

IN THE MATTER OF
FORTE-FAIRBAIRN, INC., ET AL.

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

Docket 8453. Complaint, Nov. 17, 1961—Decision, Apr. 13, 1963

Order dismissing as not sustained by the evidence, complaint charging Boston, Mass., manufacturers of wool products with representing fiber stocks falsely on invoices as "Baby Llama".

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Forte-Fairbairn, Inc., a corporation, and Orville W. Forte, Jr., Donald Forte, and Boyce W. Godsoe individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by

it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Forte-Fairbairn, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 311 Summer Street, Boston, Massachusetts. Said respondent corporation is a manufacturer of wool products, and operates its woolen and specialty fiber stocks business through its division known as Forte, Dupee, Sawyer Co. whose address is the same as the corporate respondent. Individual respondents Orville W. Forte, Jr., Donald Forte and Boyce W. Godsoe are president, treasurer, and vice president and assistant treasurer respectively. Said individual respondents formulate, direct and control the acts, practices and policies of said corporate respondent. The office of the individual respondents is the same as that of the corporate respondent.

PAR. 2. Corporate respondent through its division Forte, Dupee, Sawyer Co. is now, and for some time last past has been, engaged in the sale of woolen and specialty fiber stocks and distributing such products throughout the United States.

PAR. 3. Respondents, in the course and conduct of their business, now cause, and for some time last past have caused, said products, when sold, to be shipped from their place of business in the Commonwealth of Massachusetts to purchasers located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, as aforesaid, respondents have made representations concerning their said products on sales invoices. Among and typical of the representations made was the invoicing of their fiber stocks as "Baby Llama".

PAR. 5. The aforesaid representations were false, misleading and deceptive. In truth and in fact, said fiber stocks were not composed wholly of "Baby Llama" but were composed of fibers other than baby llama.

PAR. 6. The acts and practices set out above have had and now have the tendency and capacity to mislead and deceive purchasers of said products as to the true content of said fiber stocks, and to cause such purchasers to misbrand and misrepresent products manufactured by them in which said fiber stocks were used.

PAR. 7. In the course and conduct of their business and at all times mentioned herein, respondents have been and are in substantial competition, in commerce, with corporations, firms, and individuals in the

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sale of woolen and specialty fiber stocks of the same general kind and nature as that sold by respondents.

PAR. 8. The acts and practices of the respondents set out above were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Michael P. Hughes and Mr. Harry Garber supporting the complaint.

Ely, Bartlett, Brown & Proctor by Mr. David E. Place, of Boston, Mass., and Howrey, Simon, Baker & Murchison by Mr. David C. Murchison and Mr. Richard L. Perry, of Washintgon, D.C., for respondents.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

MARCH 5, 1963

This proceeding was commenced by the issuance of a complaint on November 17, 1961, charging the above-named corporate respondent and the individual respondents with unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act by falsely identifying fiber stocks on invoices as "Baby Llama" when actually they were not composed wholly of "Baby Llama" but were composed of fibers other than baby llama.

Upon being served with the complaint, respondents appeared by counsel and denied the charges of falsely invoicing their fiber stocks. Pursuant to notice duly given, a prehearing conference was held in this matter at Washington, D.C. on March 14, 1962, and the initial hearing was held from October 8, through October 17, 1962, at New York, New York, and on December 5, 1962, at Washington, D.C. At these hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. At the end of the hearing on December 5, 1962, the record was closed, and, in due course, both parties filed proposed findings of fact, conclusions of law, and briefs in support thereof. Consideration has been given to the proposed findings of fact, conclusions of law, and briefs submitted by the parties and all proposed findings of fact hereinafter not specifically adopted are rejected. Based upon the entire record and his observation of the witnesses, the hearing examiner makes the following findings as to facts, conclusions drawn therefrom, and order.

PRELIMINARY STATEMENT

At the outset, in order to put this matter in proper perspective, it should be noted that the charges in the complaint and, as hereinafter found, relate to a single sale by respondents of several lots of fiber stocks sold to Northfield Mills, Inc., 35 Kneeland Street, Boston, Massachusetts, on November 25, 1959, and invoiced as "Baby Llama." The sole issue in this proceeding is whether the fiber stocks involved in this single sale were in fact composed wholly of "Baby Llama" or as alleged in the complaint composed of fibers other than "Baby Llama." The fibers in question were imported into the United States in 1956 and 1957 from Peru through various firms, and complaint counsel has meticulously traced by testimony and documents consisting of shipping records, purchase memoranda, sales receipts, lot cards, processing records, invoices, etc., the history of these fibers from their importation until they were sold on November 25, 1959, to Northfield Mills. Respondents also admit that the fibers imported in 1956 and 1957 are the same fibers that were ultimately sold by them to Northfield Mills in 1959 and delivered in early 1960. In short, there is no dispute as to the whereabouts and disposition of these fibers at all times between 1956 and 1960, and all references to fibers as hereinafter made in the findings relate to all or a portion of the fibers hereinabove identified.

FINDINGS OF FACT

Formation and Control of Respondent Corporation

1. Respondent, Forte-Fairbairn, Inc., is a corporation organized, existing and doing business since 1952 under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 311 Summer Street, Boston, Massachusetts. The respondent corporation is a manufacturer of wool products, but is divided into several departments: the wool department; specialty fibers department—which includes alpaca, llama and mohair; cashmere department; the noils department, and waste department. Individual respondent, Orville W. Forte, Jr., from January 2, 1959, to March 1961,¹ was a vice president of Forte-Fairbairn and head of the cashmere department. In that capacity, he had no responsibility for the specialty fibers department and, in particular, had no personal knowledge of, responsibility for or complicity in the acts or practices alleged in the complaint relating to the sale on November 25, 1959, to Northfield Mills of fibers invoiced as "Baby Llama." Accordingly, at the

¹ On March 1, 1961, Orville W. Forte, Jr., became president of Forte-Fairbairn succeeding his father, Orville W. Forte.

close of complaint counsel's case-in-chief, the hearing examiner granted a motion to dismiss the complaint insofar as it related to Orville W. Forte, Jr., in his individual capacity, but not in his capacity as an officer or agent of the corporate respondent.

Individual respondent, Donald Forte, is the salesman who negotiated the November 25, 1959, transaction and respondent, Boyce W. Godsoe, is the head of the specialty fibers department who was personally responsible for changing the designation of the fibers on the invoices to "Baby Llama." In these capacities, Donald Forte and Boyce W. Godsoe had personal knowledge of and were responsible for the acts and practices of the corporate respondent.

2. Forte-Fairbairn, Inc., is a closely held corporation and controlling interest at all times material to this complaint has been held by members of the Forte family. In addition, members of the Forte family predominate on its board of directors and serve as its principal executive officers. Boyce W. Godsoe is one of the larger minority stockholders.

3. Forte, Dupee, Sawyer Co., hereinafter referred to as Forte Dupee, was incorporated in Massachusetts in 1922. It also is a closely held corporation and controlling interest at all times material to this complaint has been held by members of the Forte family. As in the case of Forte-Fairbairn, members of the Forte family predominate on the board of directors and serve as principal executive officers of Forte Dupee. Boyce W. Godsoe is also one of its principal minority stockholders.

On January 1, 1959, Forte-Fairbairn acquired the inventories of Forte Dupee including the stocks on hand in its wool and specialty fiber department. After January 1, 1959, Forte Dupee² was merely a division of Forte-Fairbairn. Prior to January 1, 1959, Boyce W. Godsoe was in charge of the specialty fiber department of Forte Dupee and after that date was chief of the specialty fiber department of Forte-Fairbairn.

4. Forte-Fairbairn, through its Forte Dupee division, is now, and since January 1, 1959, has been engaged in the sale and distribution of woolen and specialty fiber stocks throughout the United States.

5. Respondents, in the course and conduct of their business, now cause, and for some time last past have caused, said products, when sold, to be shipped from their place of business in the Commonwealth of Massachusetts to purchasers located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

² On January 2, 1959, Forte, Dupee, Sawyer Co. changed its name to Forte Investment Fund, Inc.

In the course and conduct of their business and at all times mentioned herein, respondents have been and are in substantial competition, in commerce, with corporations, firms, and individuals in the sale of woolen and specialty fiber stocks of the same general kind and nature as that sold by respondents.

Classification of the Llamas

6. The genus *Llama* is subdivided into two distinct species, *lama glama* and *lama vicuna*, both of which are part of the family *camelidae*. The *lama glama* species is further subdivided into *lama glama pacos* (the alpaca), *lama glama glama* (the llama), and *lama glama huanaca* (the guanaco). The habitat of the llama tribe, except the guanaco, is the high Andean regions of Southern Ecuador, Peru, Bolivia and Northwestern Argentina. Both the llama and alpaca have been domesticated for over 1200 years. All of the llamas are smaller in size and lighter in build than the camels.

7. The outer coat of the llama is thick and coarse and the hair next to the body is much finer closely resembling those of the alpaca. The young llama is left with its mother for about a year, after which it is placed in flocks. When about 4 years old, the males and females are separated, the former being trained to their tasks as burden carriers, the latter being sent to pasturage, for the females are used exclusively for breeding purposes and for their hair. Usually the males are never shorn until death, the hair being permitted to grow to form a cushion for the pack. The llama's economic importance is as a burden carrier and apparently always will be, for it remains today the only reliable draught animal of the upper Andes.

8. The alpaca is somewhat shorter than the llama, but its body is proportionately larger and of greater bulk. The hair of the alpaca hangs down its sides, rump, and breast in long glossy and more or less tangled strands, measuring from 8 to 12, and not infrequently, 16 inches in length, and when left unsheared for long periods will attain lengths of nearly 30 inches. This hair differs from that of the llama in having no coarse or brittle fibers, which are of common occurrence in the fleece of the llama. The alpaca has occupied a major position in the economic life of the great Andean Plateau and its position as a fleece bearer is unchallenged. For this reason, the alpaca is of specific importance to the textile industry.

9. Due to the difference in length and texture, the fleece of the adult alpaca may be distinguished by relatively simple methods of testing from the fleece of the adult llama. In contrast, the fleece of the baby alpaca and baby llama are of similar length and texture and cannot be distinguished either by ordinary sensory perception or simple methods

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of testing. It should also be noted that the importation and use of adult alpaca fibers in comparison to the importation and use of baby alpaca or baby llama fibers is much greater. Actually, the availability of baby llama or baby alpaca fibers is very restricted.

Importation of the Fibers

10. In August 1956, Curt W. Haedke of C. Haedke & Co., New York, New York, importers of specialty fibers and Emilio Salomon of Emilio Salomon Sahurie G., Arequipa, Peru, exporters of alpaca and llama fibers, called upon Boyce W. Godsoe, head of the specialty fibers division of Forte Dupee, and his assistant, William J. Hobbs, at which time Godsoe and Hobbs ordered several shipments of baby alpaca fibers pulled from skins (Tr. 93, 309). On August 31, 1956, Hobbs confirmed the purchase of 6 bales of "Kid Alpaca Fleece" (CX 40) and, on December 3, 1956, Hobbs confirmed the purchase of 14 bales of "Baby Alpaca Fleece" (CX 42) from C. Haedke & Co.

11. By invoice of Emilio Salomon Sahurie G., Arequipa, Peru, dated August 16, 1956 (CX 39A, 39B), 6 bales of alpaca fleece were shipped to C. Haedke & Co., New York, and by invoice of Emilio Salomon dated November 16, 1956 (CX 41A, 41B), 14 bales of alpaca fleece were shipped to Forte Dupee. On September 12, 1956, C. Haedke billed Forte Dupee for 6 bales of callao alpaca seconds³ (CX 10), and on November 30, 1956, C. Haedke billed Forte Dupee for 14 bales of alpaca fleece (Baby Alpaca) (CX 17).

In 1956 and 1957, Godsoe and Hobbs also ordered from Franz Rotmann, Arequipa, Peru, an exporter of fibers and skins, several shipments of "baby alpaca skins." Shipping advices confirming these orders and describing the shipments as "white baby alpaca skins," "baby alpaca skins in colors" and "Baby Alpaca Skins" were sent by Rotmann to Forte Dupee (CX 47, CX 56, CX 67).

12. The invoices of Emilio Salomon Sahurie G. (CX 39A, 39B, CX 41A, 41B), and the shipping advices of Franz Rotmann (CX 47, CX 56, CX 67) were prepared in the regular course of business at the time of the shipments by clerks in the offices of these concerns in Arequipa, Peru. The clerks who prepared these documents do not speak English, but merely copy the pertinent information, including the description of the fibers from other documents (Tr. 361, 364). Actually, Mr. Salomon and Mr. Rotmann, or the clerks who prepared these documents, as a matter of practice, never see the fibers but merely

³ C. Haedke testified that only two classes of customs export designations existed in Peru and that there was no classification for baby alpaca fibers so they were listed under the lower classification as "Callao Alpaca Seconds" (Tr. 370, 376). However, when the error was brought to Haedke's attention by Godsoe, Haedke admitted the error (Tr. 199) and changed it to "Baby Pulled Alpaca" (Tr. 101).

use the same description on their invoices that appears on the invoices they receive from their suppliers (Tr. 369). It is also the undisputed testimony of Mr. Haedke that even had Mr. Salomon or Mr. Rotmann or any of their employees personally inspected the baby fibers, they would have been unable to determine the difference between baby alpaca and baby llama (Tr. 372).

Entry of the Fibers on Books and Records of Forte Dupee

13. The routine procedure followed by Forte Dupee upon receipt of shipping invoices is to have them checked by Hobbs or someone else on Mr. Godsoe's staff to make sure that the information as to price, quantity and description thereon conforms to what was ordered. If everything is found to be in order, the stock is paid for approximately a week or two in advance of the arrival of the actual shipment. Upon arrival of the stock, it is trucked to Forte Dupee's warehouse in Boston, where the information on the bills-of-lading accompanying the stock is checked against the orders and shipping invoices previously received. Following this, it is Forte Dupee's procedure to have someone on Godsoe's staff go down and get samples from at least 10 percent of the bales and check them to see if they are of the same standard and quality as ordered. If the shipments meet with Forte Dupee's approval, appropriate entries are made on Forte Dupee's stock and inventory control records (Tr. 85-90).

14. Upon arrival of the stocks ordered from Haedke, Salomon and Rotmann, the foregoing procedures were followed: the bills-of-lading were checked and the fibers were entered on the records of Forte Dupee as baby alpaca (Tr. 104, 200). Specifically, lot cards established by Forte Dupee to cover the shipments of the 6 and 14 bales from C. Haedke and Emilio Salomon described the pulled fibers as "Kid Alpaca Fleece" (CX 12) and "Baby Alpaca Fleece" (CX 18) respectively. Similarly, lot cards established and maintained by Forte Dupee covering the shipments from Franz Rotmann described the skins as "Baby Alpaca Skins" (CX 58, CX 59, CX 68, CX 74, CX 75). At the time the lot cards were prepared, no one in Forte Dupee could tell the difference between baby alpaca and baby llama fibers (Tr. 188) and the description of the fibers as baby alpaca on the shipping invoices was not challenged.

Contract to Sell the Fibers to Old Bennington Weavers and Subsequent Repurchase by Forte Dupee

15. On January 29, 1957, Forte Dupee offered to sell 10,000 pounds of "Baby Alpaca Fleece" at \$4 a pound to Old Bennington Weavers, Inc., Bennington, Vermont (CX 83) and upon acceptance thereof

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Forte Dupee shipped 493 pounds (CX 27A). Old Bennington failed to exercise its rights further under the contract and no additional deliveries were made. As a result of Old Bennington's failure to live up to its contract, the contract was cancelled by mutual agreement and on December 31, 1958, a settlement of the transaction was agreed to by the parties (CX 14). The document evidencing the settlement described the fibers as "Baby Alpaca Fleece" and charged Old Bennington for 9,507 pounds at \$4 per pound or a total of \$38,028. In settlement, the described fibers were repurchased by Forte Dupee at \$2.50 a pound or a total of \$27,767.50, leaving a balance of \$14,260.50 owed by Old Bennington to Forte Dupee in the nature of liquidated damages for failure to live up to their contract. Old Bennington made an initial payment of \$2,000 on January 5, 1959, towards this indebtedness, and on May 4, 1960, made a final payment of \$4,607.34 wiping out its liability stemming from this transaction. Respondents admit and the lot card records of Forte Dupee conclusively show that the fibers sold to Old Bennington are the same fibers heretofore found to have been imported from Peru as "Baby Alpaca."

Processing of the Fibers by Damar Wool Combing Co.

16. As hereinabove found, Forte-Fairbairn, on January 1, 1959, acquired all of the inventories of Forte Dupee including specifically the stock of 9,507 pounds of "Baby Alpaca Fleece" repurchased from Old Bennington on December 31, 1958. In April 1959, Forte-Fairbairn sent the "Baby Alpaca Fleece" to Damar Wool Combing Co. to be carded and scoured. Entries covering this processing made by both Forte-Fairbairn and by Damar Wool Combing Co. referred at all times to the fibers as baby alpaca. Billings sent to Forte-Fairbairn on May 15, 1959, setting forth the scouring and carding charges on specific lots of these fibers consistently described the fleece as baby alpaca (CX 22A-D, CX 23A-B, CX 24A-D). Similarly, lot card entries made by Forte-Fairbairn reflecting the processing of these fibers were captioned "Various Colors Baby Alpaca Scoured & Carded" (CX 19), "Lite Fawn Baby Alpaca Fleece Scd. & Carded (CX 20) and "Scd. Baby Alpaca—Bleached" (CX 25).

Sale of the Fibers by Forte-Fairbairn to Northfield Mills, Inc.

17. Mr. H. Maxwell Goldfine of New York City, buyer for Northfield Mills, Inc., customarily telephoned Mr. Donald Forte, the salesman handling the Northfield account, two or three times a week to inquire about the availability of various fibers. In early June 1959, Goldfine, who had become interested in baby llama, telephoned Donald Forte to

inquire about the availability of baby llama fibers. Although the testimony of Goldfine and Donald Forte are in conflict as to the particulars of the conversation, the hearing examiner finds that Goldfine made it clear to Donald Forte that he was solely interested in purchasing baby llama fibers and that Donald Forte so understood Goldfine's inquiry.⁴

18. On June 9, 1959, Hobbs wrote Northfield Mills, Inc., Northfield, Vermont, attention Mr. Bussiere, Plant Manager, with a carbon to Goldfine, the following letter: (RX5)

Yesterday we were talking to Max Goldfine and during our conversation the matter of Baby Alpaca Llama Fleece was brought up. Max advised that he had something in mind for Fall, 1960, fabrics and requested that we mail you samples of our current accumulations of Baby Alpaca Llama Fleece. We therefore mailed you yesterday, with duplicates to Max, the following samples marked:

Lot 7027 White Baby Alpaca Llama Fleece representing spot quantity of 1,450#

Lot 7028 Dark Baby Alpaca Llama Fleece representing spot quantity of 6,500#

Lot 7029 Lite Fawn Baby Alpaca Llama Fleece—representing spot quantity of 8,000#

These three types we are offering combined at \$2.75 ex mill basis. We would like to call your attention to the fact that these stocks have been scoured and carded.

Max has requested that after you have the opportunity of examining the samples, you get in touch with him regarding these offerings.

19. Goldfine testified that he paid little or no attention to written offers received through the mail and apparently was not aware that the written offer describing the fibers as baby alpaca llama fleece differed from the verbal discussions with Donald Forte relating to baby llama.

20. Respondents explained the abrupt change in terminology employed by stating that the term "alpaca/llama" as used in this letter was to show the genus as well as the species of the animal from which the fibers came, although, at this time, respondents admit that they still believed that the fibers were of the alpaca species rather than the llama species. Respondents also admit that the fiber stocks had been on hand for some time and had been hard to move.

21. On July 30, 1959, respondents made a formal offer to Northfield Mills, Inc., 35 Kneeland Street, Boston, Massachusetts, of 180 pounds of fibers, describing them as "scoured and carded white baby alpaca/llama"; "scoured and carded random dark baby alpaca/llama", and "scoured and carded lite fawn baby alpaca/llama at \$2.75 per pound ex mill, together with an option on the balance of approximately 7,000 pounds (RX 6 and RX 7). The offer of 180 pounds was accepted by Northfield Mills.

⁴ See Goldfine's letter of January 26, 1960 (Finding No. 30, *infra.*) and Donald Forte's response (Finding No. 31, *infra.*)

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22. On August 4, 1959, Donald Forte wrote Northfield Mills, Inc., Northfield, Vermont, attention Mr. F. Bussiere, with carbon copy to Goldfine, as follows: (RX 31)

Confirming our conversation with Mr. Mac Goldfine, we have shipped to you approximately 200 lbs. of Baby Alpaca Llama Fleece as per our enclosed purchase confirmation of July 30, 1959.

You will note that we have shipped quantities in proportion to the balances remaining on hand and we have given you an option until September 4.

We have not received the bleaching charges on 7028, but will forward these to you immediately upon receipt of them.

We look forward to hearing from you regarding these lots.

23. On November 25, 1959, Forte-Fairbairn made a second formal offer to Northfield Mills, Inc., 35 Kneeland Street, Boston, Massachusetts, to sell the balance of the 7,000 pounds of fibers describing them again as: "scoured and carded white baby alpaca/llama" at \$2 per pound, and "scoured and carded lite fawn baby alpaca/llama" at \$2 per pound, and "scoured and carded random dark baby alpaca/llama" at \$1.25 per pound (RX 9, RX 10A-B). This offer was accepted by Northfield Mills, Inc. At this time, the respondents still believed the fibers were baby alpaca.

24. Early in January 1960, Goldfine called Donald Forte and asked for clarification of the identity of the fibers. Forte took up the matter with Godsoe, head of the Specialties Department of respondent and was told by Godsoe that he had recently obtained new information to the effect that the fibers were baby llama. Godsoe's information came from a Mr. Michell, a resident of Peru for 40 years and a large exporter of alpaca fibers. Based upon the information given him by Godsoe and without making any further independent check of the facts, Donald Forte wrote the following letter: (CX 32)

January 6, 1960

Northfield Sales Corp.
450 Seventh Avenue
New York, New York
Attention: Mr. H. M. Goldfine
Gentlemen:

Regarding our sales confirmation to you of November 25, 1959, you will note that the description for Lots 7027, 7028, and 7029 is "Baby Alpaca/Llama". Actually, for labelling purposes, we believe a more exact description would be "Baby Llama", since the bulk of this stock is produced from Baby Llama Skins although a few Baby Alpaca Skins are used.

The reason this fiber is so fine is that it comes from the skins of Llamas either forced into premature birth or recovered from the baby of the slaughtered female before birth. Occasionally, a skin of a Baby Alpaca is included, but since the Alpaca is such a valuable animal for the fleece, it is seldom purposely slaughtered or forced to give birth prematurely. As you know, the Llama is a beast of burden,

and has a much coarser coat than Alpaca, although both are in the Llama family. If the baby Llama were born normally and allowed to live for even a few hours, the coat would be much coarser than the fiber from the unborn babies. Since the Alpaca is by nature a much finer type of wool than Llama, the fibers of their babies are almost as fine as the unborn Llama, if the fiber is recovered very soon after birth.

We feel that you would be slightly downgrading your description of this fiber by calling it "Baby Llama" rather than "Baby Alpaca/Llama", but since the predominant fiber is from the Llama, we believe that this is the truest description that you could give.

We hope that the above explanation proves of some interest to you.

Very truly yours,
FORTE, DUPEE, SAWYER CO.
By

25. Godsoe, when questioned by complaint counsel as to the basis for his information, changing the description of the fibers from baby alpaca to baby llama, testified as follows:

MR. HUGHES:

Q. You testified that you could not tell these baby fibers apart. If no one can tell them apart, what makes you think that the fibers you purchased now are different?

A. That needs a little explanation. As far as we are concerned no one could tell these fibers apart. We went to a lot of trouble trying to figure out in our mind whether these were baby alpaca or baby llama or what they were and I waited for—to talk in a business conference with somebody by the name of Mitchell [sic] who has lived 40 years in Peru. He started out as a rancher—I am just trying to explain—he was probably in my mind and most other people's minds he was probably the best authority on alpaca.

Q. The information that was brought to your attention came about 10 years later?

A. No, sir.

Q. But you in the meantime had sold these fibers as alpaca?

A. That is correct. We changed our description because we believe and I believe that Mitchell [sic] proved to me very satisfactorily to my mind that these were not alpaca, but were 100 percent llama fibers.

Although Godsoe was subsequently called to testify as a witness for respondents, he was not questioned further about his relationship with Mr. Mitchell or asked to elaborate on the proof supplied him by Mitchell.

26 Mr. Donald Forte testified that Mr. Mitchell was a leading exporter of alpaca from Peru, but that Mr. Mitchell had never examined the specific fibers or skins shipped to Forte Dupee by Haedke, Salomon and Rotmann. Except for the reference to Mr. Mitchell's forty years experience in Peru as a rancher and his status as a leading exporter of alpaca, respondents offered no particulars concerning how Godsoe communicated with Mitchell, the exact information Mitchell

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supplied Godsoe, and the precise date this occurred. Although a Frank W. Michell, Arequipa, Peru, was noticed on respondents' pre-trial list of witnesses to testify as to the grade, quality and characteristics of baby llama and alpaca fibers, he was not called as a witness and no reason was given for his failure to appear and testify.

27. Pursuant to the November 25, 1959, sale, partial shipments of fiber stocks were made on January 11 and January 15, 1960. Invoices covering these shipments described the fibers as "scoured and carded baby alpaca/llama" and "scoured, carded and bleached random dark baby alpaca/llama" (RX 11, RX 13).

28. Contemporaneously, with these shipments, Donald Forte wrote the following letter to the Federal Trade Commission: (CX 28)

January 14, 1960.

Mr. Harvey H. Hannah
Chief, Division of Wool Act Administration
Federal Trade Commission
Bureau of Investigation
Division of Textiles and Furs
Washington 25, D.C.

Dear Mr. Hannah:

Confirming our telephone conversation, we are enclosing a copy of Sytan Stroock's *Llamas and Llamaland*.

On Page 7, showing the order of the "Artiodactyla", of which the genus *Lma* is a branch, under the genus "Lama", are the various branches which include the Alpaca, the Llama and the Guanaco. We agree with Mr. Stroock that this entire branch could be properly labelled "Llama", although, actually, the fleece of the Llama would be the coarsest in this group. The Llama is raised as a least of burden. Its fleece seldom is used for apparel; the other domesticated members of the genus "Lama" are raised primarily for the fleece, the Alpaca being the finest. We do not feel that fleece from the Llama (*Lama glama glama*) could be labelled "Alpaca" since not only would this be upgrading a coarser type, but, also, there is nothing in the generic name which could justify the Alpaca label.

We understand that Stroock labelled Alpaca "Llama" for years, since the name sounded more romantic than "Alpaca". We believe that some of our mills wish to label Alpaca "Llama" today for the same reasons.

We would be pleased to furnish further information from the authorities in Peru, or from the other Alpaca importers, if you so desire.

We look forward to hearing from you.

Very truly yours,

FORTE', DUPEE, SAWYER C.
A Division of Forte'-Fairbairn Co.
By /s/ Donald Forte

df/11
enc.

29. The Federal Trade Commission answered Donald Forte as follows: (CX 29)

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January 27, 1960

Mr. Donald Forte'
Forte'-Fairbairn, Inc.
311 Summer Street
Boston 10, Mass.

Dear Mr. Forte':

Reference is made to your letter of January 14, 1960 pertaining to Alpaca and Llama. Congress in Section 2(b) of the Wool Products Labeling Act specifically set forth Alpaca, Llama and Vicuna as separate and distinct types of specialty fibers. Further, the Commission has elaborated on this Section of the Act with Rule 18 specifically referring to Alpaca, Llama and Vicuna again as different specialty fibers.

In the Fur Products Name Guide prepared by the Commission by direction of Congress under the Fur Products Labeling Act Alpaca, Llama and Guanaco are listed as being of the same Order, Family and genus but of different species, whereas Vicuna is of the same Order and Family as the others but of different Genus and Species.

Under these circumstances it would appear that neither this Division or the Commission could give authority to use the work [sic] "Llama" to describe Alpaca Fibers.

Sincerely yours,

Harvey H. Hannah, Chief
Division of Textiles and Furs.

FC:gwh

3. On January 26, 1960, Goldfine was still unsatisfied with the description contained on the invoices referred to in Finding No. 27 above and wrote Donald Forte as follows: (CX 85)

January 26, 1960

Forte Dupee Sawyer Co.
311 Summer Street
Boston 10, Mass.

Attention: Mr. Donald Forte

Dear Sir:

Regarding your confirmations of November 25, 1959 covering lots 7027, 7028, and 7029, it is my understanding from the letter of January 6, 1960 received from you and the many conversations had with you, that these can be properly labelled BABY LLAMA as originally offered prior to purchase.

Therefore, we would appreciate your sending us a corrected confirmation and invoices, to cover the above.

Thanking you for your attention to this matter, we remain,

Very truly yours,

NORTHFIELD SALES CORP.
(s) H. MAXWELL GOLDFINE
H. Maxwell Goldfine

HMC rg

31. On January 28, 1960, Donald Forte replied to Goldfine's request as follows: (CX 84)

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January 28, 1960

Northfield Sales Corp.
450 Seventh Avenue
New York, New York
Attention: Mr. H. Maxwell Goldfine
Gentlemen:

In reply to your letter of January 26, we are correcting the invoices and confirmations of November 25, 1959 for lots 7027, 7028 and 7029.

Very truly yours,

FORTE', DUPEE, SAWYER CO.
By
A Division of Forte'-Fairbairn Inc.

df/11

cc: M Boston Office
Northfield, Vt.

32. As a result of the above-quoted exchange of letters, corrected invoices for the January 11, 1960, and January 15, 1960, shipments were issued to Northfield Mills describing the fiber stocks as "scoured & carded baby llama" and "scoured, carded, & bleached random dark baby llama" (RX 12A, RX 14A). Invoices covering the balance of shipments under the November 25, 1959 sale described the fiber stocks as follows: invoice dated January 26, 1960, "scoured and carded white baby llama" (RX 15A); invoice dated February 23, 1960, "scoured and carded white baby llama" (RX 16A); invoice dated March 9, 1960, "scoured and carded random dark baby llama" (RX 17A); invoice dated March 14, 1960, "scoured and carded random dark baby llama" (RX 18A); invoice dated March 14, 1960, "scoured and carded random dark baby llama" (RX 19A), and invoice dated March 22, 1960, "scoured and carded white baby llama" (RX 20A).

1961 Discussions with Mrs. Murphy of Old Bennington

33. In November 1960, ownership of Old Bennington Weavers Inc., changed hands and Mrs. Elsie Murphy, formerly president of Stooock & Co., from 1949 until 1960, became one of its major shareholder and its president. Because of the poor financial condition of the old concern; the uncertainty of the new financial structure under Mrs. Murphy, and large outstanding accounts due at the time of her takeover, Vincent H. Dunning, the salesman handling the Old Bennington account, called upon Mrs. Murphy in early 1961 to discuss methods of paying her overdue accounts of approximately \$29,000 to Forte'Fairbairn. During the course of this conversation, Mrs. Murphy brought up the question of the fairness of the December 31, 1958, settlement of the "baby alpaca" transaction. In this and subsequent conversation with Donald Forte and Orville W. Forte, Mrs. Murphy never chal-

lenged the correctness of the identification of the fibers as "baby alpaca" although she had them tested earlier and determined to her satisfaction that they were in fact "baby fibers." Throughout her conversations in 1961 with Dunning, Donald Forte and Orville W. Forte, and in letters addressed to her by Donald Forte on March 24, 1961 (CX 27) and by Orville W. Forte on April 21, 1961 (CX 43), the expression "baby alpaca transaction" was the frame of reference used by all concerned to refer to the 1958 settlement. At no time during these conversations with Mrs. Murphy did Dunning, Donald Forte or Orville W. Forte reveal to her that the fibers involved had been recently sold to Northfield Mills as "baby llama". Donald Forte explained this omission by stating that it would have been unethical to reveal the details of a transaction with one customer to a competitor of that customer.

During the course of these conversations, Mrs. Murphy offered to settle her current indebtedness of \$29,000 to Forte-Fairbairn for \$10,000. Mrs. Murphy based this offer on the proposition that the 1958 settlement had been unfair, because the amount charged for cancelling the contract was too high. Donald Forte refused to accept this offer to settle Old Bennington's current account or make any adjustment of the 1958 settlement, which had been negotiated before Mrs. Murphy became associated with Old Bennington and had been paid in full.

Scientific Tests of the Fibers Conducted by Respondents' Experts in March and June 1962

A. Source of the fiber samples tested

34. Mr. John H. Field, Assistant Manager of Northfield Mills, testified that it is the general practice in the industry and the specific practice of Northfield Mills to draw random samples from each delivery of fiber stocks received. In the regular course of its business a stock house employee of Northfield Mills drew random samples from the 16 fiber shipments received from Forte-Fairbairn and placed them in 16 small sample boxes each identified by Forte's lot and Northfield's receiving numbers. The sample boxes were then sent from the stock house to the office building where Field inspected and compared them with purchase samples for quality and weight. While the fiber stocks are in inventory, the sample boxes are kept in a file room next to Field's office and when the inventory has been used up, the sample boxes are transferred downstairs to an inactive file where they are held for two or three years.

35. On March 8, 1962, Dunning of Forte-Fairbairn came to Northfield Mills at the request of Mr. Place, counsel for respondents, and

asked Field if he had retained samples of the November 25, 1959, sale. Present on this occasion were Mr. Creaser, the receiver of Northfield Mills; Mr. Frank Bussiere, Manager of Northfield Mills; Dunning, and Field. After checking his records, Field went to the inactive file room where he located the 16 sample boxes. At Dunning's request, the contents of each of the 16 fiber sample boxes were divided in half; one-half being replaced in their original boxes and retained by Northfield Mills; the other half being placed in 16 new sample boxes, each marked with the same lot and receiving numbers as the original boxes and sealed with gummed labels bearing the signatures of Bussiere, Dunning, and Field.

36. On the same day, March 8, 1962, Dunning hand-delivered the 16 fiber sample boxes to Mr. Terrell, head of Forte-Fairbairn's laboratory. Between March 8, 1962, and March 21, 1962, the 16 sample boxes were continuously in Mr. Terrell's custody. During this period, Terrell testified that he opened the 16 boxes and took a few fibers from each and then resealed the boxes. The boxes, while in Terrell's custody, were locked in a desk drawer in his office. Terrell testified that his purpose in removing a few fibers was to make certain fiber diameter measurements. On March 21, 1962, Mr. Place, counsel for respondents, instructed Terrell to meet him in Newark at the airport with the sample boxes. After his arrival in Newark, Terrell and Place personally delivered the boxes to Dr. Von Bergen, at Central Research Laboratories, J. C. Stevens & Co., Garfield, New Jersey.

37. Between March 21, 1962, and April 28, 1962, Dr. Von Bergen had custody of the sample boxes and removed fibers from each for the purposes of conducting tests. On April 28, 1962, Terrell received a Railway Express package from Dr. Von Bergen containing the 16 fiber sample boxes. On May 31, 1962, Terrell received instructions from Sam Bartlett, a partner of Mr. Place, directing him to hand-carry the sample boxes to Dr. Golub, ACH Fiber Service, Boston, which he did.

38. On August 18, 1960, Robert S. Scott, a Federal Trade Commission investigator, in the course of his investigation of this matter, visited Northfield Mills. Upon cross-examination, he was asked by Mr. Murchison: (Tr. 485)

Q Would you tell me how you checked the stock at Northfield Mills?

A The only manner in which I determined my opinion whether the stock was as represented in the cloth was by their purchase invoices, although at the same time the Commission would obtain physical exhibits for analysis purposes.

Q And you obtained these physical exhibits?

A Yes.

Q Where are those physical exhibits?

A They were forwarded to Washington.

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Q Tell me whether the physical exhibits that you refer to take the form of cloth or take the form of fiber.

A They take the form of fiber.

Q And isn't it a fact that you remove from bales a handful of fiber and retain this and submit it to Washington?

A Yes.

39. On rebuttal, Scott was recalled as a witness for the Commission and was questioned by Mr. Hughes as follows: (Tr. 862)

Q Mr. Scott, state whether or not in your previous testimony you stated that you called at Northfield Mills on August 18, 1960.

A Yes.

Q Mr. Scott, after you completed your examination of the mill records, will you state what occurred then?

A I advised Mr. Fields that I wished to obtain samples of the different types of baby alpaca from their various sources that they were using to make their baby alpaca fabric, as well as samples of cashmere stocks. I proceed [sic] with Mr. Fields to their stock room where a search was made for these various bales. I had, in looking through their stock book, noted their various purchases of these stocks, baby llama, from the two companies they were buying them from, and I was interested in getting a sample from a large lot. The only lot that we could find which related to the Forte-Dupee Sawyer source was a lot identified on a tag attached to the bale as Lot 286.⁵ I would have preferred to have gotten the sample from a larger lot. I knew that this was a small lot from the examination of the stock book, and I advised Mr. Fields that we should look to see if we could find a larger lot.

However, this was the only lot that Northfield Mills had left at the time of my inspection from Forte, and was properly labeled with a tag that showed 100 percent wool, and also the name of the source, the WPL number of the source. I took a sample of this Lot No. 286 stock and requested that Mr. Fields furnish me with a purchase invoice of this lot of stock.

We went back to the office and Mr. Fields did furnish me with the purchase invoice relating to this lot of stock.

* * * * *

Q Were you furnished with any other Forte sample?

A I couldn't get any other Forte sample at that time. (Tr. 865)

40. Mr. Field was thereupon recalled as a rebuttal witness and testified as follows: (Tr. 878)

Q What was the nature of Mr. Scott's request?

A Mr. Scott was conducting an investigation and checking on various fibers, and he asked to draw some samples from our supply of baby llama in our stock house.

* * * * *

THE WITNESS: Mr. Scott asked to go down into our stock house to draw some samples of fibers from our bales in the stock house.

* * * * *

⁵ Lot No. 286 is not one of the fiber shipments involved in this proceeding but involved a "sale of March 28, 1960" on invoice No. T-43 dated April 25, 1960 (Tr. 864). Northfield's lot numbers for the 16 Forte-Fairbairn shipments were 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 264, 265, 266, 267, and 268.

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Q Did Mr. Scott ask to see Northfield's own retained samples?

A No, Mr. Scott wanted to go down to our stock house and draw samples himself.

Q Did he give any reason?

A Well, Mr. Scott ordinarily draws his own samples from bales in our stock house and he wanted to go down. This was his usual procedure.

* * * * *

Q On that occasion, at Mr. Scott's request, did you make a check of your own retained samples?

A No, Mr. Scott was only interested to my memory, in drawing samples from bales in our stock house.

* * * * *

Q Did Mr. Scott at any time question Northfield's procedure for the retention of its own samples?

A No, but another Federal Trade Commission investigator did. Mr. Buckwalter questioned our procedure.

Q Did Mr. Scott request to see or take Northfield's retained samples?

A No, he did not.

41. Upon the basis of their testimony, the hearing examiner finds that Mr. Scott made no request of Mr. Field for any Northfield Mills samples from their sample room, but merely requested and received permission to go down to the stockhouse and obtain for himself samples from any bales on hand. The examiner rejects the implications in complaint counsel's proposed findings that on August 18, 1960, or at any other time material to this proceeding, Northfield Mills did not have on hand fiber samples of the baby fibers received from Forte-Fairbairn. The examiner also rejects the vague and conjectural suspicions of complaint counsel, based on the fact the sample boxes were in Northfield's or respondents' possession at all times, that the "link of identification of said fiber samples has not been preserved." The uncontradicted testimony of the witnesses recited above accounted for the fiber samples at all times, and in the absence of any evidence impeaching their testimony, or a showing that their testimony is inherently incredible, the examiner is obliged to accept it. The examiner, therefore, finds that the fiber samples tested by respondents' experts were samples of the baby fibers sold to Northfield Mills on November 25, 1959, by Forte-Fairbairn.

B. Qualifications of Respondents' Expert Witnesses

42. Dr. Samuel J. Golub, one of the experts called by the respondents, is associate director of ACH Fiber Service and a fiber technologist. He received his doctorate in biology at Harvard University and taught biology, botany and zoology for 15 years at the University of Massachusetts and Brandeis University. More recently, he has specialized in fiber technology as Senior Research Associate for Fabric Research Laboratories and has been employed many times by the Federal Trade

Commission as a consultant on fiber identification problems and has testified for the Commission as an expert witness. Dr. Golub has had long experience in fiber and cellular structure studies, is a competent microscopist and has performed extensive research in wool, mohair, cashmere, camel, alpaca, llama, and vicuna construction and identification. He has had wide commercial experience in the field of fiber identification and is active in association work and in the adoption and perfection of standards for textile identification. His professional associations include the American Society for Testing Materials, the American Association of Textile Colorists and Chemists and the American Association of Textile Technologists. He has numerous publications to his credit and has recently written the chapter on test procedures for the forthcoming edition of the American Wool Handbook. Dr. Golub personally performed or supervised the tests on the 16 fiber samples in question and based his opinion on both his studies of the experiments of his staff and on experiments and observations made by himself. Complaint counsel did not challenge the qualifications of Dr. Golub.

43. Dr. Werner Von Bergen, another expert called by respondents, is recognized as the Dean of the fiber analysts; is an international authority and has done more research and published more on the subject than anyone else in the field. Since 1919 he has been a consultant in the woolen industry and was employed for over 31 years by Forstmann Woolen Company. Recently, he has been with J. P. Stevens & Co., who acquired Forstmann in 1957. In addition to the Federal Trade Commission, for which he has served as a consultant for many years, he has assisted other federal agencies, such as the Department of Agriculture, Beltsville Laboratory; the Western Regional Laboratory; Bureau of Standards; the Tariff Commission; and the Bureau of Customs, Department of the Treasury. He also assisted in drafting the definition of "wool" set forth in the Wool Products Labeling Act of 1939; pioneered the development of identification methods and procedures used by the American Society for Testing Materials of which he is a charter member; and is the coordinator of the Textile Fiber Atlas, author of several chapters in Matthew's Textile Fibers and editor of the American Wool Handbook. Similarly to Dr. Golub, Dr. Von Bergen personally performed or supervised the tests on the 16 fiber samples in question and based his opinions on both his studies of experiments of his staff and on experiments and observations made by himself. Complaint counsel unequivocally accepted Dr. Von Bergen as an expert.

44. Complaint counsel called no expert witnesses and there is no conflict of expert opinion in this case.

C. Results of the Scientific Tests of the Fiber Samples

45. Prior to 1960, no scientist ever had had occasion to develop reliable diagnostic criteria for distinguishing baby alpaca from baby llama. The first known work in this area was a study by Dr. Von Bergen in 1960 involving alpaca, llama and vicuna, including the baby fibers. The absence of earlier scientific work in this area is explained by the fact that there was no commercial interest in the baby fibers until recent years.

46. In developing reliable diagnostic criteria for distinguishing the baby fibers, Dr. Von Bergen gathered samples of known origin of both baby llama and baby alpaca skins. These were obtained from the Peruvian Department of Agriculture's Animal Experimental Farm. Although Dr. Golub had examined a few known samples of baby llama prior to 1962, he had not made an extensive study of the matter. Dr. Golub obtained known samples of baby llama from the following sources: The San Diego Zoological Park; the National Zoological Park, the Catskill Game Farm, the Franklin Park Zoo and the York Animal Farm. Although he attempted to obtain known samples of baby alpaca in the United States, he was unable to find any and secured his samples of known baby alpaca from the Animal Experimental Farm in Peru. Both Dr. Von Bergen and Dr. Golub had studied adult alpaca and llama fibers previously and were familiar with their characteristics.

47. In their research to discover what criteria are diagnostic in distinguishing baby alpaca from baby llama, Drs. Von Bergen and Golub subjected the known samples to the various standard identification techniques which appear in the scientific literature. These techniques include a study of the cuticle or epidermis layer of the fiber, also known as the scale structure. Factors studied which are sometimes diagnostic in the identification of fibers involve the spacing of the scales, the appearance of the scales, the shaping of the scale margins, the shape of the scale projections, and the number of scales per 100 microns. These studies are conducted by microscopic examination aided by various accessory techniques. The medulla which is the interior layer of the fiber consisting of honeycombed cells which are normally filled with air, is microscopically examined both longitudinally and cross-sectionally. When viewed longitudinally, the medulla appears as a dark inner core which sometimes runs continuously from the root to the tip of the fiber and is sometimes interrupted or fragmental, giving the appearance of tiny dots, which are called "medullary islands". In some fibers, these islands appear like a ladder and are evenly spaced, whereas in others they are irregular. The shape of the medulla in cross-sectional view is also sometimes important. In

some fibers, the medulla in cross-sectional view appears like a tiny dot or a hole in a doughnut. In other fibers, the medulla is not located at the center of the cortex, and it may appear in various forms other than a circle, such as a two-sided, three-sided, or a multi-sided configuration. In addition, the configuration of the medulla may be more or less directly related to the outer contour of the fiber itself.

48. Analytical criteria expressed statistically which are sometimes useful in identifying fibers include the calculation of the standard deviation (S.D.) and the coefficient of variation (C.V.). The S.D. is a statistical criterion based upon the fact that in plotting a normal distributional curve of a fiber population, one observes a curve which is in the shape of a bell. The S.D. is one-sixth of the base line across the curve so plotted. The C.V. is an arbitrary number derived by dividing the S.D. by the average diameter of the fiber population. In effect, the C.V. is the percentage which the S.D. is of the average diameter. It is a convenient form for expressing the distribution of the fiber population from the smallest to the largest in relation to the average diameter.

49. Fiber fineness, which must be measured in plotting the distributional curve of a fiber population and in calculating the S.D. and C.V., is sometimes helpful for diagnostic purposes. Fiber fineness is measured by the wedge projection method whereby the fiber is observed at a magnification of 500 times. The widths of the fibers are recorded by a wedge ruler which covers a range of 10 to 70 microns, which is the normal average range of all animal fibers used in the textile industry. While visual observation of itself is sometimes helpful in fiber identification, both experts agreed that it would be of little or no value in distinguishing baby alpaca from baby llama.

50. Of the foregoing techniques and observations some were considered to be diagnostic in distinguishing baby alpaca from baby llama, whereas others were not. For example, the average diameter of the 16 fiber samples permitted the experts to conclude that they came from baby animals. This fact, however, was not considered diagnostic in differentiating baby alpaca and llama because the baby fibers of both animals average about the same. Similarly, the length of the fibers and the presence of fiber tips and roots clearly pointed to the conclusion that the 16 fiber samples were composed of baby fibers, but was not considered diagnostic in distinguishing baby alpaca from baby llama.

51. The two experts agreed that there exist both morphological and statistical criteria which permit distinguishing baby alpaca from baby llama fibers. Both the samples of known origin and the samples of

unknown origin were subjected to these tests. The diagnostic factors are as follows:

A. Upon microscopic examination of the cross-section of a population of baby llama fibers, the presence of a relatively high number of coarse fibers is apparent. This is a characteristic of known samples of baby llama, which even in infancy exhibit the double coated fleece, which is a pronounced characteristic of that animal in adulthood. The presence of coarse fibers, however, is not observed in known samples of baby alpaca. That animal has a single coated fleece, both in adulthood and as a baby. The presence of coarse hairs was observed in the 16 fiber samples as well as in the known samples of baby llama.

B. The shape of the medulla was also considered diagnostic. The medulla of a baby alpaca fiber is quite round and shows little or no tendency toward irregularity. The medulla of a llama fiber, on the other hand, exhibits a pronounced tendency toward such irregularity. This characteristic was observed in the 16 fiber samples as well as in known samples of baby llama.

C. While Dr. Von Bergen noted that some differences between baby alpaca and llama exist insofar as the appearance of the scale structure is concerned, he did not rely on this factor in reaching his conclusions. Dr. Golub, on the other hand, pointed out that if an examination is made of the lower two-thirds portion of fibers of medium size, a difference in the scale margins can be observed. He testified that while the literature makes no reference to the baby animals in this regard, he made a special study of baby alpaca and baby llama to see if this feature was observable, and he found that it was. Thus, he testified that in fibers of intermediate size the scale margins of baby alpaca are very jagged and irregular, whereas those of baby llama are smooth. In this respect, he found that the 16 fiber samples corresponded with the known samples of baby llama which he had studied.

D. Both experts agreed that the C.V. of the fiber population provided a reliable criterion for distinguishing baby alpaca from baby llama. The C.V. of the samples of baby alpaca studied by Dr. Von Bergen was between 18% to 25%, which reflects the relatively uniform staple of the fleece. Known samples of baby llama, on the other hand, range between 28% to 35%. Known samples of baby alpaca studied by Dr. Golub had an average C.V. of 22%, whereas the known samples of baby llama studied by him were consistently above 30%. In examining the 16 fiber samples, Dr. Von Bergen found that the C.V. averaged in the neighborhood of 30.5% to 31.5%, whereas Dr. Golub found a range between slightly below 30% to as high as 39%. Both experts agreed that their observations of the 16 fiber samples in terms

of C.V. agreed with known samples of baby llama, but did not agree with their observations of known samples of baby alpaca.

E. The S.D. of the 16 fiber samples was approximately 6 to 7 microns, which corresponds to the S.D. of the known baby llama samples tested.

52. Both Drs. Von Bergen and Golub testified that by using these various diagnostic factors they found a complete correlation between the morphological and microscopic features of the baby llama samples of known origin and the 16 samples of stock from Forte-Fairbairn. Both Drs. Von Bergen and Golub concluded, based upon their analyses of over 1000 fiber samples taken from each of the 16 fiber stocks, at issue in this proceeding, that the stocks were composed wholly of baby llama and that there was no evidence of the presence of fibers other than baby llama, such as baby alpaca, adult alpaca, adult llama or guanaco. Both experts were also in agreement that if any such other fibers had been present in any substantial quantity, their presence would have been detected.

DISCUSSION

The essential allegations of the complaint in this matter read as follows:

PARAGRAPH FOUR: In the course and conduct of their business, as aforesaid, respondents have made representations concerning their said products on sales invoices. Among and typical of the representations made was the invoicing of their fiber stocks as "Baby Llama".

PARAGRAPH FIVE: The aforesaid representations were false, misleading and deceptive. In truth and in fact, said fiber stocks were not composed wholly of "Baby Llama" but were composed of fibers other than baby llama.

As previously found, the representations offered in support of the above quoted allegations of the complaint were made in connection with a sale of fiber stocks invoiced as "Baby Llama" by respondents on November 25, 1959, to Northfield Mills. The burden of proof is on complaint counsel to establish by clear and convincing evidence that the fiber stocks involved in this sale were "not composed wholly of 'baby llama' but were composed of fibers other than baby llama". To do this, complaint counsel has relied almost exclusively on documentary evidence consisting of foreign supplier invoices and shipping memoranda originating in Peru which describe the fiber stocks as "baby alpaca". All subsequent documents identifying the fibers as "baby alpaca" were copied from these earlier supplier invoices and shipping memoranda originating in Peru. It is clear, therefore, that the later documents and actions of respondents in reliance thereon are in and of themselves entitled to no more weight than the original sup-

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plier invoices and shipping memoranda upon which they were based. These documents consist of the supplier invoices of Emilio Salomon Sahurie G., Arequipa, Peru, dated August 16, 1956 (CX 39A, CX 39B), and November 16, 1956 (CX 41A, 41B), and the shipping advices from Franz Rotmann, Arequipa, Peru (CX 47, CX 56, CX 67), describing the fiber stocks as "baby alpaca".

There is no doubt that these documents are sufficient to sustain a prima facie case in support of the allegations of the complaint. To rebut this evidence, however, respondents introduced uncontradicted and unimpeached direct scientific evidence based upon tests conducted by two eminently qualified experts demonstrating that the fiber stocks in issue in this proceeding were composed wholly of baby llama. The issue to be decided here, therefore, is whether the identity of the fibers based upon foreign supplier invoices and shipping memoranda is to prevail over direct scientific proof based upon expert testimony of fiber technologists who have analyzed samples of the fiber stocks involved herein.

In focusing on this issue, the hearing examiner has not overlooked the fact that at the time respondents issued the corrected invoices in January 1960, they had no scientific proof, but merely relied upon the information supplied by Mr. Michell. The hearing examiner has also considered respondents' failure to inform Mrs. Murphy in 1961 of their change in identification of the fiber stocks. Although these actions of respondents are not satisfactorily explained and may be inconsistent with their prior conduct, they are not determinative of the issue in this case. The question is not whether respondents had good cause to change the invoices in 1960 or whether their treatment of Mrs. Murphy was fair and above board, but rather of what in truth and in fact these fiber stocks are composed.

In the Matter of Alscap, Inc. [60 F.T.C. 275] (Docket No. 8292, February 14, 1962), the Commission recently adopted a hearing examiner's initial decision wherein he held in effect that blind reliance on foreign labels inaccurately describing fiber content is no defense to a charge of mislabeling, where the Commission adduced scientific evidence through expert witnesses establishing the correct fiber content. In view of the decision in this case, it would appear that the evidentiary weight to be accorded foreign supplier invoices and other overseas shipping advices cannot overcome direct scientific evidence on the issue of fiber identity or content.

In ruling on the admissibility of the foreign supplier invoices and the overseas shipping advices, the hearing examiner based his determination on the testimony of Curt W. Haedke, who testified from personal knowledge that these documents had been prepared in the regular

course of Emilio Salomon's and Franz Rotmann's business and it was the regular course of said businesses to make such documents at the time of the transactions. The standards applied are set forth in the Business Records Statute, 28 U.S.C.A. § 1732, which provides in pertinent part:

* * * any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

By admitting these documents into evidence, the hearing examiner in no way passed upon their trustworthiness, but on the contrary, indicated at that time that any weight to be given to them would depend upon the sources of information from which they were made and the method and circumstances of their preparation. (See Uniform Rules of Evidence, Rule 63 (13).) As indicated in Finding No. 12, *supra*, the clerks who prepared these documents did not speak English; the clerks merely copied the pertinent information, including the description of the fibers from other documents; moreover, the clerks never personally inspected the fiber stocks and even if they had they would have been unable to determine the difference between baby alpaca and baby llama. Such lack of personal knowledge of the identity of the fiber stocks by the clerks making the invoices or shipping advices seriously impairs the weight to be given to these documents. Consequently, these documents and the entries and acts of respondents made in reliance thereon are not to be accorded great evidentiary weight in this proceeding.

Finally, the hearing examiner is not unmindful that Donald Forte's January 6, 1960, letter (CX 32) contains admissions that "a few Baby Alpaca Skins are used" and "occasionally, a skin of a Baby Alpaca is included". These statements were presumably based upon information received by Godsoe from Mr. Michell, who as already found had never inspected the fiber stocks in issue and who did not appear or testify. Moreover, the exact details of Michell's conversations with Godsoe are not contained in the record and the hearing examiner consequently accords them little weight. In any event, admissions of this character cannot overcome direct scientific proof to the contrary.

Upon the basis of the entire record and the previous decision of the Commission in the *Alscap* case, the hearing examiner concludes that complaint counsel has failed to sustain the burden of establishing

that the fiber stocks in issue were composed of fibers other than baby llama.

CONCLUSIONS

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

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The reliable, probative and substantial evidence in this record does not sustain the allegations of the complaint that respondents have engaged in unfair acts and practices or unfair methods of competition in violation of the Federal Trade Commission Act by falsely identifying fiber stocks on invoices as "baby llama".

ORDER

Accordingly,

It is ordered, That the complaint in this matter be, and hereby is, dismissed.

DECISION OF THE COMMISSION

Pursuant to Section 4.19 of the Commission's Rules of Practice effective June 1, 1962, the initial decision of the hearing examiner shall, on the 13th day of April 1963, become the decision of the Commission.
