IN THE MATTER OF

WOODY FASHIONS, INC., ET AL.

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

Docket 6123. Complaint, Sept. 21, 1953—Decision, Aug. 3, 1954

Where a manufacturer of wool products—

(a) Misbranded certain ladies' coats which contained none of the hair of the Cashmere goat as "Imported Cashmere and All Wool, Exclusively Blended", "Exclusively Blended, Wool and Cashmere, 80% Wool, 20% Cashmere", etc.; and

(b) Misbranded certain of said coats labeled as "Imported Cashmere and All Wool, Exclusively Blended", in that it failed to set out the percentage, by weight, of cashmere contained therein:

Held, That such misbranding of wool products was in violation of the Wool Products Labeling Act of 1939 and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Henry D. Stringer for the Commission.

Ducker & Feldman and *Mr. Samuel R. Friedman*, of New York City, for respondents.

DECISION AND OPINION OF THE COMMISSION

This matter has come before the Commission upon respondents' appeal from the initial decision of the hearing examiner which concludes that they have violated the Wool Products Labeling Act of 1939 by falsely labeling ladies' wool coats as containing cashmere. Briefs in support of and in opposition to the initial decision have been filed. Oral argument has not been requested.

In support of their appeal respondents take exception to rulings of the hearing examiner excluding reports of tests by Adolph Marklin and by Josephine V. Lawida of the content of certain of the material in question. They were rejected by the hearing examiner because the person making the tests were not present as witnesses and available for cross-examination as to the contents of the reports. The report of the tests by Josephine V. Lawida was identified by Arthur B. Coe, Chief Microscopist for the United States Testing Company, Inc., who was her superior. He testified that he did not participate in the actual testing and could not recall whether or not he had examined respondents' fabric at all. Similarly, as set out in detail in the initial deci-

sion, the President of Hatch Textile Research, Inc., who identified the report of the tests by Adolph Marklin, had no knowledge of the actual tests covered by the report.

Respondents contend that under a recognized exception to the hearsay rule a report of a test made in the regular course of business can be placed in evidence without making the person conducting the test available for cross-examination. However, this record shows that it is extremely difficult to identify cashmere fiber in a fabric. This is not a routine busines operation with which a supervisor would be thoroughly familiar. The testing procedure and the personal qualifications of the persons conducting the tests are extremely important in this case as the different persons testing the same fabrics have obtained such opposite results. Under these circumstances, the Commission is of the opinion that the hearing examiner correctly barred from evidence reports of tests where the person conducting the test was not made available for cross-examination.

Respondents further take exception to the findings in the initial decision that respondents' products contained no hair of the cashmere goat and that they misbranded them by labeling them as containing 20% and 30% cashmere in violation of the Wool Products Labeling Act. The Commission has fully considered the record and is of the opinion that the initial decision correctly so held and that the initial decision is correct and proper in all respects.

It is ordered, therefore, that respondents' appeal is hereby denied, and that the initial decision is hereby adopted as the decision and opinion of the Commission.

It is further ordered that respondents Woody Fashions, Inc., a corporation, and Harry D. Graff and Harry Zucker shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the initial decision, a copy of which is attached hereto.

Said initial decision, thus adopted by the Commission as its decision follows:

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

1. The complaint in this proceeding was issued on September 21, 1953, charging Moody Fashions, Inc., and Harry D. Graff and Harry Zucker, individually, with misbranding ladies' wool coats by affixing thereto tags or labels falsely representing that such coats were a blend of cashmere and wool, and by failing to reveal on one of such labels the percentage by weight, if any, of the cashmere fiber contained in

such coat. These labels are alleged to have been used in violation of Sections 4 (a) (1) and (2), respectively, of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and to constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

2. Respondents, in their answer, admit that Woody Fashions, Inc. is a corporation located at 237 West 37th Street, New York 18, New York, and is organized and existing under and by virtue of the laws of the State of New York; that individual respondents Harry D. Graff and Harry Zucker are the President and Sales Manager, respectively, of the corporate respondent, and that they direct and control the acts, policy and practices thereof. Respondents further admit manufacturing wool products; offering them for sale, and introducing, selling, transporting and distributing such wool products in commerce, subsequent to 1951, within the intent and meaning of the Wool Products Labeling Act of 1939. They deny, however, that they have misbranded their wool products in any way, or that they have committed any acts or engaged in any practice in violation of the Wool Products Labeling Act of 1939 or the Federal Trade Commission Act.

3. The denials in respondents' answer were modified during the course of the hearing by an admission, which is herein accepted as true, that one label, used on these products, which bore the legend "Imported Cashmere and All Wool, Exclusively Blended," and the use of which had been discontinued early in 1953, had failed to show the percentage by weight of cashmere present in the product, and was therefore in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder.

4. In the light of the above facts, the issues remaining in controversy are whether respondents' products contained cashmere, and, if so, whether they contained the respective percentage of cashmere represented, respectively, on two of respondents' labels, namely, 20% cashmere, 80% wool, and 30% cashmere, 70% wool.

B. In order to understand these issues clearly, it must be remembered that the term "wool" is defined as "* * * the fiber from the fleece of the sheep or lamb or hair of the Angora or Cashmere goat * * *" and other specialty fibers not here involved (Sec. 2 (b), Wool Products Labeling Act of 1939). Accordingly, any fabric composed of a combination of the fleece of the sheep or lamb with hair of the Cashmere or Angora goat may lawfully be labeled "All Wool" or "100% Wool." On the other hand, although "mohair" and "cashmere" are included within the general statutory definition of wool,

these words may not, under the provisions of Rule 19 of the Rules and Regulations promulgated under the Act, lawfully be used on a label together with the word "wool" or other fiber designations, unless the respective percentage of each such fiber is shown thereon.

5. In the latter part of 1951 the respondents were buying fabrics from a source other than Wyandotte Worsted Company, with a fiber content of 20% cashmere and 80% wool, for a price of $4.00 to $5.00 per yard, which they had labeled accordingly. Thereafter, in the early part of 1952, respondents began buying fabrics from the Wyandotte Worsted Company at a price of approximately $3.50 per yard. These fabrics were delivered to the respondent with the representation that they were 100% wool. Such a representation might lawfully have been made to describe a fabric composed wholly of the fleece of the sheep or lamb, or of mohair or the hair of the Angora or Cashmere goat, or of any blending thereof. In 1952, shortly after the respondents began their purchases of the fabrics in question, the president of the respondent corporation caused samples of such fabrics to be sent to two separate testing laboratories, requesting reports on the amount of cashmere and wool fiber contained in the submitted samples. After the United States Testing Company, Inc., Hoboken, New Jersey, rendered a report to respondents, to the effect that one of the samples contained a blend of 30% cashmere, 35% wool, and 35% mohair, whereas the other sample contained a blend of 80% Iranian and similar cashmeres, 20% mohair, and negligible traces of wool, the respondents began placing on their ladies' coats, made from the fabrics purchased from the Wyandotte Worsted Company, labels showing, in one instance, a content of 20% cashmere, 80% wool, and, in another instance, 30% cashmere and 70% wool.

6. A. The evidence presented in support of the complaint is in sharp contradiction to that presented by the respondents, and it is necessary, therefore, to evaluate the credibility of the witnesses, and to determine the relative probative strength of all the evidence.

B. The president of the Wyandotte Worsted Company, and the manager of that company's mill which manufactured the particular fabrics in question, both testified that the fabrics were made of a blend of sheep's-wool and mohair, and contained no cashmere. Neither of these executives represented themselves as experts in the analysis of wool and kindred fibers, and neither executive personally observed the actual blending of the fibers which comprised the finished product, later sold to respondents. The manager of the mill, however, exercised general supervision over the blending of fibers in the fabrics in question; and the reports which these executives re-

ceived, in the ordinary and usual course of business, from their subordinates in the textile mill, to the effect that the fabrics in question were made of sheep's-wool and mohair fleece and contained no cashmere, and upon which, in part, they based their testimony, appear to be reliable and trustworthy. In fact, there appears to be no motive why they should represent their product as less desirable on the market than they stated it would have been, if represented as part cashmere.

C. Two samples of fabrics cut from two of respondents' coats, labeled, respectively, "20% Cashmere, 80% Wool" and "30% Cashmere, 70% Wool," were submitted to Dr. John R. Hardy, of the Nittany Laboratory, State College, Pennsylvania, for a determination of the fiber content thereof. Dr. Hardy reported in his testimony that, according to his analysis, neither coat contained cashmere. but that they consisted rather of lamb's-wool and mohair. It was uncontradicted that Dr. Hardy was a scientist of specialized education and experience. He had received the degrees of Bachelor of Science, Master of Science, and Doctor of Philosophy; had been employed for many years, until his recent retirement, by the United States Department of Agriculture, where he was placed in charge of animal fiber research work. In 1948 he had received a distinguished award from the Department of Agriculture for the invention of a device for making cross-sections of all kinds of fibers. His testimony as to the exact procedure followed by him in the analysis of the samples of fabric submitted to him, which had been removed from two of respondents' coats, was clear, objective, impartial and convincing, creating the strong impression that he was an authority on the subject of animal fibers, and had performed a careful and minutely detailed analysis of the fabrics in question. His testimony was, in every respect, worthy of belief.

D. Respondents sought, by means of the testimony of the president of Hatch Textile Research, Inc., to place in evidence a report of a fiber analysis made by a technician of that laboratory. The president's testimony revealed, however, that he was not himself a technician, and that he had not personally supervised the analysis in question. In fact, the analysis was shown to have been performed by the technician in his own home, and such technician did not appear as a witness herein. In view of this evidence, and since the record shows that the analysis in question required the exercise of special technique and judgment, the report, which was clearly heresay in character, was not admissible, as contended by respondents, under the theory of an

act performed in the ordinary and usual course of business. Accordingly, it was excluded from the record.

E. Respondents, in their letter transmitting samples of the fabrics in question to the United States Testing Company, Inc., asked for a report on the amount of cashmere and wool fiber contained therein. The two reports of these requested fiber analyses were received in evidence after the two technicians who had performed the tests reported therein had testified. The first of these technicians, Miss Muriel Albanesius, testified that she was a high-school graduate, with no college training and no experience in the analysis of fibers previous to that gained during the past six years, when she had been working for the United States Testing Company, Inc. Her knowledge of wool was very scanty; for example, she did not know the native habitat of the cashmere goat, nor did she know the characteristics of the growth of the hair or fur fiber on a cashmere goat. She had done no systematic reading on the subject of fiber in general. The second technician, Mr. Felix S. Eichelbaum, had received a Bachelor of Science degree in textile manufacturing, and had been employed for a year and a half by the United States Testing Company, Inc., as a technician. Although he recognized the report of the fabric analysis in question, showing that such sample contained 80% cashmere and 20% mohair, he stated that he had performed so many similar tests that he could not remember the details of this particular one. He testified, in effect, that he knew the report to be correct at the time it was made. Although his testimony was legally sufficient to warrant the reception into evidence of the report itself, his failure to remember the details of his analysis detracted from the probative strength of such report.

F. The president of the respondent corporation testified that it was at his direction that samples of the fabric purchased from the Wyandotte Worsted Company were sent to the United States Testing Company, Inc., for determination of the content of cashmere fiber therein. He gave no satisfactory answer to the question of why he had expected cashmere to be present in a fabric which he had purchased as 100% wool, when in fact cashmere, in most instances, sold for considerably more than ordinary wool. When asked why he sent samples of the fabrics purchased from the Wyandotte Worsted Company to a laboratory with a request that the content of cashmere therein be determined, thereby implying that the fabric did in fact contain cashmere, he was evasive, asserting that he did not write the letter and that the letter did not imply a content of cashmere in the samples submitted for testing. He admitted that he had, prior to

the hearing, described cashmere as a selling "gimmick," but when asked to define the word "gimmick," he was again evasive, and it was only after repeated questions that he could be induced to testify respecting the word "gimmick." He finally stated that "gimmick," in relationship to the word "cashmere," signifies, to the purchasing public, an "extra feature." When asked why he did not mark the coats made from the fabric purchased from Wyandotte Worsted Company as 100% wool "if they would sell just as well" as if marked part wool and part cashmere, he answered, "we were using, we were selling at the time 20% cashmere from other sources." Obviously his reply was not a satisfactory answer to the question. In view of such evasions, the probative value of his testimony was materially lessened.

7. On the basis of the entire record, and after a comparative evaluation of all the testimony and other evidence, it is concluded that the evidence adduced in support of the complaint is reliable, probative and substantial, and establishes that respondents' wool products, namely, ladies' coats, in truth and in fact, contained none of the hair of the cashmere goat, and that, consequently, respondents have misbranded such coats by tagging or labeling them "Imported Cashmere and All Wool, Exclusively Blended," "Exclusively Blended, Wool and Cashmere, 80% Wool, 20% Cashmere," and "Exclusively Blended, Wool and Cashmere, 70% Wool, 30% Cashmere," in violation of the Wool Products Labeling Act of 1939.

8. It is further concluded that the misbranding of wool products herein found constitutes unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act; and, consequently, that this proceeding is in the public interest. Accordingly,

It is ordered that respondent Woody Fashions, Inc., a corporation, and its officers, and respondents Harry D. Graff and Harry Zucker, individually, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of ladies' coats or other "wool products" as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool" or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise falsely identifying such products as to the character or amount of the constituent fibers contained therein;

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool product, of any non-fibrous loading, filling, or adulterating matter;

(c) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivering for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

3. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as containing the hair or fleece of the Cashmere goat when such is not the fact.

4. Stamping, tagging, labeling or otherwise identifying such products as containing the hair or fleece of the Cashmere goat without setting out in a clear and conspicuous manner on each such stamp, tag, label or other identification the percentage of such Cashmere therein;

Provided that the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939; and

Provided further that nothing contained in this order shall be construed as limiting any applicable provisions of said Act or the Rules and Regulations promulgated thereunder.