

IN THE MATTER OF

R. H. MACY & CO., INC.

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

Docket 8650. Complaint, Nov. 13, 1964—Decision, Nov. 29, 1967

Order setting aside the initial decision and terminating the proceeding without dismissing the complaint which charged a large New York City department store with selling misbranded imported Italian mohair-blended sweaters on the grounds that since many other importers are involved the problem can be handled better on an industrywide basis.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that R. H. Macy & Co., Inc., a corporation, and its officers, hereinafter referred to as respondent has violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 R. H. Macy & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent is a retailer of wool products with its office and principal place of business located at 151 West 34th Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 respondent has manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by respondent within the intent and meaning of Section 4(a) (1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were sweaters stamped, tagged, labeled or otherwise identified as containing 66% mohair, 30% wool, 4% nylon whereas in truth and in fact, said sweaters contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondent in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a) (2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain sweaters with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight; of (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; (3) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder, in that the term "mohair" was used in lieu of the word "wool" in setting forth the required fiber content information on labels affixed to wool products without setting forth the correct percentage of the mohair, in violation of Rule 19 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

PAR. 6. The acts and practices of the respondent as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, 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. Edward B. Finch for the Commission.

Howrey, Simon, Baker & Murchison, Washington, D.C., by *Mr. J. Wallace Adair*, for the respondent. (Also on proposals for respondent: *Mr. Matthew Ryan Kenney* and *Mr. Gerald Kadish* of *Howrey, Simon, Baker & Murchison*; and *Mr. Marvin Fenster* of *R. H. Macy & Co., Inc.*)

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

AUGUST 1, 1966

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The Federal Trade Commission, referred to herein as FTC, on November 13, 1964, issued and subsequently served its complaint, charging the respondent with violations of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, referred to herein as the Wool Act. Respondent's answer denied generally the allegations of the complaint, and asserted certain affirmative defenses, particularly good faith efforts to correct and avoid the alleged violations.

The prehearing procedures were complicated and protracted. Respondent's Motion to Vacate Complaint, filed December 10, 1964, was denied by the Commission's Order of February 4, 1965 [67 F.T.C. 1349], but that order suspended the proceeding to afford respondent an opportunity to dispose of the matter by the entry of a consent order. The negotiations failed, and on April 14, 1965,

the Commission ordered that the proceedings be resumed. Answer to the complaint was filed on May 17, and a prehearing conference, the transcript of which constitutes a part of the public record herein, was held on June 23, 1965, pursuant to which the hearings were scheduled to begin on August 30, 1965 (Tr. 61; Prehearing Order June 29, 1965). On July 22, 1965, the hearing examiner certified to the Commission respondent's request for subpoenas ad testificandum to three members of the Commission's staff and two officials of another agency of the Federal Government; and on August 12, he certified respondent's request for a subpoena duces tecum to the Secretary of the Commission. On August 17, the Commission postponed the hearings until after its determination of the questions certified; and in its Order of September 30, 1965 [68 F.T.C. 1179], disposing of those questions, the Commission directed that the hearings be rescheduled for the earliest possible date. On October 14, the hearings were rescheduled to begin on December 13, 1965, and on December 7, at the request of counsel supporting the complaint, they were rescheduled to begin on January 18, 1966.

Because of prior commitments by counsel for respondent, it was necessary to schedule the hearings to suspend for a week at the end of the first week. This schedule was approved by the Commission's Order of December 15, 1965, authorizing hearings in Boston, Massachusetts, and New York, New York, pursuant to the hearing examiner's Certificate of Necessity. The hearing schedule was based upon estimates by counsel that the case-in-chief in support of the complaint would require approximately three days, and the defense approximately four days. The hearings actually required a total of 16 days. This additional time necessitated extensive adjustment of the schedule to meet the requirements of this proceeding, and the other commitments of counsel for respondent, and resulted in an interval in the hearings from February 5 to March 8, 1966.

During this interval the hearing examiner on February 7, 1966, certified to the Commission his ruling denying to counsel for respondent, for purposes of cross-examination, access to the investigational reports of the Commission's investigator, who was the witness. By its Order of March 10, 1966 [69 F.T.C. 1108], the Commission, in effect, reversed that ruling. At the hearings on March 11, counsel were notified of the Commission's order; and arrangements were made to recall the Commission's investigator for further cross-examination. This was completed in the regular course of the hearings.

The hearings began in Boston, Massachusetts, on January 18, and concluded in New York, New York, on March 17, 1966. Eighteen witnesses testified, several making more than one appearance. The transcript of testimony comprises over 2500 pages, and almost 70 exhibits were received in evidence.

The issues presented for determination are varied and complex, and much of the evidence is highly technical. Largely because of these considerations counsel requested extension of the time allowed for filing their proposals, and the hearing examiner requested the Commission to extend his time for filing initial decision so as to enable him to extend the time requested by counsel. By its Order of April 13, 1966, the Commission extended the time for filing the initial decision to August 9, 1966, and on April 14, the hearing examiner allowed counsel until May 31 to file proposals, and until June 20, 1966, to file replies thereto. The proposals of counsel were filed in accordance with that schedule.

After having considered the record in this proceeding, including the proposals and contentions of the parties, the hearing examiner issues this initial decision. Findings proposed by the parties which are not adopted herein, either in the form proposed or in substance, are rejected as not being supported by the record or as involving immaterial or unnecessary matter. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of this initial decision, are hereby denied.

The specific references herein to the testimony and exhibits, and to other parts of the record, which are made in parentheses, are intended to be convenient guides to the principal items of evidence supporting findings of fact, and do not represent complete summaries of the evidence which was considered in making such findings. The abbreviations which are used herein for purposes of brevity and convenience are intended to have the meanings indicated in the following list:

ACH—ACH Fiber Service, Inc.

ASTM—American Society for Testing and Materials.

CX—Commission Exhibit.

Fi.—Numbered paragraphs of the Findings of Fact herein.

FTC—Federal Trade Commission.

Macy—The respondent, R. H. Macy & Co., Inc.

MIT—Massachusetts Institute of Technology.

RPF—Respondent's Proposed Findings of Fact and Conclusions of Law filed May 31, 1966.

RX—Respondent Exhibit.

Tr.—Transcript of Testimony.

Wool Act—Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder.

FINDINGS OF FACT

Organization of Respondent

1. Respondent R. H. Macy & Co., Inc. (sometimes referred to herein as Macy), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 151 West 34th Street, New York, New York (Complaint and Answer).

2. Among some 50 retail stores which it operates (Tr. 1805), including stores in California, and in the Kansas City, Toledo and Atlanta areas (Tr. 1696, 1863), respondent owns and operates 18 department stores in the States of New York and New Jersey (CX 21-D, par. 10). It sells a great variety of consumer items, including wool products, directly to the public, with sales for 1965 totaling approximately \$668,000,000 (Tr. 1817, 1898-9).

3. The respondent corporation consists of six largely autonomous divisions, each headed by a president (Tr. 1863, 2182) and each with its own buying staff (Tr. 1638-9), but the buying, both foreign and domestic, is in substantial part centrally supervised (Tr. 1921, 2182). The corporation is responsible for market development here and abroad, market research, dissemination of information to the individual stores, and for assisting them in overseas buying (Tr. 2182-3). It operates 12 foreign offices, staffed by approximately 300 people, with another approximately 150 in the domestic area, responsible for overseas buying assistance, including information concerning trends, fashions, developments and anything new in retailing domestically and abroad which may be of assistance to the stores (Tr. 1660-1, 2183).

4. It is apparent that the respondent corporation carefully coordinates and, to the extent necessary, controls the policies and practices of the whole organization, including its foreign and domestic buying and its retail selling. In the consideration of this matter, therefore, it is unnecessary to deal separately with the functions, practices and policies of respondent's several stores and divisions. References herein to respondent are intended, accordingly, to refer to its whole organization except to the extent otherwise specifically indicated.

Charges and Scope of Proceeding

5. Briefly stated, the complaint charges respondent with violations of the Wool Products Labeling Act of 1939 (Wool Act) in connection with sweaters inaccurately labeled as to their fiber content, particularly their mohair and wool content. During prehearing conference counsel limited his presentation of evidence in support of the complaint to mohair-blend sweaters marked or labeled as imported Italian sweaters; and the allegations of the complaint and the commitments of counsel limited the evidence to such sweaters with fiber content labels affixed to them which are alleged to be inaccurate (Tr. 40-3, 1327-37). Counsel also limited his presentation of evidence to acts and practices occurring during the years 1963 and 1964 (Tr. 43-6; Prehearing Order June 29, 1965, par. 3). It was also stipulated that counsel would not offer as evidence any advertising pertaining to such sweaters (CX 21-E, par. 12).

6. It was stipulated that respondent's purchases of mohair-blend sweaters in Italy in 1963 amounted to \$397,485, and in 1964 to \$393,720, based upon the "first costs" value, and that the "landed costs" of such sweaters could be arrived at by multiplying those figures by 1.5 (CX 21-C, par. 7). Respondent imported about 120,000 sweaters from Italy in 1963, and about 110,000 in 1964 (Tr. 1846), and their retail prices ranged from approximately \$10 to \$50 each (Tr. 1671).

Jurisdiction

7. Respondent's Answer denied, *inter alia*, Paragraph 2 of the Complaint which alleges "commerce" as defined in the Wool Act, and the prehearing conference confirmed that the question of commerce for purposes of the Commission's jurisdiction constituted a specific issue to be determined in this proceeding (Tr. 38-40). On January 17, 1966, counsel supporting the complaint filed a motion requesting the hearing examiner to take official notice that respondent's acts and practices challenged in this proceeding were in "commerce" as defined in the Wool Act and the Federal Trade Commission Act. It was made clear at the beginning of the hearings that counsel supporting the complaint understood his responsibility concerning this issue, and that the evidence which he proposed to offer with respect to it did not depend upon what disposition might be made of his motion (Tr. 67-8). The motion was denied by the hearing examiner's order of March 24, 1966.

8. The evidence in support of the complaint relates to four sweaters purchased by the Commission's investigator from re-

spondent's retail stores in December 1963 (CX 1), and August 1964 (CX 9, 13, 17). One of those sweaters was purchased from Bamberger's, respondent's store in Newark, New Jersey (CX 1), one from Macy's Flatbush Store, in Brooklyn, New York (CX 9), and two from Macy's Herald Square Store, in New York, New York (CX 13 and 17) (see also CX 21-D, par. 9). No evidence was offered that any of these sweaters were sold by respondent in interstate commerce or that they were transported by respondent to its stores in interstate commerce after importation into this country from Italy. The only evidence offered in support of Paragraph 2 of the Complaint relates to respondent's importation from Italy of the four sweaters in evidence.

9. Section 2(h) of the Wool Act includes "commerce * * * with foreign nations" as part of its definition of "commerce." Section 3 of the Act declares unlawful "The introduction * * * into commerce, or the * * * transportation, * * * in commerce" of any misbranded wool product.

10. It was stipulated that respondent imported the mohair-blend sweaters referred to on four price tickets in evidence as CX 2, 10, 14 and 18 (CX 21-D and E, par. 11). The record is replete with evidence that respondent was engaged extensively in the importation of mohair-blend sweaters from Italy in 1963 and 1964, and that through its Italian office and its buyers who traveled to Italy, respondent dealt directly with the Italian manufacturers. It is clear that the sweaters imported by respondent from Italy in 1963 and 1964 were purchased by it in Italy, and on its order were shipped to it in this country.

11. The purchase of merchandise in Italy and its importation into this country constitute commerce with a foreign nation within the meaning of Section 2(h) of the Wool Act. The importation by respondent of mohair-blend sweaters purchased by it in Italy, accordingly, constitutes the introduction by respondent of such sweaters "into commerce" and their transportation "in commerce" within the meaning of the Wool Act. Insofar as any such sweaters may be misbranded at the time of their importation, such misbranding is unlawful and within the enforcement jurisdiction of the Federal Trade Commission. Such jurisdiction does not depend upon the interstate sale or transportation of the sweaters after their importation.

12. Although respondent stipulated that it imported the mohair-blend sweaters referred to on the four price tickets in evidence as CX 2, 10, 14 and 18, it did not stipulate that those price tickets were ever attached to the four sweaters in evidence as CX 1, 9, 13

and 17 (CX 21-D and E, par. 11). Since the evidence in support of the alleged misbranding is limited to evidence relating to the four sweaters in evidence as CX 1, 9, 13 and 17, proof of the Commission's jurisdiction herein is limited to the evidence concerning the importation by respondent of those sweaters. The proof with regard to them will be examined to determine whether or not each was imported by respondent, and, if so, to determine whether or not it was misbranded at the time of importation.

The Sweaters in Evidence

13. The four sweaters in evidence were identified by Mr. Albert Posnick, an investigator of the FTC. He testified that he purchased each of the sweaters on a particular date from a particular retail store of the respondent, and he discussed the circumstances under which each of the purchases was made. He was examined in careful detail concerning his identification of each sweater as the one which he purchased at the particular time and place (Tr. 93-311, 2224-53, 2309-72).

14. From observing him and listening to his testimony, the hearing examiner is satisfied that the investigator had a recollection generally of the places where and circumstances under which he purchased the sweaters. During the period covered by his investigation in connection with this matter, he worked on many other investigations, some of them involving mohair-blend sweaters of the same type (Tr. 146-8, 153-4, 178-9), and it was manifestly impossible for him to retain a clear recollection of the detailed occurrences in connection with each of them. The record discloses that his independent recollection was highly uncertain concerning the specific circumstances involved in his purchasing and handling each of the four sweaters in evidence, and that in order for him to testify with respect to details it was necessary for him to refer to the notes and reports which he made in the course of his investigation (Tr. 219, 225, 229, 244-7, 303-4, 308, 2237-40, 2246, 2319-20).

15. The evening before he testified he refreshed his recollection by examining his notes and reports (Tr. 188, 197, 204, 209-13). When he was recalled for further cross-examination after his reports were made available to counsel for respondent, reference was made to specific parts of certain of those reports (Tr. 2224-53, 2309-72). During such cross-examination counsel for respondent had full opportunity to show any variations as to material facts between the investigator's independent recollection and the reports which he made to the FTC concerning the details of his investi-

gation. Under these circumstances the investigator testified cautiously and earnestly, and, subject to the uncertainties and, in some instances, the demonstrated inaccuracies of his independent recollection as to specific details, his testimony is credible.

16. The hearing examiner is also satisfied that the investigator was wholly unable to identify any one of the sweaters as the specific sweater purchased by him at a particular time and place without referring to a heavy paper tag, described as a pin ticket, which he attached to each sweater (Tr. 195, 223, 308-9, 2246, 2319-20). Without this identifying pin ticket there was no point of recognition about any one of the sweaters by which the investigator could distinguish it surely and precisely from the many other sweaters of the same general type which he had observed in the course of his official duties, or, indeed, which would enable him to determine that he had ever previously seen the particular sweater. The investigator testified that he was able to identify these sweaters only by examining the pin tickets which he attached to them (Tr. 187, 224-5).

17. The pin tickets were attached to the sweaters by the investigator upon returning to his office the same day he purchased the sweaters. At that time he entered upon the pin tickets in his own handwriting the essential information showing the time when and the place where he purchased each of them (Tr. 95, 122, 129, 131-2, 167-8, 246). Relying entirely upon those pin tickets for his identification of the particular sweaters, he testified as to when and where he purchased each of them.

18. This constitutes strong prima facie evidence that the sweaters in evidence are the ones purchased by the FTC investigator from respondent's stores at the times and places to which he testified. In the absence of a showing of some reason to believe that the pin tickets were removed from the sweaters purchased by the FTC investigator, and attached to others, the hearing examiner is satisfied that CX 1, 9, 13 and 17 have been correctly identified.

19. In identifying each sweater, the investigator stated that the pin ticket which he attached could not be removed without mutilating it (Tr. 95, 122, 129, 132). On cross-examination he examined the pin tickets which he had attached to the sweaters and expressed the opinion that they had not been removed (Tr. 272-80).

20. He was then excluded from the hearing room, and during his absence, with the agreement of counsel, one sweater was selected by each counsel, CX 9 and 13, and the investigator's pin tickets were removed from and reattached to those two sweaters

by an associate of counsel for respondent (Mr. Daniel Chaucer, Director of Macy's Bureau of Standards, who was later a defense witness, but who at the time of the demonstration was not identified on the record). This was done in the presence of counsel and the hearing examiner, the only tools utilized being ordinary paper clips and a mechanical pencil. The demonstration required approximately ten minutes (Tr. 280-91).

21. The investigator was then recalled and again examined each of the pin tickets. It was his best judgment that three of them had not been removed, including the pin ticket on CX 13 which had been removed and reattached during his absence. With respect to the pin ticket on CX 9, which had also been removed and reattached during his absence, he stated that "the grommet appears to have been bent," and that the pin ticket may have been removed, but that he could not tell (Tr. 291-2).

22. The demonstration established that the investigator was incorrect in his testimony that the pin tickets could not be removed without mutilating them. It also established that removal and reattachment must be carefully done, and that, even so, the operation may leave some indication of tampering with the pin tickets. The demonstration warrants the conclusion that by the exercise of deliberate care it is possible to remove and replace or transfer the pin tickets without visual evidence of having done so, but that the careless or inadvertent removal and replacement or transfer of the pin tickets would be likely to result in such visual changes as to indicate that they had been tampered with.

23. In addition to the specific identification of the sweaters by the investigator, the evidence generally is to the effect that the sweaters were handled throughout with careful attention to completeness and correctness in their chain of identification. The identifying pin tickets were attached by the investigator upon returning to his office the same day he purchased the sweaters (Fi. 17), and the sweaters were promptly mailed to ACH for testing. CX 13 and 17 were mailed to ACH on August 27, 1964, the same day on which they were purchased (Fi. 31, 34). CX 1 was purchased on December 26, 1963, and was mailed to ACH not later than January 2, 1964 (Fi. 27, 28). CX 9 was purchased on August 19, 1964, and was mailed to ACH not later than August 20 (Fi. 29, 30). While in the investigator's office before mailing, the sweaters were kept overnight in a locked cabinet (Tr. 168). Upon being received, each of the sweaters was carefully identified by ACH with the same type of pin ticket (Tr. 1019-20) showing that it was

received from the FTC and showing the ACH test number (Tr. 343-56, 452-69, 493-8, 516-8, 1358-60, 1386-8, 1471-5).

24. The examination of the witnesses who handled these sweaters and samples cut from them for testing, was thorough and searching. Their testimony concerning the identification and handling of the sweaters was consistent and credible throughout, and provides nothing to indicate that the investigator's pin tickets may have been intentionally or inadvertently removed from the sweaters at any time (Tr. 343-56, 452-69, 493-8, 516-8, 551-4, 651-4, 660-4, 1103-7, 1186-7, 1199-1200, 1229, 1271-4, 1285-6, 1358-60, 1386-8, 1434-7, 1471-5, 1479-81).

25. The condition of the pin tickets at the time the investigator examined them when he testified persuasively indicates that they had not been carelessly or inadvertently removed from the sweaters to which he originally attached them. In these circumstances, a conclusion that the sweaters in evidence are not adequately and correctly identified must be based upon evidence indicating some reason to believe that spurious sweaters may have been intentionally substituted for those to which the pin tickets were originally attached by the FTC investigator. No such evidence was offered. The evidence shows only the possibility of deliberately and fraudulently removing the pin tickets and attaching them to other sweaters without discovery, with no showing of circumstances remotely suggesting that such fraud may have occurred in connection with the sweaters in evidence.

26. It is the opinion of the hearing examiner that the weight of the evidence establishes that the pin tickets which the FTC investigator attached to the sweaters in evidence were not removed from them before they were identified by him when he testified. It is found, therefore, that the sweaters in evidence identified as CX 1, 9, 13 and 17 are the sweaters purchased from respondent's stores at the times and places stated by the investigator during his testimony.

27. A sweater, turquoise in color, a portion of which is identified as CX 1 (Tr. 72), was purchased by the FTC investigator from respondent's Bamberger Store in Newark, New Jersey, on December 26, 1963 (Tr. 94-5; CX 4). At the time it was purchased the sweater had cloth labels sewed to it, one bearing the words "Hand Made in Italy Especially for Bamberger's, WPL-8046, New Jersey," and another bearing the words "66% Mohair, 30% Wool, 4% Nylon, Hand Made" (Tr. 72-3, 95).

28. The sweater, CX 1, was mailed by the FTC investigator to ACH Fiber Service, Inc., in Boston, Massachusetts, referred

to herein as ACH (Tr. 103, 246, 302). It was received by ACH on January 3, 1964 (Tr. 349) in connection with a letter from the FTC dated January 2, 1964 (Tr. 346-8; CX 22), and cuttings from this sweater were tested by ACH under its Test No. S-6001 (Tr. 343, 350-90). On January 9, 1964, ACH reported to the FTC that its Test No. S-6001 disclosed a fiber content of 23.9 per cent mohair, 60.3 per cent wool, 1.8 per cent nylon and 14 per cent azlon (Tr. 391-407, 413-19; CX 5A-B).

29. A blue sweater, a portion of which is identified as CX 9 (Tr. 76), was purchased by the FTC investigator from Macy's Flatbush Store on August 19, 1964 (Tr. 121-5; CX 11). At the time it was purchased the sweater had cloth labels sewed to it, one bearing the words "Hand Knitted, 60% Mohair, 40% Wool," and another bearing the words "Hand Made in Italy Expressly for Macy Associates" and an illegible WPL number (Tr. 76-8, 122).

30. The sweater, CX 9, was mailed by the FTC investigator to ACH (Tr. 125, 302). It was received by ACH on August 21, 1964, in connection with a letter from the FTC dated August 20, 1964 (Tr. 451-6, 1435; CX 12, 29), and cuttings from this sweater were tested by ACH under its Test No. S-7557 (Tr. 452-3, 457, 467-84). On August 24, 1964, ACH reported to the FTC that its Test No. S-7557 disclosed a fiber content of 12 per cent mohair, 87 per cent wool and 1 per cent nylon (Tr. 484; CX 12).

31. Two sweaters, one off-white or bone colored, a portion of which is identified as CX 13 (Tr. 79-80), and the other green in color, a portion of which is identified as CX 17 (Tr. 81), were purchased by the FTC investigator from Macy's Herald Square Store on August 27, 1964 (Tr. 127-35; CX 15, 19).

32. At the time CX 13 was purchased it had cloth labels sewed to it, one bearing the words "Macy's Own Brand, VIVO, Hand Made in Italy Exclusively for R. H. Macy & Co., Inc., WPL 8046," and another bearing the words "Hand Knit, 60% Wool, 30% Mohair, 10% Nylon, Made in Italy" (Tr. 79-80, 129).

33. At the time CX 17 was purchased it had cloth labels sewed to it, one bearing the words "Hand Made in Italy Expressly for Macy Associates, WPL 8046," and another bearing the words "Made in Italy, 40% Mohair, 55% Wool, 5% Nylon" (Tr. 81, 132).

34. The sweaters, CX 13 and 17, were mailed by the FTC investigator to ACH (Tr. 136-7, 302). They were received by ACH in connection with a letter from the FTC dated August 27, 1964 (Tr. 492-4, 516-8, 1434-5; CX 36). Cuttings from CX 13

were tested by ACH under its Test No. S-7568 (Tr. 495-515, 1435), and cuttings from CX 17 were tested by ACH under its Test No. S-7567 (Tr. 518-20, 525-7, 1434).

35. On September 8, 1964, ACH reported to the FTC that its Test No. S-7568 (CX 13) disclosed a fiber content of 66 per cent wool, 22 per cent mohair and 12 per cent nylon (Tr. 515-6; CX 16); and on September 4, it reported that its Test No. S-7567 (CX 17) disclosed a fiber content of 84 per cent wool, 6 per cent mohair, 5 per cent nylon and 5 per cent azlon (Tr. 527-8; CX 20).

36. The cloth labels showing the fiber content of the four sweaters in evidence were sewed to the inside of the sweaters at the neck. The Italian manufacturers had the responsibility of affixing the fiber content labels to sweaters purchased by Macy (Tr. 1678-9), and it is implicit in the testimony of all of the witnesses who discussed the subject that the cloth labels sewed to the sweaters showing fiber content were attached by the manufacturers in Italy and were on the sweaters when they were imported by Macy (Tr. 1645-50, 1669, 1677-8, 1730-1, 1752, 1809, 1887). It is concluded, therefore, that the cloth labels showing fiber content, which were sewed to the four sweaters in evidence when they were purchased by the FTC investigator, were attached by the manufacturers in Italy, and were on the sweaters when they were imported by the respondent.

37. The Macy price ticket identified in evidence as CX 10 was attached by respondent, when offered for sale during the regular course of business, to a mohair-blend sweater which was purchased and imported by respondent from an Italian manufacturer in a group of about 1800 sweaters. The sweater was imported with an invoice from Fraus, dated September 23, 1963, showing delivery date of November 5, 1963, and showing a fiber content of 60% mohair and 40% wool (Tr. 1707, 1760-1; CX 21-B par. 4, CX 21-D par. 8 and 11, CX 21-F, CX 21-H). When the FTC investigator purchased CX 9 from Macy's Flatbush Store on August 19, 1964 (Fi. 29), it had the Macy price ticket, CX 10, attached to it (Tr. 123-4, 130, 2337). The sweater identified in evidence as CX 9 was, accordingly, imported by respondent in November 1963, and was sold by it at its Flatbush Store on August 19, 1964.

38. The Macy price ticket identified in evidence as CX 14 was attached by respondent, when offered for sale during the regular course of business, to a mohair-blend sweater which was purchased and imported by respondent from an Italian manufacturer in a group of 100 sweaters (CX 21-C par. 6, CX 21-D par. 8

and 11). It was stipulated that the information on the price ticket disclosed the sweater to which it was attached was imported from the Italian manufacturer, Amita, and that the letter B and numeral 14 on the ticket meant the first week of May 1964 (CX 21-A, CX 21-G). The buyer for respondent's Bamberger Store in Newark, New Jersey, testified, however, that the information on the price ticket meant that at the latest the sweater came into this country in January 1964 (Tr. 2454-5). When the FTC investigator purchased CX 13 from Macy's Herald Square Store on August 27, 1964 (Fi. 31), it had the Macy price ticket CX 14 attached to it (Tr. 129-30). The sweater identified in evidence as CX 13 was, accordingly, imported by respondent not later than January 1964, and was sold by it at its Herald Square Store on August 27, 1964.

39. The Macy price ticket identified in evidence as CX 18 was attached by respondent, when offered for sale during the regular course of business, to a mohair-blend sweater which was purchased and imported by respondent from an Italian manufacturer in a group of 142 sweaters. The sweater was imported with an invoice from Pavesi, dated June 6, 1963, showing the delivery date of September 20, 1963, and showing a fiber content of 55% wool, 40% mohair and 5% nylon (CX 21-B par. 5, CX 21-D par. 8 and 11, CX 21-I). When the FTC investigator purchased CX 17 from Macy's Herald Square Store on August 27, 1964 (Fi. 31), it had the Macy price ticket CX 18 attached to it (Tr. 132). The sweater identified in evidence as CX 17 was, accordingly, imported by respondent in September 1963, and was sold by it at its Herald Square Store on August 27, 1964.

40. The Bamberger price ticket identified in evidence as CX 2 was attached by respondent, when offered for sale during the regular course of business, to a mohair-blend sweater which was purchased and imported by respondent from an Italian manufacturer in a group of 513 sweaters which were received during the first week of September 1963. The sweater was imported with an invoice from Landi, showing a fiber content of 66% mohair, 30% wool and 4% nylon (Tr. 1639-42, 1644, 1703-4; CX 21-B par. 3, CX 21-D par. 8 and 11, CX 21-F, CX 21-J).

41. When the FTC investigator selected CX 1 to purchase from respondent's Bamberger Store on December 26, 1963 (Fi. 27), it did not have a price ticket attached to it. The salesclerk then removed the Bamberger price ticket, which is identified in evidence as CX 2, from another sweater and pinned it to the one purchased by the investigator (Tr. 2246-52, 2311-5).

42. The buyer for respondent's Bamberger Store testified that immediately after the FTC investigator left the store a phone call was received from the salesgirl advising "that she had just sold a Landi sweater to a man who identified himself as a F.T.C. investigator" (Tr. 1645). When the Bamberger buyer was recalled for further testimony after it was established that CX 2 was removed by the salesgirl from another sweater and pinned to CX 1, she testified that the salesgirl had no way of knowing that the sweater from which she removed CX 2 was the same style as CX 1 or that it was manufactured by Landi, and that the salesgirl acted contrary to instructions in making such a transfer of the price ticket (Tr. 2456-60, 2463-5, 2467-9). The buyer examined the sweaters on the counter and determined that sweaters from Landi and another Italian manufacturer were on sale the day that CX 1 was purchased by the FTC investigator (Tr. 2460-1).

43. There are circumstances indicating that CX 1 may be, and probably is, of the same style, and the product of the same manufacturer, Landi, as the sweater from which CX 2 was removed. The salesgirl undoubtedly had some familiarity with her stock and the styles which she sold, and another Macy official testified that the same style sweater is not produced by different manufacturers (Tr. 1819-20); the salesgirl immediately advised the buyer that she had sold a Landi sweater; the fiber content shown on the cloth label attached to CX 1, 66% mohair, 30% wool and 4% nylon, is the same as the fiber content shown on the Landi invoice covering the importation of the sweater to which CX 2 was originally attached (Fi. 27, 40; CX 21-B par. 3, CX 21-J); and the sweaters of Landi and only one other Italian manufacturer were on the counter at the time of the transaction, with no evidence concerning the invoiced fiber content of the sweaters of the other manufacturer.

44. The price ticket, CX 2, was not, however, attached to CX 1 when it was selected by the FTC investigator, and the uncontradicted and credible testimony of the Bamberger buyer is that the salesgirl had no way of knowing that the sweater from which she removed CX 2 was of the same style as CX 1, or that it was manufactured by Landi. On this record it is concluded that counsel supporting the complaint has failed to establish that CX 2 correctly identifies CX 1 as having been imported by respondent from Landi in September 1963.

45. At the time it was purchased, however, CX 1 had attached to it a cloth label bearing the words "Hand Made in Italy Especially for Bamberger's, WPL-8046, New Jersey" (Fi. 27), and a paper label identified in evidence as CX 3 bearing the words

"Made in Italy Expressly for Bamberger's, New Jersey" (Tr. 72-3, 95, 100-1, 103-4, 2241, 2310-11). The number "WPL-8046" identifies wool products introduced or transported in commerce by respondent (Wool Act, Sec. 2, 3(a) (3), 4; Tr. 1911; CX 13, 17). These labels firmly establish that CX 1 was made in Italy expressly for respondent, and that it was imported by respondent. Although the date of importation and the identity of the manufacturer are not established, the sweater identified in evidence as CX 1 was, accordingly, imported by respondent and was subsequently sold by it at its Bamberger Store on December 26, 1963.

The Validity of the ACH Test Reports

46. Respondent broadly challenges the validity of the fiber analysis test reports in evidence (RPF 88-150), urging that complaint counsel has failed in his burden of proof to show that the percentages of fibers reported by ACH have any validity (RPF 112). Respondent contends that ACH does not have a quality control program and does not follow a standard procedure in conducting fiber analyses (RPF 135); that the ACH operators who performed the tests were not qualified to do so (RPF 119, 149); that ACH improperly computed the test results reported by its operators (RPF 135-41); that ACH testing procedures are without merit, incompetent and unreliable (RPF 101, 117); and that the test reports in evidence are unreliable for the purpose of determining, within any measurable degree, the approximate mohair and wool content of the four sweaters in evidence (RPF 149-50).

The Facilities and Reputation of ACH

47. ACH Fiber Service, Inc., located in Boston, Massachusetts, is engaged, on a commercial basis, in fiber analysis and core testing (Tr. 313-5), and prior to 1963 it was also engaged, to some extent, in bacteriological research (Tr. 543-4). Core testing, which is a method of testing bales of raw wool to determine quality and the content of extraneous material (Tr. 319-20, 729, 747-9), is not a part of the testing procedures involved in this matter (Tr. 726-7). Since 1962 core testing has represented about half or more of the work done by ACH. The balance of its work, and the part with which this proceeding is concerned, has been done by its fiber analysis department (Tr. 544-5, 1492).

48. The fiber analysis department of ACH employs, on a full-time or part-time basis, five persons whom it considers to be qualified to identify, count and measure fibers (Tr. 313-5, 755-9), in addition to others who are from time to time trained for that

purpose (Tr. 635-6, 759-62, 1259-65), and in addition to the general administrative and clerical personnel of the company. Its fiber analysis laboratory occupies an area approximately ten by fourteen feet, part of which is sectioned off into a dark room which contains three projection microscopes (Tr. 1263). ACH does some fiber testing chemically, but its work in fiber analysis is primarily by microscopic examination (Tr. 545).

49. Since the latter part of 1963, when serious questions were raised concerning the fiber content labeling of imported Italian mohair-blend sweaters, ACH has participated in conferences with the FTC and the Bureau of Customs with respect to the problem of sampling and testing such sweaters, and has participated with clients in efforts to develop acceptable programs and procedures (Tr. 913-6, 999-1001, 1494-5, 1501-8, 1515-17, 1571-4). The testing of these sweaters at the time of importation overloaded the facilities of the laboratory of the Bureau of Customs, and in December 1963 the Bureau instituted a program of utilizing the facilities of outside laboratories for that purpose. ACH was approved by the Bureau of Customs, after a conference with FTC representatives, as an outside laboratory in connection with that program, and the Bureau has relied upon the results of tests by ACH in determining its labeling and relabeling requirements (Tr. 1524-39, 1553, 1566-8, 1570-1, 1575-6, 1579-80).

50. Since the Fall of 1963 ACH has tested many imported Italian mohair-blend sweaters for various clients. In addition to testing sweaters for the FTC, and for importers with the approval of the Bureau of Customs (Fi. 49), it has also tested such sweaters for respondent and other importers (Tr. 1513-5, 2383, 2387-8, 2437; CX 17, 18). The respondent used ACH for testing these sweaters largely because it understood that the FTC also used ACH for this purpose and relied upon the results of its tests (Tr. 2271-3, 2289-90, 2452). It may reasonably be presumed that other importers who used ACH for testing these sweaters, and who consulted ACH in connection with programs for testing them, may have been influenced to some extent in making that selection by an understanding that ACH had been approved as a testing laboratory by the FTC and the Bureau of Customs. There is no evidence, however, that any of the importers involved advised the FTC or the Bureau of Customs that ACH was not qualified to determine the fiber content of sweaters, or otherwise challenged the competency of ACH to perform the tests which so vitally affected their business affairs (see Tr. 2434-5).

51. It is apparent, therefore, that there is impressive evidence that ACH was extensively used, and that the results of its tests were relied upon, by the affected business community and by the government agencies responsible for enforcing labeling requirements with regard to these sweaters. The evidence as a whole persuasively discloses that ACH was generally considered by the government agencies and importers concerned with the fiber content labeling of imported Italian mohair-blend sweaters to be a reputable, reliable and competent fiber testing laboratory.

The ACH Fiber Analysts

52. Tests of the four sweaters in evidence were made by ACH under the supervision of Richard T. McAndrew, whose title is Assistant Laboratory Manager, but who actually performs the function of laboratory manager (Tr. 313). He has been employed by ACH since 1962 (Tr. 315). Prior to that time he was employed by U. S. Testing Company for about 26 years, in which employment he had considerable experience in fiber identification and testing, particularly with respect to wool fibers, and considerable administrative responsibility in connection with such testing (Tr. 317-22, 619-35).

53. Mr. McAndrew clearly is not a qualified expert in every facet of the techniques and procedures involved in the tests and computations required to determine the fiber composition of mohair-blend sweaters. He does not have a college degree (Tr. 316, 633-4), he is not a chemist (Tr. 1077, 1079), he is not a qualified statistician (Tr. 528-9, 1022-3, 1028, 1067-8), and he is not an expert microscopist (Tr. 325-7, 622).

54. In 1936, however, Mr. McAndrew completed a three-year course in a textile college which at that time was not accredited and did not give degrees (Tr. 316, 633-4), and he has had long practical experience in fiber identification and testing (Fi. 52). He is a member of the American Society for Testing and Materials, referred to herein as ASTM, and is chairman of two task groups concerned with formulating ASTM test methods. Since 1941 he has been a member of an ASTM task group responsible for establishing the method for determining the fineness of wool fiber by microscopical means. He is also a member of the American Association of Textile Technology, a member and on a panel of arbitrators of the American Arbitration Association, and a member of an association of textile chemists (Tr. 322-3, 331).

55. Mr. McAndrew has a general knowledge of statistics sufficient to enable him to understand the statistical problems which

arise in the course of tests and computations concerning fiber content, and to resort to available assistants and standard references for their solution (Tr. 528-9, 1023-30, 1060-80). He is familiar with microscopes and how to use them, and is able to use them effectively in identifying and measuring fibers (Tr. 325-7, 331-2, 622, 758-9). He is an expert fiber analyst qualified to determine the tests to be made, and the means to be used in making them, and to supervise and appraise the work done by his assistants in determining the fiber content of mohair-blend sweaters (Tr. 326, 332, 334-9, 389-91), and is himself qualified to perform such tests (Tr. 327-30, 332-4, 622, 758-9).

56. The record establishes that Mr. McAndrew was qualified to supervise the tests which were made by ACH of the four sweaters in evidence. This qualification included his competency to see that the prescribed procedures of ACH were followed, to participate in prescribing those procedures, to appraise the abilities of the ACH technicians who actually performed the tests and calculations, to determine the circumstances in which re-examinations by the technicians and rechecks of their results were warranted, and to evaluate the validity of the final test results.

57. Mrs. Aurora Duarte was one of the technicians who participated in the test of CX 1 which was reported to the FTC on January 9, 1964. At that time she was a full-time employee of ACH and was supervisor of the fiber analysis laboratory of ACH (Tr. 1354, 1356-8, 1414, 1418-19).

58. Mrs. Duarte graduated from an accredited college in 1957, receiving a degree in liberal arts, with a major in chemistry. She also took two courses, differential calculus and calculus, at the Massachusetts Institute of Technology, referred to herein as MIT, which she attended for two semesters at night. Except for the use of microscopes in biology courses in college, her first use of a microscope was about six months after she was employed by ACH (Tr. 1347-9, 1374). During the summers of 1954 and 1955 she worked for a chemical company as a laboratory trainee (Tr. 1349).

59. She was employed by ACH in 1959 as a laboratory technician. She was trained for about two years in that employment before she actually started working on fiber analysis tests to be reported by ACH to its clients. Her training included a year in identifying and measuring wool fibers, and an additional six months with respect to other fibers. After the first six months, her training included the use of microscopes for about three or four hours a day (Tr. 1349-53, 1374-82). Beginning in April 1963

she became supervisor of the fiber analysis laboratory where she was responsible for seeing that their work was done by the other technicians, usually two, in addition to her own participation in the tests. She continued in this capacity until June 1964, when she left the ACH employment because she was going to have a baby (Tr. 542, 546, 570, 617, 636, 1354-6). During the period she was supervisor of the fiber analysis laboratory she worked under the supervision of the person who had general responsibility for the fiber analysis department of ACH (Tr. 546, 618, 1355, 1374, 1382, 1411).

60. At the time of the hearings Mrs. Duarte was employed by ACH on a part-time basis. In that employment she worked at home making tests of mohair-blend sweaters by microscopic examination, using a bench microscope supplied by ACH. Her examinations were limited to identifying and counting the types of fibers in the samples, and did not include measurement of the fiber diameters. None of her test results during the part-time employment in her home related to the ACH tests on the four sweaters in evidence (Tr. 547-50, 570, 578-93, 1412-13).

61. Clifford N. Beck was one of the technicians who participated in the ACH tests of all four of the sweaters which are in evidence (Tr. 1171). He received the degree of Bachelor of Science in Textile Engineering in about 1951, based upon attendance from 1932 to 1936 at a textile school which did not grant degrees at that time, and attendance in about 1950 and 1951 at the New Bedford Institute of Technology where he completed the requirements for his degree (Tr. 1172-4). During the period from 1936 to 1949 he was employed successively by a testing company and two automobile tire companies in which employment he had extensive experience and considerable responsibility in fiber testing, quality control and research, including experience in the use of microscopes (Tr. 1175-7, 1182).

62. In 1949 Mr. Beck was employed as an instructor by the New Bedford Institute of Technology, the name of which has been changed to Southeastern Massachusetts Technological Institute, and at the time of the hearings he was still in that employment. He has been an Assistant Professor for about eight or nine years, and his courses of instruction include textile fiber technology, textile testing, textile microscopy and photo microscopy, and including instruction in the use of bench microscopes and projection microscopes (Tr. 1172, 1177-81, 1183, 1201-2). He is a member of the American Association of Textile Technology (Tr. 1181).

He is textile engineer, but does not consider himself qualified as a statistician (Tr. 1238, 1244-5).

63. During the past 10 years, while he was a full-time teacher, Mr. Beck has had a part-time consultant arrangement with ACH on an intermittent basis (Tr. 533, 1172, 1181-2, 1202). During the months of July through October 1964 he worked 266 hours for ACH, and he estimated that last year his work for ACH amounted to 250 hours (Tr. 569, 1183). His test work for ACH, including his participation in the tests of the four sweaters in evidence, has included identifying and counting fibers and measuring their diameters. The identifying and counting may be done with a bench microscope but the measuring requires the use of a projection microscope (Tr. 1188). He has not done any of this work on the premises of ACH, or with the use of its equipment (Tr. 551). It has been done primarily at the Institute with the use of its equipment, but occasionally some of it has been done at his home. He has a bench microscope at his home, and during summer vacations he has borrowed a projection microscope from the Institute and used it for measuring in his home, but because of the trouble involved, he now does all of the measurement work at the school (Tr. 1187-8, 1192).

64. Vasant Kumar Devarakonda succeeded Mrs. Duarte as supervisor of the fiber analysis laboratory of ACH in June 1964 (Tr. 538, 617, 1136-7). He supervised the work in the ACH laboratory in connection with, and was one of the technicians who participated in, the test of CX 9 which was reported to the FTC on August 24, 1964, CX 13 reported on September 8, 1964, and CX 17 reported on September 4, 1964 (Tr. 1137, 1142-3).

65. Mr. Devarakonda, a native of India, came to this country in September 1961 as a student in the textile division of MIT (Tr. 1122-3). Prior to coming to this country he had an extensive education in India, with emphasis on physics, chemistry, mathematics and textile technology. After completing two years in each of two colleges he received, in 1956, a bachelor's degree in physics, with mathematics and chemistry as subsidiary subjects; and, after completing two years in another college, he received, in 1958, the degree of Bachelor of Science in Textile Technology. He also worked as an apprentice for two years in a cotton textile mill, and spent nine months before coming to the United States as an assistant lecturer in a technical college which was a part of the Madras University system. After arriving in the United States he attended the textile division of MIT for two semesters from

September 1961 to May 1962, completing a laboratory course in textile research and a classroom course in textile technology. He also took a course in the biology department involving methods of research (Tr. 1123-8). At the time of the hearings he was taking night courses in mechanical engineering at Northeastern University (Tr. 1130-1).

66. In the course of his education Mr. Devarakonda has studied the basic principles of statistics and their specific applications to the textile industry, and he is familiar with the computations and statistical procedures involved in fiber analysis (Tr. 2482-3). His education and experience in India, and his laboratory course at MIT, included the use and theory of microscopes in the analysis and testing of fibers (Tr. 1111-22, 1124-6). He is a member of ASTM, and of a committee of ASTM concerned primarily with the testing of wool for fiber lengths, diameters and color, and he is a member of the American Association of Textile Chemists and Colorists (Tr. 1139-40, 1323-4).

67. Following the completion of his studies at MIT in May 1962, Mr. Devarakonda was employed by a private consumer testing company in Boston, Massachusetts, where he was in charge of its laboratory specializing in testing the performance characteristics of fabrics. He continued in that employment until December 1963 (Tr. 1128-30).

68. In January 1964 Mr. Devarakonda was employed in the fiber analysis department of ACH (Tr. 1130). After a trial period of a month he was accepted as a fiber technologist and continued in a training period for about two additional months under the supervision of Mrs. Duarte, until in March or April 1964 he began to perform regular fiber analysis tests. When Mrs. Duarte left ACH in June 1964, he became senior fiber technologist in charge of the laboratory, and since then he has participated in and supervised all of the tests made in the fiber analysis laboratory of ACH (Tr. 538-40, 617, 901-2, 1131-7, 1319-20, 1409, 1414). In that capacity he has supervised the work in the laboratory of Mr. Williams, a full-time employee, and of certain other employees, but has not supervised the work of Mr. Beck or Mrs. Duarte in connection with the tests which they have made on a part-time basis outside of the ACH laboratory (Tr. 540, 1257-62).

69. Charles M. Williams was one of the technicians who participated in the ACH tests of CX 9, 13 and 17 (Tr. 1433-4). He received a Bachelor of Arts degree in 1956 from a college in Tennessee. In 1963 he took a night course in inorganic chemistry

at Boston University, and in 1964-1965 he attended Northeastern University, presumably also at night since he was then a full-time employee of ACH, majoring in chemical engineering, with courses in algebra, trigonometry, physics and mechanical drawing (Tr. 1424-6, 1428, 1444-5).

70. After graduating from high school in 1948, he was employed for four years at Marine Studios in Florida as a biological technician, in which employment he used a projection microscope in a show which involved projecting on a large screen the images of microscopic animals in a drop of water, and in which employment he also used a binocular table model microscope (Tr. 1427-8). Beginning in February 1957 he was employed until about November 1962 by a manufacturer of dairy feed in its research and development laboratory as a chemical technician on the assay of vitamins in dairy feeds (Tr. 1428).

71. Mr. Williams was employed by ACH in November 1962 as a chemical laboratory technician. In October 1963 he began training under Mr. Beck and Mrs. Duarte for work in the fiber analysis laboratory. This included training in the use of microscopes for four hours a day, approximately four out of five days during his training period, which continued intermittently until April 1964. His training involved the identification of fibers, the theory of the microscope and the theory of calculations. About May 1, 1964, he began performing fiber analysis tests for ACH under the supervision of Mrs. Duarte. Since that time he has continued to perform tests as a fiber analyst, and throughout his employment with ACH his work has also included tests in the chemical laboratory (Tr. 902, 1415-17, 1429-32, 1445-61, 1488, 1927-59, 1963-4, 1966-73).

The ACH Test Procedures

72. The ACH test reports in evidence represent that the "method used was in accordance with provisions of ASTM D629-59T," and that the method "generally provides a maximum possible error of $\pm 4\%$ at standard engineering probabilities" (CX 5A-B, 12, 16, 20). This procedure which is published by ASTM provides that a minimum of 1000 fibers be counted and that at least 100 fibers of each type present be measured (Tr. 362-3, 369, 616, 896, 2114). The information thus obtained is used to compute the percentage by weight of each type of fiber contained in the tested sample.

73. In making a fiber analysis test of a mohair-blend sweater ACH usually identifies and counts about 1800 fibers, including all

types present. When three fiber technicians, referred to as operators, are involved in a test, each identifies and counts about 600 fibers for an aggregate of about 1800. Until recently when the number was increased, each operator customarily measured 100 fibers of each type, but in some instances in which ACH uses three operators on a test only two of them count and measure, and the third one merely identifies and counts the fibers without measuring them. In such instances an aggregate of about 200 fibers of each type are measured. In the ACH procedures, therefore, substantially more fibers are customarily counted and measured than the number prescribed by the ASTM procedures. If, however, a particular type fiber is present in such small percentage that less than 100 fibers of that type have been encountered when the operator has completed his count, only those encountered are measured by that operator. For this reason there are some tests in which an aggregate of less than 100 fibers of a particular type are measured (Tr. 362-3, 369, 616, 1006-7, 1154-5, 1161, 1226-8, 1275-9, 1478-9, 2122).

74. In the ACH procedures cuts are separately made with a special cutting device, known as a Swiss cutter, by each operator from the samples supplied to him. The fibers obtained from these cuts are mounted on a microscopic slide and examined by the use of a projection microscope calibrated to 500 magnifications (Fi. 81).

75. In the course of this examination the fibers on the slide are identified by the operator as to type, *i.e.*, wool, mohair, nylon, azlon, etc., and measured until the required number of each type fiber has been measured. The measurements are of the diameter of each fiber and are made by the use of a wedge, a paper measuring device scaled to the same calibration as the microscope. A separate wedge is used for each type of fiber in the sample. The image of an identified fiber in the critical field of magnification of the microscopic projection is superimposed upon the wedge and its diameter thus determined (Tr. 368, 379-80, 806, 1152, 1154, 1290, 1366-7, 1396, 1440-3, 1485-6, 1488-9). The number and diameters of fibers of each type measured are recorded on the appropriate wedge (Tr. 371-2, 1160, 1368-9).

76. After measuring the required number of each type of fiber, the operator continues identifying and counting, but not measuring, all the fibers on the slide which fall within the field of view of the microscopic projection until the total number of fibers required by the procedure have been counted (Tr. 368, 1160, 1290-3, 1369-71). Ordinarily a digital counter, a small mechanical device

activated by the operator, is used for each type of fiber in the sample to keep a record of the number counted as each fiber is identified (Tr. 367, 371, 1160, 1226, 1293-4, 1369-71, 1443-4).

77. The diameters of fibers of the same type vary considerably, wool fiber diameters, for example, ranging from about 8 to 70 microns or more, and mohair fiber diameters from about 10 to 80 microns or more (Tr. 1044, 1228, 2426). The measurements provide the basis for determining the proportion of the fibers of each type falling within each diameter classification, as provided for on the wedge. The diameters determined in this manner provide a factor for the cross-sectional area of the fibers of each type which is used as a part of the computation of the weight of the fibers of that type contained in a particular sample.

78. Identifying and counting fibers of all types contained in the sample until the required number have been identified and counted, including those which are measured, discloses the proportion of each type of fiber included in the total count. This is used in connection with the other data to compute the percentage by weight of each type of fiber contained in the sample.

79. In testing mohair-blend sweaters ACH has samples of a particular sweater tested by two or three operators, and combines the results of their observations to compute the percentage by weight of each fiber in the sample. In its test of CX 1, which was reported to the Commission in January 1964, two operators were used (CX 5A-B), and in its tests of CX 9, 13 and 17, which were reported to the Commission in August and September 1964, three operators were used (CX 12, 16, 20).

80. The record discloses that frequently the fiber composition of imported Italian mohair-blend sweaters is not uniform throughout a particular sweater and that there may be material variations in the fiber content of samples taken from different parts of the same sweater. There may also be some variation in the proportion of the constituent fibers contained in different cuttings from the same samples of a sweater, either by the same operator or by different operators (Tr. 674, 747-8, 1225, 1240, 1303, 1388-9, 1812, 1895).

81. ACH cuts a sample from the front and one from the back of each sweater to be tested and supplies to each of its operators a smaller sample cut from each of the primary samples. Each operator microscopically examines fibers cut from both samples supplied to him and reports the composite results. Ordinarily in cutting the fibers for examination the samples from the front and back are placed together, a cut with the Swiss cutter is made

through both of them at the same time, and the cut fibers are thoroughly mixed together on a microscopic slide and examined (Tr. 363-6, 679-82, 1287-9, 1437-8, 1440). At least one of the operators, however, made a separate cut and examination of the fibers from each sample (Tr. 1363-4, 1393-5, 1419-20). By either method the test result reported by each operator is a consolidated result of the examination of fibers cut from both samples.

82. Experience, skill and care are required in the microscopic examination of samples of mohair-blend sweaters to identify the fibers, and particularly to distinguish between mohair and wool fibers. Some wool fibers from particular types of sheep look very much like certain types of mohair, and damaged wool can look like mohair. It is possible for one operator to decide that a particular fiber is wool, and another that it is mohair. Although an individual fiber examined under a microscope will sometimes have characteristics which make accurate identification difficult or unlikely, the probability of finding many such fibers in a test population is very remote. With the exception of a small fractional percentage, the fibers on a test microscopic slide can be properly identified (Tr. 341-2, 708-9, 1302, 1484, 2425, 2438-9).

The ACH Calculations

83. The percentages of the several types of fibers in the tested sample are computed by ACH by using the number of fibers of each type which were counted, the average diameter of the fibers of each type which were measured, and the specific gravity of each type (Tr. 2483). The square of the average diameter of each type, which represents a factor for the cross-sectional area of the fiber type, is multiplied by the number of fibers of that type and by its specific gravity (Tr. 2484-5). Each type of fiber present is computed in the same manner, and the results are added together. The weight percentage of each type is computed by dividing the figure obtained for each type fiber by the total figure obtained for all types present (Tr. 385, 1055-7, 1167. The calculations involved are illustrated by reference to CX 40A, among others).

84. The basic difference in the calculation procedures used by ACH and the revised procedures of ASTM as published in its 1964 edition relates to the method of computing the fiber diameters. In making its computations ACH calculates the average diameter of the fibers of each type, squares that figure, and uses it in its further computations (Fi. 83). The revised procedure appearing in the 1964 edition of ASTM is to "Multiply the mean of the

squares of the diameters of the fibers of each type by the specific gravity (Note 22), and then calculate the percentage from these figures as described in Note 23" (Tr. 2484-5; CX 20A-B). The basic difference, therefore, is that ACH uses "the square of the mean diameter," and the revised ASTM prescribes the use of "the mean of the squares of the diameters" (Tr. 2485, 2494-5).

85. The method of calculation prescribed by the 1958 edition of ASTM is the same as the method used by ACH (Tr. 2150, 2440-1). The ASTM method was revised in 1959, when it adopted the procedure set out in its 1964 and 1965 editions (Tr. 2486, 2565-66). ACH finds what it considers to be an ambiguity in the ASTM explanation of its revised procedures (Tr. 1038-9, 1076-7, 2485-7, 2493-4), and the Director of Macy's Bureau of Standards seems to believe that the language of the revised ASTM procedure needs clarification (Tr. 2450-2, but see 2441). In its efforts to get clarification of the ambiguity which it finds, ACH has examined other standard reference books, particularly the 1963 edition of Von Bergen's Wool Handbook, and the 1947 edition of Matthews Textile Fibers, and has found in those books strong support for the method which it uses (Tr. 2438, 2445-50, 2487-94, 2567).

86. Dr. Robert R. Boorstyn, an Assistant Professor at the Polytechnic Institute of Brooklyn (Tr. 1993) with the degree of Doctor of Philosophy in Electrical Engineering (Tr. 1975), testified on defense as an expert statistical witness. His qualifications as a statistician are impressive and unchallenged (Tr. 1974-2007, 2064-7). Dr. Boorstyn testified unequivocally that the method of calculation of fiber diameters used by ACH, "the square of the mean diameter" is improper and statistically unsound (Tr. 2025-30, 2149-51, 2169-70), and that computations by the two methods in question will in general give different answers, but not in all instances (Tr. 2170-1). Prior to his preparation to testify in this proceeding Dr. Boorstyn had not applied statistics to fiber analysis, and had no knowledge or experience in connection with fiber analysis (Tr. 2069-70, 2083, 2158, 2167).

87. Mr. Daniel Chaucer, Director of Macy's Bureau of Standards, also testified unequivocally that the method of calculating fiber diameters used by ACH is improper and gives a result which is not representative of the fibers involved, even though in some instances it may yield the correct answer (Tr. 2430-1, 2441-5, 2450). He has not personally ever conducted a test to determine the content of mohair or wool in a yarn, and does not consider himself to be a qualified microscopist (Tr. 2433-4), and his qualifications as disclosed by the record do not establish that he is a

qualified statistician. There is no challenge on the record, however, of his qualifications to direct the Macy laboratory, or of the competency of that laboratory to make fiber analyses.

88. Mr. Devarakonda, one of the ACH technicians who participated in the tests of three of the sweaters in evidence, testified during the case-in-chief in support of the complaint and as a rebuttal witness. By education and experience he is qualified to understand and apply the computations and statistical procedures involved in fiber analysis (Fi. 65, 66). He testified that from a theoretical statistical point of view the method of computation used by ACH, "the square of the mean diameter," is wrong, but that for practical purposes both methods are correct (Tr. 2565, 2573). He explained that even though there is a difference in the cross-sectional area of each type fiber computed by the two methods, an increase in the computed cross-sectional area of each by the same percentage under both methods will not affect the final results (Tr. 2574-5).

89. More importantly, Mr. Devarakonda recomputed the test data of each of the sweaters in evidence using the revised ASTM procedure, "the mean of the squares of the diameters," and compared the results with those originally reported to the FTC by ACH. In all four comparisons the results were the same or substantially the same as those originally reported, the difference being one per cent or less in all instances (Tr. 2517-42; CX 47). He also recomputed in the same manner the test data of each of nine other sweaters which ACH had previously tested for and reported to Macy in accordance with its regular method. In all nine of those comparisons the results were the same or substantially the same as those originally reported to Macy, the difference not exceeding one per cent in any instance (Tr. 2542-50, 2572; CX 48A-B. Also see Tr. 2140-2, 2169-71).

90. This proceeding is concerned with the accuracy of the test results which ACH reported to the FTC on the four sweaters in evidence. It is not concerned with the soundness of the principles involved in the mathematical and statistical methods used except to the extent that the methods used may have affected the accuracy of the test results in these four instances. Although it appears that the method of computation used by ACH is wrong from a theoretical statistical point of view, the record contains evidence that its method is prescribed by impressive authority in the field of fiber analysis, and that it was formerly prescribed by ASTM. The record also discloses that in some, probably many, instances the two methods will yield substantially the same results,

and that in the four instances here in issue they actually did so. The record establishes, therefore, that, with respect to the four tests in issue in this proceeding, the use by ACH of "the square of the mean diameter" of the measured fibers in its calculations has yielded correct results.

Combining the Results of Different Operators

91. It is also vigorously urged by respondent that the reported results of the four tests in evidence were unreliable and inaccurate because in making its calculations ACH combined the results of the microscopic observations of two or three operators (RPF 105-112, 138-43. See Fi. 79). In support of this position respondent relied primarily upon the testimony of Dr. Boorstyn (Fi. 86) concerning the application of statistical principles to this method of calculating the test results.

92. Dr. Boorstyn testified in considerable detail concerning the statistical validity of calculations based upon the combined observations of two or three operators. In appraising Dr. Boorstyn's testimony, however, it must be kept in view that he discussed only the application of statistical principles to the matters with which he dealt. He has had no experience in the field of fiber testing, and he is not qualified to testify concerning the customary allowable variations among operators or other practical problems involved in fiber analysis (Tr. 2083, 2086-91, 2158, 2166-7).

93. As the hearing examiner understands his testimony, it is the opinion of Dr. Boorstyn that it is not proper to combine the test data of two or three operators to calculate the final test results because of uncertainty concerning the extent of the errors of each of the operators in identifying, counting and measuring the fibers, and because of uncertainty concerning the extent of variations in the sample which each examined. In such a combination he thinks that no subjectivity or sample variation should be permitted. If it can be determined or assumed that the operators are performing the tests in an equal manner and that operator errors do not exist, and if it can be determined or assumed that the samples which they examine are uniform, it would then be proper to combine their data to calculate the test results (Tr. 2039-47, 2049, 2052, 2056-7, 2124-5, 2162).

94. It appears to be his view, however, that if it can be assumed that the operators perform within a tolerance of seven percentage points, this would probably provide an adequate quality control to permit combining their data in order to calculate final test results with an engineering tolerance of $\pm 4\%$ (Tr. 2049-52, 2091). It also appears to be his view that the chance of undetected

bias, or characteristic errors, by the operators may be reduced by the use of two or more operators on a test (Tr. 2126-30).

95. The ASTM test provisions prescribe separate observations by two operators, and provide that "Each operator shall independently prepare at least one slide for each test specimen" (Tr. 2115). Wildman, "The Microscopy of Animal and Textile Fibers," 1954 edition, published in England by the Wool Industries Research Association, to which many references were made in the testimony herein, and which counsel have treated as an authority in its field (Tr. 401-2, 707, 1066-76, 2033, 2158), also refers to an example which called for the measurement of 250 fibers, and provides for the measurement of 125 fibers by each of two operators (Tr. 2041-2, 2047-9, 2116-22).

96. In January 1964, when it conducted the test on CX 1, ACH was using two operators on each of its tests of mohair-blend sweaters, but since about April 1964 it has been using three operators on each test (Tr. 448, 1268-9; Fi. 79). Each of the ACH operators who performed tests on the sweaters in evidence has testified, and each has described his, or her understanding of the recognizable physical characteristics of the fibers involved (Tr. 414-8, 708-9, 1156-9, 1184-6, 1299-1302, 1309-10, 1367-8, 1439-40, 1484. Also see Fi. 52-71). The hearing examiner is satisfied that each of them is qualified to identify the fibers involved in these tests.

97. The identification of fibers on a microscopic slide is, however, affected to some extent by the subjective judgment of the operator. There is undoubtedly some variation in the skill of different operators, and even in the accuracy of the observations of a particular operator from time to time depending upon the characteristics of the fibers and upon possible eye fatigue and other factors affecting the operator's general level of effectiveness (Fi. 82; Tr. 419, 709, 725-6, 1303).

98. Care is exercised to avoid pre-test influences which may affect the subjective judgment of the ACH operators. Before making a test the operators do not know the fiber content represented on the label of the sweater being tested, or what the client may believe to be the claimed or proper fiber content; and no operator knows the results of a test by another operator on the same sweater until after his own results have been submitted (Tr. 353, 912, 1281-2, 1299, 1371-2, 1481).

99. ACH changed from using two operators to using three operators on each test in order to reduce operator variations as much as possible, and to eliminate as much as possible undetected

variations in the sample. It considers three independent readings better than two, and two better than one (Tr. 677, 1008-9, 1024-5). Its test procedures are thus designed to minimize the effects of variations in the fiber content in different parts of the same sweater, including the effects of variations in the same sample, and to minimize the effects of variations in the skill and subjective judgment of different operators. ACH keeps records of the individual results of the observations of its several operators as a part of its quality control program, and it is able to determine if and when the results of a particular operator go off in one direction or another (Tr. 419, *et seq.*, 486). It is confident that its operators are generally performing satisfactorily (Tr. 423).

100. When three operators are used in a test of mohair-blend sweaters, the ACH procedures, for purposes of internal quality control, permit a tolerance of seven percentage points on the significant fiber, mohair, between the differences in the highest and lowest results obtained by the three operators. When the company used two operators on a test, its tolerance in the difference between their test results was six percentage points. When it changed to using three operators, it appeared that since there were more observations, more latitude in the extent of the variations of the operator results should be permitted, and eight percentage points were allowed. It subsequently established seven percentage points tolerance in the test results of three operators to improve its internal quality control (Tr. 936-7, 1001-2, 1004-5, 1026).

101. ACH considers that the differences in the test results of its operators involved in the seven percentage points tolerance which it permits is due to sample variation, or to variation in operator subjectivity, or to both, and that it would include part of the $\pm 4\%$ maximum error allowed by the test procedures (Tr. 785, 805-7, 936, 1024-8, 1303-4, 1307-8, 1319). Differences in excess of this tolerance provide reason to believe that the results may be out of control, or inconsistent with results normally to be expected in the circumstances, and indicate that re-examinations may be warranted. When the results between the tests made by three operators exceed the allowable difference of seven percentage points, it is the practice of ACH, but not an inflexible rule, to have one or more of the operators, depending upon the circumstances and based upon the judgment of the supervisor, check their results by making an additional test of a new specimen from the sample (Tr. 389, 448-51, 654, 670-7, 792-807, 963-4, 1028-30, 1089-91, 1270). In such reexaminations the operator identifies and counts the required number of fibers, but ACH

usually does not consider it necessary to measure additional fibers (Tr. 803, 807-8, 820-2, 950).

102. It is the opinion of the hearing examiner that the use of two, and particularly of three, operators on each test, together with the internal quality control procedures of ACH, contribute substantially to detecting and keeping a close check upon variations in the samples and in the performance of the operators. The results of its rechecks, considered in connection with the original results, enables ACH to make a better appraisal of the validity of its test results, and to satisfy itself that they are properly controlled and consistent with results normally to be expected. Its calculations based upon the combined results of the observations of two or three operators minimize the effects of sample variations and of operator variations (Tr. 959-60, 1005), and are more fairly representative of the fiber composition of the tested sweater than calculations based upon the observations of any single operator.

The ACH Test Reports Are Reliable

103. It is the opinion of the hearing examiner that the evidence in this record has established that ACH is generally considered by the government agencies and importers concerned with the fiber content labeling of imported Italian mohair-blend sweaters to be a reputable, reliable and competent fiber testing laboratory; that its facilities and equipment are adequate; that its management and personnel are competent to supervise and perform the tests with respect to which evidence has been received in this proceeding; and that the procedures, controls and checks employed by ACH in testing the sweaters in evidence were properly designed and applied to deal with the practical problems involved in such tests. It is concluded, therefore, that the fiber analysis reports which ACH made to the FTC with respect to the four sweaters in evidence are reliable within the range of engineering probabilities contemplated by established procedures.

104. Throughout this proceeding samples of the four sweaters in evidence have been available to respondent, and it has had full opportunity to check the validity of the ACH test results in its own laboratory, which it considers qualified for this purpose, or in another laboratory of its selection (Tr. 57-60, 658-9, 664-6, 2422-3, 2437-40). This it has not elected to do (Tr. 666, 669), but it has not hesitated to offer in evidence the results of tests of other sweaters which were made at its instance (Tr. 2379-2415; RX 18). Subsequent to the prehearing conference, tests of these sweaters were made by another laboratory at the instance of counsel supporting the complaint. When complaint counsel proposed to offer

the results of such tests in evidence, respondent objected and was sustained because this information had not been supplied to respondent in advance as required by the prehearing order (Tr. 968-84).

105. Respondent's failure to offer, and its objection to receiving, readily available evidence of other tests of the sweaters, indicates that it does not consider that such evidence would rebut the ACH test reports, and removes much of the force of its contentions that the reports are unreliable. The hearing examiner, however, has not given any weight to such failure in finding that the ACH test reports in evidence are reliable.

Extent of Misbranding

106. The extent to which the test results differed from the fiber content shown on the cloth labels attached to the sweaters in evidence is summarized in the following table (Fi. 27-35):

Exhibit	Test No. Test Report Date of Report	Fiber	Label Percentage	Test Percentage
CX 1	S-6001	Mohair	66%	23.9%
	CX 5A-B	Wool	30%	60.3%
	1-9-64	Nylon	4%	1.8%
		Azlon	—	14.0%
CX 9	S-7557	Mohair	60%	12.0%
	CX 12	Wool	40%	87.0%
	8-24-64	Nylon	—	1.0%
CX 13	S-7568	Mohair	30%	22.0%
	CX 16	Wool	60%	66.0%
	9-8-64	Nylon	10%	12.0%
CX 17	S-7567	Mohair	40%	6.0%
	CX 20	Wool	55%	84.0%
	9-4-64	Nylon	5%	5.0%
		Azlon	—	5.0%

107. The mohair content, the fiber of primary concern in this proceeding, was greatly overstated on the labels attached to CX 1, 9 and 17, and those sweaters, accordingly, were misbranded when they were imported by respondent and when they were sold by it. The combined mohair and wool content shown on the label of CX 9 was substantially the same as that disclosed by the test report, but the overstatement of the mohair content nevertheless constituted misbranding. The combined mohair and wool content shown on the label of CX 17 varied by five percentage points, and on the label of CX 1 varied by about 12 percentage points, from that disclosed by the test reports, due primarily to the presence of azlon which was not referred to on the labels. The overstatement of the mohair content and of the total wool content, and the failure to disclose the azlon content on the labels constituted misbranding of CX 1 and 17.

108. Respondent contends that it is impossible to blend wool and mohair yarn homogeneously and to insure that the mohair content of any sweater will be uniform (RPF 153-4), and that it is impossible to comply with Rule 19 of the Rules and Regulations under the Wool Act (RPF 150), which, it contends, "requires that the quantity of mohair and wool in a 'wool product' be stated with exactitude" (RPF 152).

109. Rule 19 does not require that the mohair content of a wool product be stated on the label. It is permissive only, affording an election to use the term "mohair" in lieu of "wool." The Wool Act includes hair of the Angora goat, known as mohair, in its definition of wool (Section 2(b)), and Rule 19 permits the use of the term "mohair" in lieu of "wool" provided the percentage is given. If the election is made to designate as "mohair" that part of the wool content which is composed of the hair of the Angora goat, the Rule requires that the percentages of mohair and of the remainder of the wool content be stated.

110. The record in this case does not warrant a conclusion that Rule 19 cannot reasonably be applied to the labeling of mohair-blend sweaters. This is particularly so if the position of complaint counsel is correct that "mohair may be designated on the label so long as the wool product contains *at least* that designated percentage of mohair," and that a wool product may properly contain more mohair than designated on the label (Proposed Findings of Complaint Counsel, May 31, 1966, p. 30). In any event, it is clear from the record that the difficulties which may be involved producing mohair-blend sweaters with a uniform mohair content, and the lack of precision recognized by the standard engineering probabilities upon which the tests of these sweaters are based, constitute no justification for the very extravagant overstatement of the mohair content of CX 1, 9 and 17.

111. The overstatement of the mohair content on the label of CX 13 by eight percentage points as compared with the test report, however, warrants special consideration. This sweater was separately tested by three operators, Devarakonda, Williams and Beck, and because of the variations in their results, each made a recheck. Their original individual observations showed a mohair content of 20 per cent, 17 per cent and 30 per cent, respectively (CX 40B); and their individual observations on recheck showed a mohair content of 25 per cent, 18 per cent and 23 per cent, respectively (CX 40C). By combining the individual results which each obtained on his original and recheck observations, they showed a mohair content of 23 per cent, 18 per cent and 26 per

cent, respectively (CX 40A). By combining the original and recheck observations of all three operators, the final test report showed a mohair content of 22 per cent. After running a complete recheck and finding that the test results of its three operators still fell outside the seven percentage points tolerance allowed by its procedures, ACH considered that the mohair content of this sweater, CX 13, was particularly variable, and that further tests would not be useful (Tr. 963-4).

112. Assuming, therefore, that accurate observations were made by each of the three operators originally and on recheck, and that their differences were due to sample variation, the original sample from CX 13 tested by Beck contained 30 per cent mohair, the same as represented on the label, and the recheck sample tested by Devarakonda contained 25 per cent mohair, five percentage points short of the label claim. If allowance is also made for operator variation, an uncertainty is added which is ordinarily included in the tolerance allowed by ACH. Consideration should also be given to the demonstrated lack of uniformity of the fiber content of samples taken from different parts of a sweater of this sort (Fi. 80); to the lack of precision recognized by the standard engineering probabilities upon which these tests are based (Fi. 72); and to the fact that since the testing of mohair-blend sweaters is not an exact science, the Bureau of Customs, after consulting with FTC representatives, allowed, for import purposes, a tolerance of five percentage points between test results and label markings with respect to wool and mohair (Tr. 1577-8, 1598-1601).

113. In view of all of these circumstances it does not appear that the difference of eight percentage points in the mohair content between the label and the test report is sufficient to warrant a finding that CX 13 was misbranded as to mohair content. It should also be noted that the combined mohair and wool content shown on the label of CX 13, 90 per cent, is substantially the same as that disclosed by the test report, 88 per cent. It is the opinion of the hearing examiner, therefore, that the record does not establish that CX 13 was misbranded as charged in the complaint.

Unavoidable Variations in Manufacture

114. Respondent contends that any deviations in labeling which may have occurred resulted from unavoidable variations in manufacture and despite the exercise of due care to make accurate the fiber content statements on the label; and that variations of this nature constitute a defense under Section 4 of the Wool Act (RPF

29). It urges that although the Italian spinners mix wool and mohair in precise percentages, it is impossible to get a uniform composition in the yarn because these fibers do not readily blend and because of characteristic losses which occur in the process of producing the yarn (RPF 8-9, 30-1, 79); and that the problem is further complicated by the difficulties of controlling the actual knitting of the sweaters so that the particular yarn supplied by a manufacturer will be used in the sweaters knitted for him (RPF 31-2, 79-80).

115. The hand-knitting of mohair-blend sweaters in Italy constitutes what is referred to as a "cottage industry." The sweaters are knitted by Italian women in their homes and cottages using yarns supplied to them by representatives of the manufacturers. The manufacturers contract with middlemen, called "fattorini," and furnish them with the yarn to be used and with instructions as to the styles and quantities of sweaters to be produced. Each of the fattorini may work with from 20 to 200 knitters, supplying them with the yarn and instructions. After the sweaters have been knitted, the fattorini assemble them into completed orders and deliver them to the manufacturers, where they are inspected, labeled, packaged and shipped (Tr. 1667-9).

116. Beginning in February 1964 Macy's representatives in this country and in Italy contacted representatives of the Italian Government, and urged and cooperated in efforts to find a solution to the labeling problem and to induce the Italian industry to correct the situation (Tr. 1686). Efforts of this sort were already in progress by representatives of the Italian Government who supplied to the Italian manufacturers extensive information concerning the requirements of the law in this country and the standards and testing procedures which should be followed. The Italian manufacturers advised, however, that it was impossible to make a precise determination of the percentage of mohair contained in a blend of wool and mohair fibers (Tr. 1606-9, 1624-5, 1687).

117. The record indicates that difficulties are involved in controlling the uniformity of the mohair content of the sweaters involved in this proceeding. It also indicates, however, that the Italian manufacturers were not seriously concerned with this question until late in 1963. Although the Italian manufacturers may not be able to determine precisely the mohair content of these sweaters, the record does not disclose that they have undertaken any comprehensive measures to solve the problem since it was brought to their attention. On the contrary, the proof seems

to be that the Italian manufacturers have been annoyed by respondent's efforts to correct its labeling, that they have not been fully cooperative with respondent in those efforts, and that those efforts have substantially increased their resistance to dealing with the respondent (Tr. 1673-4, 1686-7, 1707, 1711, 1765, 1875, 2195).

118. Respondent is not a manufacturer, and it has only a limited influence over the means employed by the Italian manufacturers to control the mohair content of the sweaters which they produce. The proof which has been made that difficulties were involved, and that efforts by the respondent and others did not accomplish uniformity in the mohair content of sweaters produced by the Italian manufacturers, falls far short of establishing that the deviations "resulted from unavoidable variations in manufacture and despite the exercise of due care" within the meaning of Section 4 of the Wool Act.

Enforcement of Wool Act Against Others

119. In its answer to the complaint and in its proposed findings respondent contends that the FTC and its staff have arbitrarily discriminated against Macy and in favor of its major competitors in the enforcement of the Wool Act (RPF 34-54). It has been the position of the hearing examiner throughout that it would be irrelevant to attempt to determine in this proceeding the details and effectiveness of the Commission's enforcement policies and procedures against other members of the industry; and that, it would also be impractical because such a determination could be made only after consideration of the acts and practices of other members of the industry upon a full hearing with respect to all of the facts involved in each situation (see Certification July 22, 1965). This question was considered in detail and disposed of by the Commission in its Order and Opinion of September 30, 1965 [68 F.T.C. 1179]. It warrants no further discussion in this initial decision.

Macy's Corrective Efforts

120. In its answer to the complaint and in its proposed findings, respondent also contends that upon learning that imported Italian mohair-blend sweaters may be misbranded, it immediately undertook to correct any misbranding of sweaters imported by it, and to cooperate with the FTC in avoiding any recurrence of the problem (RPF 10-28). These contentions are based upon the undisputed testimony of officials of the respondent, no countervailing evidence having been offered in support of the complaint. This evidence warrants careful consideration.

121. Macy began purchasing mohair-blend sweaters from Italy late in 1961 or in the Spring of 1962. In 1961 the total imports of

such sweaters into this country by all buyers was fairly small, but in 1962 their value rose to about 22 million dollars and in 1963 probably to more than 40 million dollars (Tr. 1612-3, 1630, 1662-3).

122. Macy first became aware that there may be a problem with respect to labeling these sweaters on October 28, 1963, through an article in *Women's Wear Daily*, a trade publication (Tr. 1672, 1708, 1849-52, 1865-6; RX 9). Until that time it was not concerned with the percentage of mohair stated on the labels of the sweaters. It had relied upon the labels and invoices of the Italian manufacturers as accurately reflecting the fiber content of the sweaters, and had made no tests of its own to determine their accuracy (Tr. 1671, 1676-8, 1708-9, 1730-1, 1736, 1866). It appears that the Bureau of Customs also became aware of the problem late in 1963, and that prior to that time it generally relied upon the labels for import purposes, and did no sampling and testing of these sweaters (Tr. 1522-4, 1529-30, 1777).

123. On the same day that it became aware of the problem, Macy directed all of its retail stores to remove from sale all of these sweaters and to hold them pending further instructions. This occurred at the peak of the selling season, and resulted in removing approximately 22,000 sweaters from sale. About sixty of these sweaters were tested, representing one sweater of each style of each manufacturer. To the extent necessary to conform with the test results on each style, these 22,000 sweaters were relabeled and returned to the counters for sale (Tr. 1643-4, 1646, 1652, 1672-6, 1685, 1742-3, 1747, 1818-20). The record indicates that these sweaters remained off sale from about October 28 to about November 11, 1963, and that the approximately sixty samples selected were tested by the Macy laboratory (Tr. 1645, 1742-3, 2292, 2300-1, 2438-9; RX 16-B).

124. Macy also immediately advised its Italian office of the problem and instructed it to obtain guarantees from the manufacturers with which it was dealing, and to inform them that any mislabeled sweaters would be returned. This was done in an effort to impress the manufacturers with the seriousness of the matter, and to correct their labeling, and not to provide protection to Macy under the provisions of the Wool Act (Tr. 1673-4, 1680, 1743-5, 2293-4). Certain of the manufacturers gave the requested guarantees, and, so far as respondent knows, have complied with them since that time, at least to the extent that they were later modified by other conditions (Tr. 1707, 1761).

125. The Italian manufacturers generally advised that they were unable to determine the precise percentage of mohair in their blends. To be sure that the percentage of mohair would not be overstated in these circumstances, Macy's Italian office requested the manufacturers to mark the sweaters with half of what they considered to be their actual mohair content. This system of marking was instituted by the Italian manufacturers for Macy in November 1963 (Tr. 1678-9, 1686-7, 1746-7).

126. Beginning with shipments received in April 1964, and until September when it discontinued any reference to mohair, the maximum mohair content shown on any of these sweaters imported by Macy was 20 per cent, regardless of tests indicating a higher mohair content, but the sweaters already in stock in April were not relabeled to conform with this policy (Tr. 1821-2, 1900-3).

127. In the late Summer or early Fall of 1963 the Bureau of Customs was alerted by the FTC and others to the problems in the labeling of mohair-blend sweaters imported from Italy, and the result and it immediately increased its attention to the labeling of these sweaters for import purposes (Tr. 1522-4, 1529-30, 1581). In December 1963, in cooperation with representatives of the FTC, the Bureau of Customs instituted a concentrated effort to examine these imports. In order to facilitate that effort it notified the importers early in January 1964 that, if they so desired, sample sweaters could be tested by an independent laboratory of their choice instead of by the Customs laboratory which was overloaded (Tr. 1524-8, 1530-1, 1552-3; RX 4).

128. After this program was put into effect, Customs did not sample every import shipment of these sweaters, but in the course of the program samples were taken from some shipments to all importers; and although not all of the sweaters had to be relabeled, the tests disclosed that every importer had some sweaters that were not properly marked. Probably more than 90 per cent of the tests made under this program were made by independent laboratories (Tr. 1534, 1566-70). On March 16, 1965, when the need for the intensive testing program apparently had ended, Customs discontinued the use of independent laboratories in making these tests (Tr. 1537-9, 1556).

129. The samples to be tested were selected by Customs, usually only one sweater of a style in a shipment. Its action with respect to the whole shipment from which samples were selected was based entirely upon the results of the tests of the selected samples. Although it recognized that there may be variations in the fiber

content of other sweaters in the shipment, and that the procedure was somewhat risky, Customs considered that this represented a necessary approach in order to deal with the problem on a practical basis (Tr. 1545-8, 1550-1, 1563-4, 1571).

130. In determining whether or not to require relabeling of the imported sweaters, Customs, with the approval of representatives of the FTC, also set up a tolerance of five percentage points. Under this tolerance, if the fiber content of wool or mohair shown on the label was within five percentage points of the test results in either direction, relabeling was not required. Since the testing of sweaters is not an exact science, it was felt that this represented a reasonable, practical tolerance for dealing with the problem (Tr. 1577-8, 1598-1601).

131. Beginning in January 1964, Macy participated in and conformed with the Bureau of Customs program of testing and relabeling. Some time after the middle of 1964, however, Macy was advised by its legal office that the Customs program had not been approved by the FTC and, accordingly, that it would not solve the problem. It also learned that Customs was not sampling every shipment of these sweaters. In these circumstances it endeavored to institute a procedure to insure that samples from each of its shipments would be tested (Tr. 1687-9, 1752-3, 1774, 1782-5).

132. In a conference with representatives of the Bureau of Customs in July 1964 Macy proposed that it be allowed to bring into this country sweaters unmarked as to fiber content, that Customs then select one sweater of each style from each shipment, that the selected samples be tested by Customs or an outside laboratory, and that all of the sweaters of each style in the shipment be marked in conformity with the results of the tests with respect to each style. This proposal by Macy was not approved by Customs (Tr. 1571-4, 1581-6, 1601-2, 1688, 1774-5).

133. On or about July 27, 1964, during the period when it was negotiating with Customs concerning the importation of sweaters unmarked as to fiber content, Macy received a shipment of about 6300 sweaters on the steamer The Export Bay. This shipment consisted of about 17 different styles of sweaters, all of which were already labeled as to fiber content. A sample of each style was extracted by Customs for testing, and during August 1964 the selected approximately 17 sweaters were tested by private laboratories. The tests disclosed that less than half of the sweaters were not labeled within the five percentage points tolerance allowed by Customs, and the sweaters of the styles not correctly labeled were relabeled to conform with the test results. On or about August 28,

1964, after the tests and relabeling had been completed, these sweaters were delivered to the Macy stores for sale (Tr. 1574-8, 1586-7, 1689, 1752-4, 1775-6, 1785-8, 2268-9).

134. In September 1964, when Macy understood that the FTC would not approve its proposal to the Bureau of Customs, and in order to avoid the possibility of misrepresenting the mohair content of sweaters which it imported, Macy decided to eliminate the word "mohair" from its labels, and to label as "wool" the combined percentage of wool and mohair (Tr. 1690, 1776-7, 1789-90, 1799-1800, 1881-2, 2268-9, 2271, 2282-3). When it made this decision, Macy instructed its stores to remove all Italian mohair-blend sweaters which had been imported by it from their stocks and to relabel them in conformity with this policy, and required that the job be accomplished by October 1, 1964 (Tr. 1804-5, 1885-6, 2184-94, 2217). In implementing this policy Macy removed over 20,000 sweaters from sale and relabeled them. It also required that all sweaters then in transit be relabeled as they were received and before they were put on sale (Tr. 1805-6). The approximately 6300 sweaters which had previously been received in The Export Bay shipment, and which had already been relabeled to conform with the selective tests before Macy's new policy was adopted, were relabeled a second time to eliminate the word "mohair" from the labels in conformity with the new policy (Tr. 1789, 1806-7, 1888-92, 1902-3, 1922-4).

135. Immediately upon adopting its new policy in September 1964, Macy's Italian office was also informed of the policy and instructed to see that it was complied with. The Italian office was instructed to have any sweaters in Italy, which had already been manufactured, relabeled in accordance with the policy, and to have all further sweaters manufactured for it labeled accordingly, so that no further sweaters would be imported by Macy with "mohair" on their labels.

136. This policy is still in effect, and since October 1, 1964, Macy has not knowingly sold a sweater imported by it with the word "mohair" on its label (Tr. 1709-10, 1807-8). This was a very costly operation, both in the time of personnel and in the loss of sales during a busy season while the relabeling was being done (Tr. 1808-10).

137. In connection with the implementation of this policy, however, it should be understood that Macy also purchased mohair-blend sweaters from other importers to supplement its stocks. Its policy of eliminating "mohair" from its labels applied only to sweaters imported by it. Sweaters which it purchased from im-

porters were not relabeled to conform with the policy because the labels on those sweaters were protected by guarantees from the importers (Tr. 1823-6). Inquiry by the FTC investigator at certain of Macy's stores in November 1964 disclosed that sweaters imported by Macy in the stocks which he examined did not contain the word "mohair" on their labels (Tr. 2369-72).

138. In September 1964, when it decided to eliminate "mohair" from the labels of sweaters which it imported, Macy also decided to accept no sweaters containing traces of azlon, and to reject shipments of sweaters which contained azlon. In addition to rejecting what it considered to be an inferior ingredient in the sweaters which it had no intention of buying, and had not knowingly bought, this policy was also partly for the purpose of impressing the Italian manufacturers with the sincerity of its efforts to correct the labeling of these sweaters. Since that time it has made checks for azlon on every shipment it has imported and one such shipment has been rejected and returned to Italy because of the presence of azlon (Tr. 1690-1, 1710, 1738-9, 1762, 1811, 1886, 1892-5, 2184-7, 2216-7, 2429).

139. Beginning in December 1964 Macy made a further effort to tighten its control over the manufacture of mohair-blend sweaters for it in Italy and to avoid mislabeling of their fiber content. At that time it adopted a plan under which the manufacturers were required to purchase yarn for the manufacture of sweaters for Macy from only two spinners in Italy. These two spinners were selected by Macy, on the basis of their reputations and tests of their yarns, as the most reliable available spinners. This plan which was adopted in December 1964 is still in effect (Tr. 1691-3, 1726, 1730, 1754, 1770-1, 2429).

140. In furtherance of the policies which it adopted in September and December 1964, the present procedures of Macy require that before any sweaters are manufactured for it in Italy samples of the yarn to be used in their manufacture must be sent to Macy in New York for testing in its laboratory. The procedures also require that after the sweaters are manufactured and before they leave Italy a sample sweater of each style and color is extracted from each shipment, sent to Macy in New York and tested in its laboratory. These tests of the yarn and sweaters before shipment from Italy are for the purpose of determining that they contain no azlon and otherwise that they conform to Macy's present labeling policy (Tr. 1761-2, 2195-6, 2429-30). Since the inception of its present procedures Macy has also discontinued the purchase of any job lots of sweaters in Italy because of the uncertainty and

difficulty of determining and controlling the fiber content of sweaters purchased under those conditions (Tr. 1703, 1822).

141. The procedures instituted by Macy to correct the labeling of mohair-blend sweaters imported by it and to avoid further mislabeling of sweaters which it imported, and the requirements which it imposed upon the Italian manufacturers from whom it purchases such sweaters, have been very costly and have seriously interfered with its buying and selling of these sweaters. Its first and most immediate problem was the loss of sales during the peak selling season when the sweaters were in high demand but were withdrawn from sale for testing and relabeling. There were also extensive delays in the testing of the sweaters which were withdrawn from sale, and it sometimes became necessary to reduce the price of the sweaters when they were returned to the counters for sale after the peak selling period had passed. There were also substantial delays in shipments and increased costs of shipments to avoid further delays. The requirements which Macy imposed upon the Italian manufacturers increased its difficulty in dealing with them, and generally its procedures crippled the pace of its buying and resulted in not buying as great a volume of these sweaters as it could sell while the demand for them was increasing. It became necessary from time to time to supplement its needs by purchasing from other importers at substantially higher costs (Tr. 1684-5, 1688, 1696-8, 1711, 1714, 1765, 1774, 1779-80, 1785-6, 1820-1, 1846-7, 1874-5, 2192-4, 2196-7).

142. After Macy learned of the problem concerning the labeling of Italian mohair-blend sweaters, it requested a conference with representatives of the FTC. It was Macy's purpose in seeking this conference to find a solution to this problem for the industry as a whole, and to determine how Macy could eliminate the problem in its own operations. On November 19, 1963, the requested conference was held, at which time Macy sought the cooperation of the FTC and offered its own cooperation (Tr. 1681-3, 1725, 1745-6).

143. After Macy understood that the FTC was considering issuing a complaint against it, there were several conferences between its counsel and the FTC staff concerning the situation. The first such conference was on April 20, 1964. At that conference its counsel proposed that the FTC investigation of Macy be resolved on an administrative basis, without the issuance of a complaint. Another meeting was held in July or early August, and another on August 24, 1964, at which there were further discussions of the overall problem as it affected Macy and its competitors (Tr. 2258-69). Macy's position and the steps which it had

taken and which it proposed were outlined in some detail in a letter from its counsel to the FTC dated September 4, 1964 (Tr. 2269-71; RX 16A-Q).

144. In referring to the conferences of Macy's counsel with the staff of the FTC, it is not the purpose of the hearing examiner to appraise the efforts of respondent's counsel or of the FTC staff representatives to dispose the investigation of respondent by administrative action or consent order. Whatever efforts were made along these lines were unsuccessful, and the complaint herein issued on November 13, 1964 (Tr. 2271, 2305).

145. It is clear from the record that at least by the latter part of April 1964 respondent understood that the FTC was considering issuing a complaint against it. It is also clear that respondent was aware that it was being investigated by the FTC as early as December 26, 1963, when the FTC investigator purchased CX 1 (CX 6A-B). Any corrective action instituted by respondent after December 26, 1963, was, therefore, with full knowledge that its labeling of imported Italian mohair-blend sweaters was under scrutiny by the FTC.

The Effectiveness of Macy's Corrective Efforts

146. It is appropriate to consider the extent to which Macy's corrective efforts proved to be effective. Although the record affords no precise, or even approximate, measurement of their degree of effectiveness, it does provide a basis for appraising the reasonable consequences to be expected from efforts of such scope, instituted and applied in good faith and with determination to accomplish their fundamental purpose. At the outset in this appraisal, the circumstances should be examined in connection with each of the three sweaters in evidence found to be misbranded, CX 1, 9 and 17.

147. Although the date of its importation is not established, CX 1 was purchased by the FTC investigator on December 26, 1963, and at that time bore a cloth label incorrectly stating its mohair content (Fi. 27-28, 45). Under respondent's corrective procedures, the cloth label on this sweater showing the fiber content should have been cut off, and the fiber content correctly re-labeled. When 22,000 sweaters were withdrawn from sale in late October and early November 1963, this was not done. The fact that CX 1 was purchased on December 26, 1963, bearing an inaccurate fiber content label appears to be an indication that respondent's corrective procedures were not effective.

148. The evidence indicates, however, that at the time it was

purchased by the FTC investigator, CX 1 was the only mohair-blend sweater with a cloth fiber content label attached to it which was then in the stock of the store from which it was purchased. The cloth labels had been cut out of all of the others and they had been relabeled (Tr. 1645-53). The evidence also indicates that this sweater was probably sold by Macy as a Christmas gift before the other mohair-blend sweaters were withdrawn from sale, and that it had been returned by the customer the day after Christmas, and had inadvertently been returned to respondent's stock for retail sale without cutting out the cloth fiber content label and relabeling the sweater (Tr. 1647-8, 2325, 2461-2).

149. It is the opinion of the hearing examiner that the improper label on CX 1 at the time it was purchased by the FTC investigator was the result of inadvertence by Macy's sales personnel, and that it is not representative of respondent's general practice at that time. The circumstances disclosed in connection with the misbranding of CX 1 do not indicate that the corrective action taken by respondent in November 1963 was generally ineffective.

150. CX 9 was imported by Macy in November 1963 with 1800 sweaters invoiced with the same fiber content, and CX 17 was imported by Macy in September 1963 with 142 sweaters invoiced with the same fiber content. Both were purchased by the FTC investigator in August 1964 with cloth fiber content labels attached to them which corresponded with the invoice specifications, and which falsely represented their fiber content (Fi. 29-31, 33, 35, 37, 39). Neither had been relabeled in conformity with the corrective procedures undertaken by Macy in November 1963 or subsequently. When he purchased these sweaters, the FTC investigator observed others on display which were being offered for sale, and which appeared to be similarly labeled (Tr. 125-6, 133-5). It cannot be assumed, however, that the other similarly labeled sweaters on display at that time were also, in fact, mislabeled.

151. The record establishes, therefore, that the three mislabeled sweaters in evidence were purchased by Macy before it had any knowledge of the problem with respect to their labeling. They were, however, purchased by the FTC investigator from Macy after it undertook extensive efforts to correct the labeling of sweaters imported by it, two of them having been purchased some nine months after those efforts were instituted. The record discloses, therefore, that, at least with respect to these three sweaters, respondent's corrective efforts were ineffective.

152. The record provides no basis for a conclusion, however, that, at the time of their sale by Macy, these three mislabeled sweaters were representative of the labeling of respondent's imported mohair-blend sweaters generally. In fact, the testimony makes it clear that it was not the purpose of the FTC investigator to purchase sweaters which were necessarily typical or representative generally of those then on sale by respondent, but rather that he sought to purchase sweaters labeled with a relatively high mohair content which he thought were more likely to be improperly labeled (Tr. 233, 2336-8, 2366-7).

153. The Wool Act does not require a showing that the mislabeling of wool products is a general practice, or that wool products which are proved to be mislabeled are representative of a respondent's labeling of a substantial portion of its wool products in the same category. Section 3 of the Act makes the misbranding of "any wool product" unlawful. Counsel supporting the complaint, having established that respondent introduced in commerce three misbranded Italian mohair-blend sweaters in violation of the Wool Act, has no obligation to show the extent to which sweaters of the same sort imported by it were misbranded.

154. The lack of uniformity of the fiber content of mohair-blend sweaters imported from Italy (Fi. 80, 116-117), and the complications involved in the proof of the three instances with respect to which evidence was offered, indicate the practical difficulties of establishing that any misbranded Italian mohair-blend sweaters are in fact representative of a larger group (see, e.g., Tr. 739-49). These considerations demonstrate that a requirement that proof of such instances must be sufficiently extended to establish a general practice would result in almost unsurmountable problems and would make the Wool Act, as a practical matter, largely unenforceable with respect to wool products of this sort.

155. This is not to say that proof of an isolated instance of misbranding is necessarily sufficient to establish a violation of the Wool Act (*Richard S. Marcus v. FTC*, 354 F. 2d 85 (1965)). That consideration is not involved in this proceeding. On the contrary, the record establishes that at least two of the misbranded sweaters, CX 9 and 17, were imported by respondent with many other sweaters invoiced with the same fiber content. It also establishes that in October 1963 respondent became aware of the problem of misbranding with respect to these sweaters, and that by its own

tests it determined that many of the sweaters which it had imported were in fact misbranded and required relabeling (Fi. 123). The question here is whether or not respondent's efforts to correct the labeling of these sweaters were so designed and carried out, and were of such scope and effectiveness as to affect the public interest which may now be present in the issuance of an order requiring it to cease and desist from violations of the Wool Act.

156. The record discloses that when respondent first learned on October 28, 1963, through an article in a trade publication, that there may be a problem with respect to the fiber content labeling of mohair-blend sweaters imported by it and others from Italy, its reaction was immediate and drastic. Since that time, it has progressively taken other action at very considerable effort and expense to correct its labeling and to avoid further mislabeling of these sweaters. This action included extensive marking of the sweaters with half of what was considered to be their actual mohair content, limitation of the maximum mohair content to be shown on the labels, elimination of any traces of azlon from the sweaters, elimination of the word "mohair" from their labels, and control over the sources of yarn for sweaters manufactured for it. Respondent has supplemented and implemented its efforts by extensive testing both in this country and in Italy, and, where necessary, by extensive removal from sale and relabeling of the sweaters.

157. These efforts were undoubtedly motivated to some extent for the purpose of avoiding conflict with the law and possible action by the Bureau of Customs and the FTC. They were also undoubtedly motivated in large measure, and probably primarily, because of respondent's concern for its commercial reputation and the integrity of the labels on its products. The examiner is of the opinion that the corrective procedures which it instituted were not undertaken by respondent merely as a gesture of compliance with the requirements of the law, but that they were seriously instituted and vigorously pursued in an earnest effort to deal promptly and effectively with a problem which respondent unexpectedly encountered and one which it considered to be adverse to its reputation and its own best interests.

158. While its corrective efforts were not wholly effective, as indicated by the mislabeled sweaters in evidence, the hearing examiner is satisfied that respondent's efforts were undertaken and have been continued in good faith, and that they were as effective as could reasonably be expected in dealing with the volume of sweaters involved. He is also satisfied that respondent's

efforts will continue, and that respondent will fully comply with any requirements or guide lines which the FTC may establish for dealing with this problem on an industrywide basis. There is sound reason to believe that insofar as they can be prevented by respondent with the exercise of unusual care, violations of the sort established by this record will not occur in the future. This is particularly so since the respondent has eliminated the word "mohair" from the fiber content labels of these sweaters imported by it, and, by its counsel, has assured the Commission "that it will continue to adhere to its present program of not referring to the mohair content of any mohair-blend sweater; and if desired, will give this assurance in any reasonable form requested by the Commission" (RPF 176).

159. It is appropriate to consider in this connection that the problem with respect to the labeling of mohair-blend sweaters imported from Italy was industrywide and involved difficulties and peculiarities characteristic of those sweaters which are not generally applicable to other wool products; that respondent operates its own Bureau of Standards where it exercises very careful quality control over the products which it sells, including wool products, and that, through its laboratory and otherwise, it jealously endeavors to protect the integrity of its labeling (Tr. 1866, 2203, 2206-7, 2377-9); and that the record indicates that the FTC has not investigated respondent for, or charged it with, violations of the Wool Act in connection with any product other than mohair-blend sweaters imported from Italy (Tr. 1711, 2198-9, 2218-9).

Burdens of an Order to Cease and Desist

160. Through the testimony of its officials, respondent has endeavored to show that the issuance of a broad order against it in this proceeding would impose upon it punitive disadvantages and would seriously affect its ability to compete in the retail business generally, and particularly in the retail sale of imported wool products (Tr. 1711-20, 1872-6, 2202-15; RPF 180-5).

161. By a broad order the witnesses were referring to an order which would require respondent to cease and desist from mislabeling, not only with respect to imported mohair-blend sweaters with which this proceeding is concerned, but also with respect to all other imported wool products. They did not seem to be seriously concerned with the labeling of wool products domestically acquired, apparently because of the protection afforded by the guarantees received with domestic purchases (Tr. 1920). In this

connection respondent makes it clear that it has no reason to believe that the wool products generally which it imports are now mislabeled, but that the extraordinary care and procedures which it would be required to undertake to guard against possible \$5000 penalties in rare instances would be almost prohibitively burdensome and costly (Tr. 2205-11, 2213).

162. Respondent's showing concerning the burdens and disadvantages to it of a broad order is impressive. Macy started importing directly in 1859, and its first foreign office was established in 1885 (Tr. 1715). It now imports probably 350 different kinds of wool products (Tr. 2203-5), and in order to compete effectively it is necessary for it to buy directly in the foreign markets, and to do its own importing (Tr. 1720, 1875-6, 2214-5). Buying these products only through importers would destroy the creative possibilities and versatility of its buyers, and would sharply limit the variety and originality of imported wool products available to it (Tr. 1713-5). The protection of purchasing only through importers would be prohibitively costly (Tr. 1712-5, 2204).

163. A broad order would make it necessary for Macy to enforce stricter requirements on its foreign suppliers of wool products, and would require additional test programs throughout the world (Tr. 2213). It is already considered by foreign suppliers to be difficult to deal with because of its stringent requirements. To impose in all its foreign markets for wool products systems and requirements similar to those it now has in effect in the Italian mohair-blend sweater market, would result in seriously increased resistance from foreign suppliers. Such a program, including the overseas controls necessary in each situation, would be very difficult, if not impossible, to establish, and would involve serious additional seasonal delays because of foreign testing, and almost prohibitive additional costs (Tr. 1711-4, 1716-7, 1765, 1873-4, 2202-3, 2208). These results would seriously handicap respondent in purchasing wool products in foreign markets, and in competing in their retail sale (Tr. 2209-11).

The Public Interest Does Not Require an Order to Cease and Desist

164. It is the opinion of the hearing examiner that, in the circumstances disclosed by this record, protection of the public interest does not require the issuance of an order against respondent to terminate the violations of the Wood Act proved in this proceeding, or similar violations. It is also his opinion that, in view of the burdens and hardships to respondent, and the absence

of a countervailing public interest, the effect of such an order would be essentially punitive rather than corrective. The complaint should, accordingly, be dismissed.

165. In the event, however, that the Commission should consider that the public interest requires an order, it is strongly urged that the scope of any order which may issue should be limited to imported mohair-blend sweaters. There is nothing in the record to suggest the need for a broader order. On the contrary, the peculiarities of the problem with respect to properly labeling these sweaters, and the specialized considerations involved in the solution of that problem, clearly warrant the suggested limitation.

CONCLUSIONS

1. During 1963 and 1964 respondent imported from Italy and offered for sale and sold in its retail stores in this country substantial quantities of sweaters which contained blends of wool and mohair and in some instances certain other fibers. Cloth labels attached to these sweaters showing their fiber content were on the sweaters when they were imported by respondent; and except to the extent that they were removed by respondent after importation for the purpose of relabeling as to fiber content, the cloth labels were on the sweaters when they were sold by respondent.

2. Mohair-blend sweaters with cloth labels attached to them which falsely represent the percentage of wool or of mohair or of other fibers contained in the sweaters are misbranded wool products. The importation of such sweaters from Italy into this country constitutes the introduction and transportation of misbranded wool products in commerce within the meaning of the Wool Act. The importation of misbranded mohair-blend sweaters is, accordingly, in violation of the Wool Act and within the corrective jurisdiction of the FTC.

3. The record contains evidence of three instances, CX 1, 9 and 17, in which mohair-blend sweaters imported by respondent from Italy bore cloth labels at the time of their importation which falsely represented their fiber content by greatly overstating the percentage of mohair contained in them. In two of those instances, CX 1 and 17, the labels also overstated the total wool content and failed to disclose the azlon content. In these three instances the cloth labels misrepresenting the fiber content of the sweaters constituted violations of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder.

4. The testing of mohair-blend sweaters is not an exact science, and the standard engineering probabilities upon which they are based recognize a lack of precision in the tests of these sweaters.

The record discloses that there is a lack of uniformity in the fiber content of mohair-blend sweaters imported from Italy, and that there was an unusual variability in the mohair content of the tested samples of CX 13, one such sample actually containing 30 per cent mohair as represented on the label. These circumstances indicate that technical precision cannot be required in this instance, and that a practical approach should be applied. In view of these considerations, the difference of eight percentage points in the mohair content shown on the label, 30 per cent, and in the test report, 22 per cent, does not establish that CX 13 was misbranded. The test report shows that the total wool content of this sweater, 88 per cent, was substantially the same as that shown on the label, 90 per cent, a difference which in this instance is not sufficient to support the charge of misbranding. The record does not establish, therefore, that CX 13 was misbranded in violation of the Wool Act.

5. The record does not warrant a conclusion that Rule 19 of the Rules and Regulations under the Wool Act, which permits use of the term "mohair" in lieu of "wool," cannot reasonably be applied to the labeling of mohair-blend sweaters. The difficulties involved in producing mohair-blend sweaters with a uniform mohair content, and the lack of precision recognized by the standard engineering probabilities upon which the tests of these sweaters are based, constitute no justification for the very extravagant overstatement of the mohair content of CX 1, 9 and 17; and the proof which was offered by respondent falls far short of establishing that the deviations in the mohair content of the magnitudes here involved "resulted from unavoidable variations in manufacture and despite the exercise of due care" within the meaning of Section 4 of the Wool Act.

6. Respondent began purchasing mohair-blend sweaters from Italy late in 1961 or in the Spring of 1962. It first became aware that there may be a problem with respect to the fiber content labeling of these sweaters on October 28, 1963. Until that time it had relied upon the labels and invoices of the Italian manufacturers as accurately reflecting the fiber content of the sweaters, and had made no tests of its own to determine their accuracy. Upon learning of the problem respondent took immediate and drastic action to determine the accuracy of the labeling and, where necessary, to correct the labels on the sweaters which it had imported. Since then it has progressively taken other action at very considerable effort and expense to correct its labeling and to avoid further mislabeling of these sweaters.

7. Respondent's corrective efforts have been motivated, not only by a purpose to avoid action by the Bureau of Customs and the FTC, but also, and probably primarily, because of its concern for its commercial reputation and the integrity of the labels on its products. Its efforts were seriously instituted and vigorously pursued in an earnest endeavor to deal promptly and effectively with a problem which was unexpectedly encountered and one which it considered to be adverse to its reputation and its own best interests.

8. Respondent's corrective efforts were undertaken and have been continued in good faith. Although they were not wholly effective, they were as effective as could reasonably be expected in dealing with the volume of sweaters involved. There is sound reason to believe that insofar as they can be prevented by respondent with the exercise of unusual care, violations of the sort established by this record will not occur in the future. This is particularly so since the respondent has eliminated the word "mohair" from the fiber content labels of sweaters imported by it, and has excluded azlon as a part of their fiber composition, and has assured the Commission that it will adhere to its present program.

9. The problem with respect to the labeling of mohair-blend sweaters imported from Italy was industrywide, and involved difficulties and peculiarities characteristic of those sweaters which are not generally applicable to other wool products. The solution of the problem requires the application of special considerations designed to cope with the characteristic difficulties and peculiarities involved. There is nothing in the record to suggest the need for an order in this proceeding which would include any wool products other than imported mohair-blend sweaters. A broader order would impose upon respondent very serious burdens and disadvantages not warranted by the record.

10. Since the record discloses that corrective action was promptly instituted by respondent, and that the violations have been surely stopped with sound reason to believe that they will not be renewed in the same or any related form, protection of the public interest does not require an order terminating the violations. In these circumstances the effect of such an order would be essentially punitive rather than corrective. The complaint should, accordingly, be dismissed.

ORDER

It is ordered, That the complaint herein be, and it hereby is, dismissed.

OPINION OF THE COMMISSION*

NOVEMBER 29, 1967

BY REILLY, *Commissioner*:

I

These cases are substantially similar. Both matters involve importers of finished wool products who are charged with violations of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated under the authority of said statute, and in both matters the allegations focus upon respondents' labeling of the fiber content of mohair-blend sweaters manufactured in Italy and sold in commerce as "commerce" is defined in the Wool Act.

Respondent R. H. Macy & Co., Inc., is a New York corporation operating some 50 retail department stores in New York, California, New Jersey, Ohio, Georgia and Missouri. It operates 12 foreign offices, responsible for overseas buying assistance, including information concerning trends, fashions, developments and anything new in retailing domestically and abroad which may be of assistance to the company's operations. It sells a great variety of consumer items, including wool products, directly to the public. Its sales for 1965 amounted to approximately \$668,000,000.

Respondent Sportempos, Inc., is also a New York corporation. It imports wool products for sale to retailers located within the various States. Its sales of such products, on the basis of the transactions revealed by the record, may be described as substantial.

Respondents Macy and Sportempos were charged in complaints, issued on November 13, 1964, and May 18, 1966, respectively, with misstating the mohair content of sweaters sold in commerce. The core violation charged in each case is the misbranding of mohair content in violation of Rule 19 of the Rules and Regulations promulgated by the Federal Trade Commission under the authority of the Wool Products Labeling Act. Rule 19 is permissive and relates to the use of terms such as "mohair" on labels. It permits the use of the term "mohair" in lieu of "wool" provided the percentage is given. If an election is made to designate as "mohair"

* Consolidated opinion in two cases: *R. H. Macy & Co., Inc.*, Docket No. 8650 and *Sportempos, Inc.*, Docket No. 8683.

that part of the wool content of a product which is composed of the hair of the Angora goat, the Rule requires that the percentage of the wool content be stated.

Hearings on the complaints were held before different examiners. In the Macy proceeding, the hearing examiner concluded that respondent had violated the Wool Act through the importation and sale of mohair-blend sweaters, the mohair content of which "was greatly overstated." However, the examiner, relying primarily on "corrective efforts" undertaken by the respondent, held that an order was unnecessary for protection of the public. In the Sportempos proceeding, the hearing examiner found that respondent had imported and offered for sale and sold in this country substantial quantities of sweaters which falsely represented the percentage of wool or of mohair fibers contained in such products in violation of the Wool Products Labeling Act. Notwithstanding the asseverations of respondent that it had ceased the importation of mohair-blend sweaters in order to avoid violation of the law, the examiner entered an order proscribing further misbranding or sale of misbranded products by Sportempos.

Neither party appealed the initial decision in the Macy proceeding. By order of September 20, 1966, the Commission stayed the effective date of the decision, and by subsequent order placed the matter upon its docket for review of all findings and conclusions made by the examiner. Respondent Sportempos appealed from the opinion of Hearing Examiner Raymond J. Lynch. Oral argument was heard on said appeal on March 29, 1967.

II

In administering the Wool Products Labeling Act, the Commission primarily directs its enforcement efforts at the manufacturing level of the wool industry. Under Section 9, no party may be held liable under the statute if he establishes receipt of a guaranty that the product in question is not misbranded. Such guaranties stem from domestic wool producers who are required by Section 6(b) of the Act and Rule 31 of the Regulations to maintain complete records concerning the fiber content of all products they manufacture. Through such records, it is possible to establish a line of continuity from the finished product back to the origin of the raw fibers. This record keeping plus periodic inspections by Commission personnel provides an effective means of policing the labeling of domestically produced wool products to prevent incipient violations of the statute.

With respect to imported wool products, Commission enforcement efforts must necessarily be directed at other than the manufacturing level. The Commission has no authority to require record-keeping by foreign producers as to the accuracy of labeling, or to impose sanctions against them in cases of misbranding. It therefore looks to their customers, American importers, for compliance with the statute; its general purpose and policy in this regard being the deterrence of sales of misbranded products through issuance of orders against offending importers.

The Commission's experience has been that the great majority of wool imports are properly labeled. However, on occasion we have found that the inability to impose a deterrent at the manufacturing level and/or unique production difficulties, have resulted in problems of misbranding confined not to one or several importers but rather present on an industrywide basis. The complaints in the instant matters arose from such a situation.

Respondents' sweaters were products of a "cottage industry," products knitted in homes by Italian women from yarn furnished them by manufacturers' representatives called "fattorini." Each "fattorino" contracts with from 20 to 200 of these home knitting manufacturers. Each representative in turn is supplied yarn spun by various spinners from mohair imported from Texas, Turkey, and South Africa and wool produced in New Zealand, Australia, and Argentina. The Italian producers, or ultimate sellers to respondent importers, either claimed that precise identification of fibers in their products was impossible or refused to cooperate in such identification with their customers when the latter first became aware of labeling problems by reason of Commission interest. The examiner in the Macy proceeding found that "[t]he problem with respect to the labeling of mohair-blend sweaters imported from Italy was industry-wide, and involved difficulties and peculiarities characteristic of those sweaters which are not generally applicable to other wool products." The records and Commission proceedings against other importers of mohair-blend sweaters¹ support this finding.

Our review of the respective records convinces us that the hearing examiners' findings concerning respondents' sales of mislabeled mohair-blend sweaters are amply supported by the evidence. However, we do not believe that an order to cease and desist from further violations of the statute is appropriate in either matter.

¹ During the period covered by the instant proceeding, the Commission issued and resolved through consent orders eighteen complaints charging importers with misbranding of mohair-blend sweaters.

Recently, in recognition of our duty to achieve substantial equality in the administration of the Wool Products Labeling Act as applicable to domestic products and imported products, we proposed amendment of the Regulations promulgated under the authority of the statute.² Our proposal calls for the testing of wool imports prior to their entry into American channels of commerce whenever the Commission believes it in the public interest to require such testing. The proposed testing requirements are not intended to be applicable to all imported wool products, but only those of which the Commission has reason to believe that there is widespread misbranding.

It is in this light, and in consideration of other facts of record, that we hold that an injunctive order is not warranted in the matters under review. While the proposed amendment is subject to industry comment and subsequent revision of its terms, Commission policy behind the proposal is definite. We seek a cooperative endeavor between importers and the government that will equalize administration of the Wool Act and prevent widespread misbranding of particular wool imports through advance detection and voluntary correction. We have reason to believe that the respondents will adhere to whatever procedure is required in furtherance of this aim. Neither corporation has violated the Wool Products Labeling Act before. Respondent Macy, upon becoming aware of the deficiencies in the labeling of its mohair-blend imports, undertook extensive efforts to correct the problem, including fiber testing and the removal from sale and relabeling of the questioned products. Respondent Sportempos' misbranding resulted from an isolated purchase, and we have the company's assurance that it will make every effort to see that such misbranding will not recur.

Accordingly, we shall set aside the initial decisions in both matters and terminate the proceedings without dismissal of the complaints.

SEPARATE STATEMENT*

BY MACINTYRE, *Commissioner*:

I concur in the decision of the Commission to suspend these proceedings at this time but only upon the understanding that the Commission will promptly have in operation an industrywide rule providing for effective Federal Trade Commission enforcement of

² 32 Fed. Reg. 15180 (1967).

* Consolidated statement in two cases: *R. H. Macy & Co., Inc.*, Docket No. 8650 and *Sportempos, Inc.*, Docket No. 8683.

the Wool Products Labeling Act, particularly with reference to the problems involved in these proceedings.

FINAL ORDER

This matter having been placed by the Commission on its own docket for review of the hearing examiner's initial decision; and

The Commission having concluded for the reasons stated in the accompanying opinion, that the public interest does not require the entry of an order to cease and desist and that the initial decision should be set aside and the proceeding terminated:

It is ordered, That the initial decision be, and it hereby is, set aside.

It is further ordered, That the proceeding herein be, and it hereby, is, terminated without dismissal of the complaint.
