicating a congressional intent to insure an even higher degree of accuracy in labels under the Wool Products Labeling Act than was considered possible under the more generally worded provisions of the Federal Trade Commission Act. In view of this intent and the policy of the Commission, as expressed in Rule 25, the examiner concluded that even if it were appropriate in a proceeding involving solely a violation of the Federal Trade Commission Act (as was the case in the *Jacob Siegel* and *Country Tweeds* proceedings) to permit qualified use of a deceptive trade name, it would not be proper to permit the use of such names on labels which violated the Wool Act and the Rules and Regulations promulgated thereunder.

4. In affirming the examiner's findings and conclusions, the Commission stated that complete excision of the name Cashmora on products containing no cashmere was required even under the Federal Trade Commission Act. Accordingly, it found it unnecessary 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 the [Wool Products Labeling Act and the Federal Trade Commission Act]".

5. In the opinion of the examiner, Rule 25 of the Rules and Regulations promulgated under the Wool Act would bar the use of language on a label referring to or suggestive of fibers which the product does not contain. This would include the word Cashmora, which is clearly suggestive of cashmere, and also negative statements such as "no cashmere" or "contains no cashmere". For this reason, continued use of the name Cashmora, with or without qualification or explanation, would not, in the opinion of the examiner, be an appropriate remedy under the Wool Products Labeling Act. Whether or not there is any difference in the permissible scope of the remedy under the Wool Products Labeling Act than under the Federal Trade Commission Act, it is the conclusion and finding of the examiner that, in this proceeding which is brought under the Wool Products Labeling Act, and now specifically includes a charge of violation of Rule 25 of the Rules and Regulations promulgated thereunder, the remedy of excision is the only appropriate one to be adopted.

CONCLUSIONS

1. 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, transportation or 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 Rules 25 and 30 thereof, and that the delivery for shipment, shipment, sale or offer for sale of such products, in commerce, by respondents also 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.

2. It is further concluded that the aforesaid violation of the Wool Products Labeling Act and the Federal Trade Commission Act can be effectively terminated only by ordering respondents to cease, unconditionally, the use of the name "Cashmora" on tags, stamps or labels attached to wool products not composed in substantial part of cashmere.

ORDER

It is ordered, That the respondents Elliot Knitwear, Inc., and Elliot Import Corporation, 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 or 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.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission having now determined that the hearing examiner's supplemental initial decision on remand of proceeding, filed June 22, 1961, is adequate and appropriate to dispose of this proceeding:

It is ordered, That the aforesaid supplemental initial decision on remand of proceeding be, and it hereby is, adopted as that of the Commission.

It is further ordered, That the respondents Elliot Knitwear, Inc., and Elliot Import Corporation, both corporations, and Herman Gross, individually and as an officer of said corporation, shall, within sixty

