

IN THE MATTER OF
SPORTEMPOS, INC.*

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

Docket 8683. Complaint, May 18, 1966—Decision, Nov. 29, 1967

Order setting aside the initial decision and terminating the proceeding without dismissing the complaint which charged a New York City importer of Italian mohair-blend sweaters with misbranding sweaters in violation of the Wool Products Labeling Act on the grounds that since many other importers are involved the problem can be handled better on an industry-wide 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 Sportempos, Inc., a corporation, 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

* For opinion of the Commission and statement of Commissioner MacIntyre in this case, see consolidated opinion and statement *In the Matter of R. H. Macy & Co., Inc.*, Docket No. 8650, pp. 894, 947, 950 herein.

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

PARAGRAPH 1. Respondent Sportempos, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent is an importer of wool products with its office and principal place of business located at 1407 Broadway, New York, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondent has 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 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 50% Wool, 45% Mohair, 5% Nylon, whereas in truth and in fact, such sweaters contained substantially different amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded 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 name of the manufacturer of the wool product or the name of one or more persons subject to Section 3 with respect to such wool product.

PAR. 5. Respondent with the intent of violating the provisions of the Wool Products Labeling Act of 1939 has removed or caused or participated in the removal of the stamp, tag, label or other identification required by the Wool Products Labeling Act of 1939 to be affixed to wool products subject to the provisions of such Act, prior to the time such wool products were sold and delivered to the ultimate consumer, in violation of Section 5 of said Act.

PAR. 6. 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 when certain of the fibers described as "Mohair" were not entitled to such designation, in violation of Rule 19 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

PAR. 7. 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. Thomas J. Kerwan and Mr. Edward B. Finch for the Commission.

Wald, Harkrader & Rockefeller, Washington, D.C., by *Mr. Edwin S. Rockefeller* for respondent.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

NOVEMBER 1, 1966

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint against the respondent on the 18th day of May, 1966. The complaint charges the respondent with violations of the Wool Products Labeling Act of 1939 in connection with sweaters inaccurately labeled as to their fiber content, particularly their mohair and wool content.

The respondent on June 2, 1966, filed a Motion for a More Definite Statement and counsel supporting the complaint filed a reply thereto on June 13, 1966. On June 16, 1966, the undersigned examiner issued an order denying respondent's Motion for a More Definite Statement and scheduled a prehearing conference for June 30, 1966, at 10 a.m., in Room 7314 of The 1101 Building, Washington, D.C. Counsel representing the respondent filed his answer to the complaint on June 27, 1966, admitting that the respondent is a corporation organized, existing and doing business under the laws of the State of New York with its principal office at 1407 Broadway, New York, New York, but stated that

respondent is without knowledge sufficient to admit or deny the other allegations of the complaint and denies them.

Pursuant to the examiner's prehearing conference order, initial hearings in the matter commenced on July 28, 1966, at 10 a.m., in Hearing Room D, Federal Trade Commission Offices, 14th Floor, 30 Church Street, New York, New York, and were concluded in Washington, D.C., on August 4, 1966. Proposed findings of fact and conclusions of law were filed by the parties on September 9, 1966. Replies to the parties' proposed findings of fact and conclusions of law were filed on September 19, 1966.

This proceeding is before the hearing examiner to be considered upon the complaint, the answer, testimony and other evidence and the proposed findings of fact and conclusions of law filed by counsel representing the respondent and by counsel supporting the complaint.

Consideration has been given to the proposed findings of fact and conclusions of law submitted by both parties, and all proposed findings of fact and conclusions of law not hereinafter specifically found or concluded are rejected and the hearing examiner, having considered the entire record herein, makes the following findings of fact and conclusions drawn therefrom and issues the following order.

FINDINGS OF FACT

1. Respondent Sportempos, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Respondent is an importer of wool products with its office and principal place of business at 1407 Broadway, New York, New York. (Answer; CX 20.)

2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 the respondent imported from Italy and 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. (CXs 1, 4, 5, 6, 7, 12-19.)

3. The wool products referred to in this proceeding were Italian made mohair-blend sweaters which will be discussed in detail later in this opinion.

4. The respondent, according to Commission Exhibit CX 7, purchased knit wearing apparel (mohair-blend sweaters) from Mfr. Confezioni DIEMME, S. FELICE. CX 7 is an invoice from Krieger, Ltd., P.O. Box 185, Florence (Italy), 11, Parione Str., dated September 16, 1963, covering the shipment of 55 boxes of

knit wearing apparel from the above referred to manufacturer to the respondent in this proceeding. The garments were shipped to New York via the steamship Excalibur, sailing from Leghorn on September 19, 1963. The invoice covers the shipment of 3,649 Style 705, V neck cable front pullover long sleeve (sweaters). The invoice discloses that the sweaters involved in the shipment contain 50 per cent wool, 45 per cent mohair and 5 per cent nylon. The exhibit referred to herein was secured by an investigator of the Federal Trade Commission from Mr. Levine, an employee of the respondent and there is no reason to doubt its authenticity. Mr. Levine admitted while testifying in this proceeding (Tr. 143-146) that the sweaters had been purchased as set forth in Commission Exhibit 7. Furthermore, that the sweaters had been delivered to the respondent at their North Bergen, New Jersey, warehouse in the ordinary course of business.

5. During the year 1963, respondent imported from Italy 26,649 mohair-blend sweaters, among which were 16,000 Style 705 mohair-blend sweaters, (see CX 20(C)) and of these at least 3,649 were represented as to fiber content by the Italian manufacturer as 50 per cent wool, 45 per cent mohair and 5 per cent nylon.

6. The definition of "commerce" as contained in the Wool Products Labeling Act of 1939, is essentially the same as that contained in Section 4 of the Federal Trade Commission Act. The commerce question was settled by the Commission *In the Matter of Alscap, Inc., et al*, 60 F.T.C. 275, wherein the Commission found that:

 Insofar as it is contended on behalf of the respondents that they were not engaged in commerce, both the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 define commerce as being that " * * * with foreign nations * * * or between * * * any state or foreign nation, * * * ." Both Alscap and Lopa caused the goods involved to be exported from Italy and imported into the United States. In addition, it appears that Alscap made at least three sales to purchasers outside of the State of New York. Consequently, the defense that the respondents were not engaged in commerce within the meaning of the Acts is overruled.

7. In addition to the fact that the respondent falls within the jurisdiction of the Federal Trade Commission by virtue of its importation of wool products from a foreign country, the Commission also has jurisdiction in this matter by virtue of the respondent's sale in commerce of 100 mohair-blend sweaters Style No. 705 to Loehmann's, Bronx, New York, on February 27, 1964, CX 6. While it is argued by the respondent that this sale did not

constitute a sale in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939 because the shipment of goods involved in the above referred to invoice was picked up by Loehmann's at the respondent's North Bergen, New Jersey, warehouse, the sale was made in interstate commerce. The record also discloses other sales in interstate commerce. CX 12 is an invoice by the respondent to Loehmann's Bronx, New York, store which includes 500 Style 705 mohair-blend sweaters. The invoice dated January 6, 1964, further discloses that the shipment was made via truck to the purchaser of the merchandise, Loehmann's. Sales of Style 705 mohair-blend sweaters were made by the respondent in interstate commerce to purchasers in New Orleans, Louisiana, CX 11, Lafayette, Indiana, CX 13, and other areas throughout the United States.

8. On March 26, 1964, Mr. Charles T. Rose (Tr. 66-119), an investigator for the Federal Trade Commission, purchased a sweater, CX 1, from the Chas. C. Loehmann Corp., 2467 Jerome Avenue, Bronx 68, New York, for \$6.98. In addition to the receipt, CX 4, received by Mr. Rose for the purchase of the sweater, Mr. Rose also obtained a statement, CX 5, signed by Mr. Irving Saidel, Manager of the Loehmann Bronx store, which states:

Sold to Mr. Charles T. Rose, Investigator, Federal Trade Commission 1 sweater at \$6.98.

Tag (CX 4) showing Code No. ZB represents sweater supplier Sportempos. No. 710005 represents Style Number 705.

CX 4 represents the sweater as "wool, mohair, nylon." The fiber disclosure label in the neck of the sweater (CX 1) states "50% Wool, 45% Mohair, 5% Nylon, Hand Knitted." An examination of the physical exhibit (CX 1) also discloses that the manufacturer's label had been removed and that respondent Sportempos' labels had also been removed. The original label removal will be discussed later.

9. After purchasing the sweater from Loehmann's, Mr. Rose made a visit to the respondent's warehouse in North Bergen, New Jersey, and interviewed Mr. Isaac M. Baker (Tr. 147-159), vice president of Sportempos, who supplied him with CX 2, which is a xerox copy of the tagging of a Style 705 sweater. The respondent's tagging discloses that the garment was made in Italy exclusively for Sportempos and that it was hand knit and contained 50 per cent wool, 45 per cent mohair and 5 per cent nylon. Mr. Baker testified in this proceeding and stated that he recalled the visit of Investigator Rose and that he supplied him with CX 2.

10. Subsequent to the purchase of CX 1 by the investigator for the Federal Trade Commission, the sweater was sent to ACH Fiber Service, Inc., in Boston, Massachusetts, for a fiber analysis, authorized by Section 6(a) of the Wool Products Labeling Act of 1939. CX 1 was examined by ACH Fiber Service, Inc., in accordance with the standards prescribed by the American Society for Testing and Materials and the fiber content set forth on the label and the result of the fiber analysis test is as follows:

<i>Label reads:</i>	<i>Test result:</i>
CX 1 50% Wool	79% Wool CX 20(F) and (G)
45% Mohair	13% Mohair
5% Nylon	8% Nylon

The above test result shows that CX 1 is misbranded under Section 4(a) (1) of the Wool Products Labeling Act of 1939. The original fiber content labels were placed upon these mohair-blend sweaters in Italy. (CX 20(C).) A comparison of CX 7 and CX 1 reveals that the same fiber content information as set forth on the import invoice (CX 7) is set forth on the woven neck label in CX 1 and by noting the description as set forth on CX 7, and comparing this description with CX 1, it will be seen that the description of the sweater on CX 7 is identical to that of CX 1.

11. Accepting the findings stated above requires an evaluation of the testing procedures and the qualifications of the experts who conducted the test in question. In this connection, it is noted that counsel for respondent and counsel supporting the complaint have entered into a stipulation covering the testimony and qualifications of said experts had they testified in this proceeding. (See CX 20 (A) through (C) and (E) through (L).) In addition, see *Transcript pages 178 through 181* encompassing further stipulations concerning portions of the transcript of proceedings in Docket No. 8650, *R. H. Macy & Company, Inc.* (also see *Transcript pages 189 and 190*), in which both respondent's counsel and counsel supporting the complaint agreed to be bound by the results in the Macy case concerning testing procedures and authorities relied upon.

12. As a result of the above stipulation, it is found 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 test with respect to which evidence

has been received in this proceeding; and that the procedures, controls and checks employed by ACH in testing the sweater in evidence were properly designed and applied to deal with the practical problems involved in such test. It is concluded, therefore, that the fiber analysis report which ACH made to the Federal Trade Commission with respect to the sweater (CX 1) in evidence is reliable within the range of engineering probabilities contemplated by established procedures.

13. The respondent, both in his proposed findings and during the course of cross-examination of Investigator Rose, endeavors to make an issue of the improper handling of CX 1. However, the record is clear that the sweater, CX 1, was purchased by Mr. Rose in due course of business and that he exercised proper care and diligence in marking the exhibit and that the proper records were maintained from the time the sweater was purchased until it was received in evidence in this proceeding.

14. 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.

15. Section 4(a) (2) of the Wool Products Labeling Act of 1939 provides that the correct percentages of all fibers present in the wool product must be set forth on the label required to be affixed to the wool product.

16. By a reference to the fiber content label affixed to CX 1 and to the test report of ACH Fiber Service, Inc., pertaining to this exhibit, more specifically set forth as CX 20(F) it will be noted that the correct percentages of all fibers present in this wool product were not set forth on the label. Therefore, CX 1 is found to be misbranded under Section 4(a) (2) of the Wool Products Labeling Act of 1939.

17. 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, when certain of the fibers described as mohair were not entitled to such designation, in violation of Rule 19 of the rules and regulations under the Wool Products Labeling Act of 1939.

18. Rule 19 is permissive in nature and relates only to the use of terms such as "mohair" on labels. One of the provisions of the Rule is to prevent the use of the name of a specialty fiber on a label without stating the percentage thereof. This means that, since the Rule is permissive, a given percentage of mohair may be designated on the label so long as the wool product contains *at least* that designated percentage of mohair. It may contain more mohair than designated on the label. Here, however, respondent's product contained more wool and less mohair than stated on the label.

19. Paragraph five of the complaint charges that the respondent with the intent of violating the provisions of the Wool Products Labeling Act of 1939 has removed or caused or participated in the removal of the stamp, tag, label or other identification required by the Wool Products Labeling Act of 1939 to be affixed to wool products subject to the provisions of such Act, prior to the time such wool products were sold and delivered to the ultimate consumer, in violation of Section 5 of said Act.

20. The evidence discloses that the garments imported from Italy by the respondent were tagged by the manufacturer (CX 2). However, after CX 1 was received by the respondent and prior to the time of purchase by Mr. Rose, the respondent's and manufacturer's labels had been removed. Counsel supporting the complaint contends they were removed by the respondent. Counsel for respondent denies the allegation. The evidence of record as previously stated clearly shows that the original labels had been removed. However, whether they were removed by the respondent or by Loehmann is unclear. There is an inference that they were removed by the respondent on all garments received by Loehmann's. However, Mr. Saidel (Tr. 120-42) stated that if they had not been removed by respondent, Loehmann would have removed respondent's labels prior to ticketing and selling the garments. The evidence in the record is insufficient to make a finding that the respondent removed the labels on CX 1 before it was shipped from North Bergen, New Jersey to Loehmann's in New York. Therefore, the examiner finds that Paragraph No. 5 of the complaint has not been sustained and must be dismissed.

21. 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.

22. Respondent contends that prior to the commencement of this proceeding it has never been charged with violating the Wool Products Labeling Act and that Sportempos relied in good faith upon the fiber content set forth on the labels of the sweaters involved. Furthermore, that the labels were printed and attached to the garments in Italy and respondent had no reason not to rely upon the statement of fiber content. That in reliance upon the Italian sources the respondent conducted no tests of its own. Respondent also contends that the importation of mohair-blend sweaters was an isolated transaction and that respondent has not imported any further mohair-blend sweaters from Italy. The respondent states in the stipulation filed herein that it makes every effort to comply with all of the Commission's rules and regulations and that if any violations took place, efforts have been made to see that they will not happen in the future. Respondent's actions are commendable but cannot be considered as a defense to the proved violations. The exercise of reasonable care to avoid misbranding does not constitute a defense under the Act, except in connection with unavoidable variations in manufacture not applicable here.

CONCLUSIONS

1. During 1963 respondent imported from Italy and offered for sale and sold in this country substantial quantities of sweaters which contained blends of wool and mohair and nylon. Cloth labels attached to these sweaters showing their fiber content were on the sweaters when they were imported 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 Products Labeling Act.

3. 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 sweat-

ers are based, constitute no justification for the very extravagant overstatement of the mohair content of CX 1.

4. Paragraph Five of the complaint has not been proved by a preponderance of the reliable evidence and, therefore, must be dismissed.

5. It is concluded, therefore, that 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 that they 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, and that this proceeding is in the interest of the public.

ORDER

It is ordered, That respondent Sportempos, Inc., a corporation, and respondent's officers, representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from introducing into commerce, or offering for sale, selling, transporting, distributing or delivering for shipment in commerce, wool sweaters or any other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939:

1. Which are falsely or deceptively stamped, tagged, labeled or otherwise identified as to the character or amount of the constituent fibers contained therein.

2. To which are affixed labels wherein the term "Mohair" is used in lieu of the word "Wool," unless the percentage of fibers designated as "Mohair" is set forth in the required fiber content information, and the fibers described as "Mohair" are entitled to that designation and present in at least the amount stated.

It is further ordered, That respondent Sportempos, Inc., a corporation, and respondent's officers, representatives, agents and employees, directly or through any corporate or other device in connection with the introduction into commerce, or the offering for sale, sale, transportation or delivery for shipment, in commerce of any wool product as "wool product" and "commerce" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by failing to securely affix to or place on each product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each

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element of information required to be disclosed by Section 4 (a) (2) of the Wool Products Labeling Act of 1939.

It is further ordered, That Paragraph Five of the complaint be, and the same is, hereby dismissed.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; 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 containing such an order 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.