

Complaint

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IN THE MATTER OF
COUNTRY TWEEDS, INC., ET AL.

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

Docket 8085. Complaint Aug. 24, 1960—Decision, Nov. 29, 1962

Order requiring a New York City manufacturer of ladies' coats, to cease misrepresenting the quality of the cashmere fabric in many coats by such practices as distorting a testing company's test report on the comparative qualities of the "Best Quality Cashmere Produced to Date", which it had used until the time of a business quarrel with the manufacturer, and "Country Tweeds El Elegant" cashmere which it had used since that time; and to cease furnishing its dealers with means to misrepresent its coats by giving them the altered report.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Country Tweeds, Inc., a corporation, and Marcus Weisman, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Country Tweeds, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 250 West 39th Street in the city of New York, State of New York.

Respondent Marcus Weisman is an officer of the corporate respondent. He formulates, directs and controls the acts, practices and policies of the corporate respondent, including those hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution, among other things, of ladies' cashmere coats to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of

the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents early in 1958 submitted to United States Testing Company, Inc., a private commercial laboratory, for analysis and report, two pieces of cashmere fabric, one identified by respondents as "Best Quality Cashmere Produced to Date" and the other as "Country Tweeds El Elegant Cashmere." The testing company subjected both pieces to an abrasion test to ascertain resistance to wear, a breaking load test to determine the strength of the warp and filling yarns, and a dry cleaning test to show its effect on the appearance of the fabric. In its report to respondents on each of the aforesaid tests, which consisted of several pages, the testing company used the same descriptions to identify the fabric samples as the respondents had used when submitting the materials, thus the report showed the test results of respondents' cashmere compared to test results of the alleged "Best Quality Cashmere Produced to Date".

PAR. 5. Respondents thereafter altered the report of the testing company by deleting certain portions and by adding new statements. Parts of the testing company's report consisting of its letterhead, client designation, subject, number, and date, and the signatures of the two officers of the testing company who had signed the report, were reproduced on respondent's version of the testing company's report thus giving it the appearance of an authentic report. The body of the report was changed. The testing company's report of the abrasion test, besides other information, contained the following statement:

We list below the number of cycles necessary to produce the above mentioned degree of wear.

<i>Best Quality Cashmere Produced to Date</i>	<i>Country Tweeds El Elegant</i>
<u>673</u>	<u>715</u>

Comment: Test results indicate no significant difference in abrasive resistance between the two submitted samples. It is noted that there is no significant difference in "roughing up" in the intermediate stages of wear.

In the altered report produced by respondents the foregoing quoted statement was excised and the following paragraph was substituted:

Abrasion Test: COUNTRY TWEEDS El Elegant 100% Cashmere lasts 6.3% longer than Best Quality Cashmere produced to date.

The testing company's report of the breaking load test was as follows:

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Average Breaking Load (Pounds)

<i>Best Quality Cashmere Produced to Date</i>		<i>Country Tweeds El Elegant</i>	
Warp	Filling	Warp	Filling
29.6	14.5	28.5	22.7

This portion of the testing company's report was deleted and respondents' version was substituted which was as follows:

Breaking Load Test: Country Tweeds El Elegant 100% Cashmere proves 56.5% stronger than Best Quality Cashmere produced to date.

PAR. 6. Respondents furnished copies of the said altered report to the dealers of its products throughout the United States, and it was used by some of said dealers in advertising respondents' products purchased by them.

Through the use of said altered report respondents represented, and furnished its dealers the means and instrumentality by and through which they were enabled to and did represent:

(1) That the cashmere fabric involved in the test with respondents' El Elegant fabric was the best quality cashmere fabric produced up to the date of the test and that United States Testing Company, Inc., had so found prior to the test.

(2) That respondents' cashmere fabric was the best quality on the market at the time of the test.

(3) That respondents' altered version of the testing company's report was authentic and represented a true and complete reproduction of the results of said test.

PAR. 7. Said statements and representations were false, misleading and deceptive. In truth and in fact:

(1) The cashmere fabric involved in the test with respondents' El Elegant fabric was not the best quality cashmere fabric produced up to the date of the test, and the United States Testing Company, Inc., had not so found prior to the test.

(2) Respondents' cashmere fabric was not the best quality cashmere on the market at the time of the test.

(3) Respondents' altered report was not authentic and did not represent a true or complete reproduction of the results of said test. Among other things, it omitted the numerical test results of the abrasion and breaking load test; the method of tests; and the testing company's comments regarding the abrasion test, all of which were necessary to correctly interpret the test results. In addition, instead of the numerical results of the abrasion and breaking load tests shown in the original report, respondents expressed the comparative results in terms of percentages which, coupled with the fact that certain

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information was omitted, distorted the actual results in favor of respondents' fabric.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of cashmere coats of the same general kind and nature as those sold by respondents.

PAR. 9. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and have caused consumers to purchase substantial quantities of respondents' garments because of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute, unfair and deceptive acts and practices, and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Charles W. O'Connell supporting the complaint.

Barshay & Frankel, by *Mr. Nathan Frankel* of New York, N.Y., for respondents.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

The complaint in this matter issued on August 24, 1960, charges the above-named respondents, manufacturers of cashmere ladies' coats, with altering a test report received from an independent fabric testing company and using the test report as altered to make certain false, misleading, and deceptive representations in violation of the Federal Trade Commission Act.¹ The complaint further charges that the respondents furnished copies of altered report to its dealers by means of which the dealers were enabled and did make the same false, misleading and deceptive representation in violation of the Act. Both the original test report and the altered test report deal with two pieces of cashmere fabric identified as "Best Quality Cashmere Produced To

¹ Section 5 (a) (1), here pertinent, reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

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Date" and "Country Tweeds El Elegant Cashmere", respectively. These terms were supplied to the testing company by respondents. The piece identified as "Country Tweeds El Elegant Cashmere" was a sample of the fabric used by respondents in the manufacture of coats from the year 1958 to the present time. The piece identified as "Best Quality Cashmere To Date" was a sample of a fabric formerly used by respondents in the manufacture of ladies' cashmere coats. (Although the complaint does not expressly allege that the last mentioned fabric was not used by respondents in the manufacture of ladies' cashmere coats at the times herein material, such an allegation clearly appears by implication from the complaint and the record as established at the hearing herein bears out this implied allegation as an admitted fact.)

The complaint charges that the aforementioned false, misleading and deceptive representations were as follows: (1) That the cashmere identified by respondents as the "Best Quality Cashmere Produced To Date" was the best quality cashmere fabric produced up to the date of the test and that the testing company had so found prior to the test; (2) That respondents' "Country Tweeds El Elegant Cashmere" was the best quality on the market at the time of the test; and (3) That respondents' altered version of the testing company's report was authentic and represented a true and complete reproduction of the results of said test.

Respondents in their answer admit² that they made the three representations set forth above but take issue with counsel supporting the complaint that the said representations were false, misleading and deceptive and in violation of the provisions of the Act. The central issues in this proceeding are thus these: (1) Are the said representations false, misleading and deceptive? (2) If so, do these

² "PARAGRAPH FOURTH" of the answer reads in part: "they [respondents] admit that copies of said altered report were sent to dealers of the corporate respondent's products; they admit that through the use of the altered and paraphrased report, a representation was made that the altered version of the testing company's report was authentically verbatim and that the quality of the corporate respondent's cashmere fabric was superior to any other cashmere fabric previously produced, and that the testing company has so found." These statements of admissions are deemed admissions that respondents made the representations shown above as (2) and (3). The failure of the answer to specifically answer the allegation of the complaint ("PARAGRAPH SIX (1)") that respondents also made the representation shown as (1) above is deemed an admission that such representation was made. In this connection other allegations in respondents' answer (see "PARAGRAPH FIVE") are pertinent which read as follows: "They [respondents] * * * allege that the corporate respondent's cashmere fabric was the best quality cashmere fabric produced up to the date of the test; that the United States Testing Company, Inc. had in effect found; [sic—it is obvious that the foregoing semi-colon was an unintentional punctuation at the point where it appears as it breaks a thought or sentence into two.] that the corporate respondent's cashmere fabric was the best quality cashmere on the market at the time of the test * * *".

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representations 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?

Except for the affirmative defense hereinafter noted, all other issues raised by the pleadings are minor in nature and have been resolved by the evidence in the record.

The answer also raises an affirmative issue of jurisdiction in that it alleges that the Federal Trade Commission lacks jurisdiction to entertain the instant proceeding on the grounds that the practices described in the complaint were discontinued prior to the issuance of the complaint; that others have committed the same practices, that respondents' participation in the said practices was inadvertent and not the result of design, and that "no reasonable basis exists for any conclusion that respondents, or either of them, might in the future renew practices set forth in the complaint".

Hearing was held at New York, New York on various dates over a period of ten days between August 16 and November 9, 1961. Thereafter proposed findings of fact, conclusions of law, original and reply briefs were filed by the parties. These have been carefully reviewed and considered and such proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance are rejected as not supported by the record or as involving immaterial matters. The facts hereinafter set forth are based on the entire record.

FINDINGS OF FACT

Respondent, Country Tweeds, Inc., hereinafter called Country Tweeds, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 250 West 39th Street, New York, New York. The other respondent, Marcus Weisman, of the same address, is an officer of the corporate respondent which he founded some twenty years ago. He formulates, directs and controls the acts, practices and policies of the corporate respondent, including those hereinafter set forth.

Country Tweeds is a manufacturer of ladies' outerwear coats, with sales in recent years in excess of \$5,000,000. It manufactures ladies' coats made of cashmere or a combination of wool and other materials. In 1958 about 50 percent of its production was of ladies' coats made of cashmere. In 1957 and 1958, it manufactured and sold between 35,000 and 40,000 ladies' coats made exclusively of cashmere and lesser quantities in 1959 and 1960. Country Tweed cashmere coats are made

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to retail between \$135 and \$155. In the course and conduct of their business, respondents for many years have shipped or caused to be shipped the coats they manufacture from their plant in the State of New York to purchasers located in various other States. At all time herein material, respondents have maintained a substantial course of trade in ladies' coats in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In the year 1957 and in the years prior thereto, Country Tweeds manufactured its ladies' cashmere coats out of a cashmere fabric made by Einiger Mills, Inc., hereinafter called Einiger, the largest and best known manufacturer of cashmere fabrics. As a result of a business quarrel, Country Tweeds terminated its cashmere fabric purchases from Einiger some time in 1957. Commencing in 1958 and in all subsequent years, Country Tweeds made its cashmere coats out of cashmere fabric supplied to it by Cashmere Fabrics, Ltd., hereinafter called Cashmere Fabrics. The latter does not own or operate any manufacturing plants but purchases the raw cashmere fiber and sub-contracts for its spinning, dyeing, and weaving with other firms engaged in such manufacturing activities. In 1958 and 1959, the coats manufactured by Country Tweeds out of cashmere fabrics supplied to it by Cashmere Fabrics were sold under the brand name of "Country Tweeds El Elegant". In 1958, Cashmere Fabrics derived 80 percent of its sales from Country Tweeds and in 1960 this volume had increased to 90 percent.

On or about February 4, 1958, respondents submitted to the United States Testing Company, Inc., a private commercial laboratory, for analysis and report, two pieces of cashmere fabric. One of these pieces was manufactured by Einiger but the manufacturer was not disclosed to the testing company. As heretofore noted, Country Tweeds in 1958 was no longer using cashmere fabric manufactured by Einiger. Country Tweeds in submitting the Einiger piece to the testing company denominated and identified it as "The Best Quality Cashmere Produced to Date", but without the use of quotation marks as shown here. The other piece was manufactured under the auspices of Cashmere Fabrics but its manufacturer was similarly not disclosed to the testing company. As heretofore noted, Country Tweeds in 1958 and subsequent years was using cashmere fabrics received from Cashmere Fabrics. Country Tweeds in submitting the Cashmere Fabrics piece to the testing company denominated and identified it as "Country Tweeds El Elegant". The written memorandum or request submitting the two pieces for testing contains the following instruction: "For comparison test in non-technical terms." The memoran-

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dum requested that the two pieces be subjected (1) to an abrasion test to ascertain resistance to wear, (2) a breaking load test to determine the strength of the warp and filling yarns, and (3) a dry cleaning test to show its effect on the appearance of fabric.

Upon completion of the comparative tests, the testing company submitted a report thereon to Country Tweeds dated February 10, 1958, on its regular letterhead bearing the printed inscription "United States Testing Company, Inc., Hoboken, N.J.". The letterhead also had the following printed matter at the bottom thereof: "Our letters and reports are for the exclusive use of the client to whom they are addressed, and their communication to any others, or the use of the name of United States Testing Company, Inc., must receive our prior written approval. * * *"

The testing company's test report reads in pertinent part as follows:

Subject: Two samples of fabric sampled and identified by Client as below.
Order No. 4424 dated 2/4/58.

Abrasion Test

Abrasion tests were conducted using the United States Testing Co., Inc. Abrasion (Wear) Test Machine. Specimens clamped to a movable carriage were constantly in contact with a lever arm covered with 320 Aloxite cloth exerting a pressure of approximately 33 ounces.

The fabrics were abraded in the warp and filling directions until an examination of the tested specimens disclosed the nap or pile to be almost completely worn from the fabric face.

We list below the number of cycles necessary to produce the above mentioned degree of wear.

<i>Best Quality Cashmere</i> <i>Produced to Date</i>	<i>Country Tweeds</i> <i>El Elegant</i>
673	715

COMMENT: Test results indicate no significant difference in abrasive resistance between the two submitted samples. It is noted that there is no significant difference in "roughing up" in the intermediate stages of wear.

Tested specimens returned.

Average Breaking Load (Pounds)

<i>Best Quality Cashmere</i> <i>Produced to Date</i>		<i>Country Tweeds</i> <i>El Elegant</i>	
Warp	Filling	Warp	Filling
29.6	14.5	28.5	22.7

This test was conducted in accordance with Method 5100 of Federal Specification CCC-T-191b. (Standard Condition.)

Dry Cleaning Test

The samples were worked for 25 minutes in a laboratory dry cleaning apparatus containing 987 parts Perchloroethylene 5 parts dry cleaning soap, 4 parts tertiary butyl alcohol and 4 parts distilled water.

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They were given three, 5 minute rinses in plain Perchloroethylene, hydro-extracted and allowed to dry at prevailing atmospheric conditions on horizontal ventilated screens.

Comparisons of the dry cleaned samples with original material revealed the following:

"Country Tweeds, El Elegant" Cashmere

This sample exhibited no noticeable alteration in appearance after dry cleaning.

Best Quality Cashmere produced to date

This sample exhibited noticeable wrinkling and slight fiber disturbance after dry cleaning.

Shortly after receiving the test report, the respondents without the authority of the testing company made certain changes and alterations in the report. The changed or altered report, being on a reproduction of the testing company's letterhead and bearing reproductions of the signatures of the two officers who had signed the original report, had the appearance of being an exact copy or facsimile of the original report from the testing company. The altered report referred to the two pieces which the testing company had tested by the identifications given to them by respondents, as heretofore noted, to wit: "Best Quality Cashmere Produced To Date" and "Country Tweeds El Elegant". In this latter respect, the altered report was identical with the original report.

The complete text of the altered test report reads as follows:

Subject: Two samples of fabric sampled and identified by Client as below.
Order No. 4424 dated 2/4/58.

Abrasion Test: COUNTRY TWEEDS' El Elegant 100% Cashmere lasts 6.4% longer than Best Quality Cashmere produced to date.

Breaking Load Test: COUNTRY TWEEDS' El Elegant 100% Cashmere proves 54.5% stronger than Best Quality Cashmere produced to date.

Dry Cleaning Test:

"Country Tweeds' El Elegant Cashmere":

This sample exhibited no noticeable alteration in appearance after dry cleaning.

"Best Quality Cashmere Produced to date":

This sample exhibited noticeable wrinkling and slight fiber disturbance after dry cleaning.

The altered report does not contain the warning shown on the original test report to the effect that the report was for the exclusive use of the client to whom addressed and was not to be communicated to others without the prior written approval of the testing company.

Thereafter the respondents furnished copies of the altered report shown above to the dealers of its products throughout the country by means of a five-page booklet advertising the El Elegant coats in which the altered report was reproduced on one of the pages under the

heading "HERE IS PROOF OF THE QUALITY OF EL ELEGANT CASHMERE". The altered report was used by some of respondent's customers in reproductions or otherwise as more specifically shown below in advertising respondents' El Elegant cashmere coats.

In addition to the said five-page booklet, respondents also caused to be printed a three-page pamphlet containing further advertising material on its El Elegant cashmere coats. From all evidence of record, it is found that this pamphlet was likewise mailed to all of respondents' customers during respondents' selling season on such coats in 1958. The pamphlet on one of its pages sets forth a series of questions and answers. One of these asks and answers a question as follows: "Q. How do I know El Elegant Cashmere is my best buy? A. Recent test by U.S. Testing, the world's largest independent testing laboratory, proclaimed El Elegant cashmere the finest money can buy."

Country Tweeds in 1958 also advertised its El Elegant cashmere coats in *Vogue*, a nationally distributed women's magazine, but there is no indication or suggestion in the record that there was any reference in the *Vogue* advertisement to the aforementioned test made by the United States Testing Company, Inc.

Joske's of Texas, a customer-dealer of respondents, with retail store at San Antonio, Texas, ran a three-quarter page newspaper advertisement in the July 20, 1958, issue of the *San Antonio Express and News* featuring respondent's El Elegant cashmere coats with the opening words "THIS IS THE ONE! Exclusive El Elegant Cashmere by Country tweeds. (sic)," following which the advertisement carried a facsimile in box form of the altered test report. Although the letter-size altered report is reduced in the advertisement to a space two inches by three inches in size, it is plainly legible and the name of the United States Testing Company, Inc., in the caption of the facsimile, is especially conspicuous. Respondents paid one-half of the cost of the described newspaper advertisement but Joske thereafter refrained from again using the facsimile of the purported test report in advertisements because of the misgivings as to its authenticity.

On July 24, 1958, Streets, another customer-dealer of respondents engaged in the retail sale of ladies' wear, with store at Tulsa, Oklahoma, ran an advertisement in the *Tulsa Tribune* featuring Country Tweeds El Elegant cashmere coats in which the statement was made that the cashmere in the El Elegant coats was "proven the country's finest by the United States Testing Company". The

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testing company on August 8, 1958, notified Streets that "No correspondence or test reports were found in our files to confirm the claims made in your ad", requested the name and address of the coat manufacturer who supplied Streets with the alleged information, and asked for Street's "cooperation in the interest of sound advertising."

Streets under date of August 12, 1958, replied to the testing company as follows: " * * * Enclosed as enclosure³ number one is a copy of a letter from your company to Country Tweeds. This letter states that Country Tweeds Cashmere lasts 6.3% longer and is 56.5% stronger than best quality Cashmere produced to February 10, 1958."

Respondent distributed the altered test report to its dealers only in the year 1958 and has discontinued the practise of such distribution and use of the altered test report in all years subsequent to 1958.

The aforementioned United States Testing Company, Inc., employing more than 500 persons and the largest testing company of diversified products in the country, issues between 75,000 and 100,000 test reports a year of which 60 percent are on fabrics of many different kinds. It has never had occasion to conduct tests for the purpose of determining the best quality cashmere ever made up to February 10, 1958, the date of its test report herein for respondents, and is not aware of any studies which involved such research. In its aforementioned original test report to respondents, the testing company did not represent or make any statement to the effect that it had found through the process of testing that the cashmere fabric therein identified as "Best Quality Cashmere Produced To Date" was actually the best cashmere fabric previously produced. Similarly the testing company did not in its said original test report make any finding or statement to the effect that respondents' El Elegant cashmere fabric was the best quality cashmere fabric produced to the date of the test. The test it made for respondents as reflected in the original test report was in accordance with respondents' request for a limited test for which it made a charge of \$85. The testing company would have charged respondents \$500 for a full scale test on the two involved pieces of cashmere fabric made in accordance with recognized standards in the testing business, had it received such a request from respondents.

Lord & Taylor is a well known ladies' department store in New York, New York. At the times herein material, the store carried three price ranges of ladies' cashmere coats, each on a separate floor. In its "Budget Department", it handled a line of cashmere coats de-

³ The enclosure was a copy of the altered report.

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signed to sell at about \$120. In its most expensive coat department, it featured cashmere coats of very fine tailoring and with silk linings at prices around \$350, with prices even higher on cashmere coats trimmed with expensive furs. For its middle class line and its most popular seller, it handled cashmere coats selling between \$135 and \$155. As a result of unsatisfactory past experience with cashmere produced by heterogeneous mills, Lord & Taylor has in recent years favored manufacturers of ladies' cashmere coats which manufacture their coats out of cashmere fabrics produced by such well and favorably known mills as Forstman, Stroock, and Einiger. In its middle range price group, the store handled the cashmere coats manufactured by respondents and Merin Brothers, among others, but not all of these simultaneously in any one year. The store in the years 1957 through 1960 stocked respondents' cashmere coats which in the years 1958 and 1959 were sold under the manufacturer's label of "El Elegant". Its experience showed that the cashmere fabric used by respondents in their coats was "very inconsistent" in that the quality of the fabric in the coats not infrequently varied from shipment to shipment. This was particularly true of the cashmere fabric in respondents' El Elegant coats of which the supplier was the aforementioned Cashmere Fabrics but was also to a lesser degree true of coats manufactured by respondents in the years prior to 1958 out of cashmere fabrics produced by Einiger. The store nevertheless considered the El Elegant coat a "fine coat for the money" and enjoyed good sales thereon in the years 1958 and 1959. It found respondents greatly concerned with retaining the good will of the store as a customer and most cooperative in replacing any coats in which the fabric was not up to standard.

It has heretofore been noted that the complaint charges and the answer admits that the respondents by means of the altered test report represented to their dealers and enabled their dealers in turn by means of the same instrumentality to likewise represent in their advertisements that the cashmere fabric referred to in the altered report as the "Best Quality Cashmere Produced to Date" in accordance with the identification thereof supplied by respondents was the best quality cashmere produced up to the date of the test and that the United States Testing Company, Inc., had so found prior to the test. Wholly aside from the admission of such representation contained in respondents' answer, it is found from the evidentiary facts set forth above that the said representation was made by respondents and some of their dealers as a representation of fact by means of the altered report. It is further found from the same evidence that this representation is false, misleading and deceptive.

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As noted, the complaint also charges and the answer admits that the respondents by means of the altered test report represented to their dealers and enabled their dealers in turn by means of the same instrumentality to likewise represent in their advertisement (a) that the respondents' "Country Tweeds El Elegant Cashmere" was the best quality on the market at the time of the test and (b) that respondents' altered version of the testing company's report was authentic and represented a true and complete reproduction of the results of said test. Wholly aside from the admissions of said representations contained in respondents' answer, it is found from the evidentiary facts set forth above that the said representations were made by respondents and some of their dealers as representations of fact by means of the altered report. It is further found on the same evidence that these representations are false, misleading and deceptive.

In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of cashmere coats of the same general kind and nature as those sold by respondents.

The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and have caused consumers to purchase substantial quantities of respondents' garments because of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being done to competition in commerce.

In summary, it is found that all material allegations of the complaint have been sustained by evidence of record in the proceeding.

DISCUSSION AND CONCLUSIONS

Respondents' charge of lack of jurisdiction on the part of the Federal Trade Commission to entertain the present proceeding, as in the case of all jurisdictional challenges, must necessarily be given first consideration. In their joint answer, respondents assert that the Commission is "without jurisdiction" in this matter on the grounds that the challenged acts and practices commenced in 1958 have been discontinued in all subsequent years and that respondents have no intention of ever renewing such acts and practices.⁴

⁴ For the purpose of considering the jurisdictional question, it will be assumed *arguendo* that respondents have no intent to renew the questioned acts and practices although there does not appear to be any testimony in the record to this effect and no finding of fact has been made herein to that effect.

The charge of lack of jurisdiction is wholly without merit. It is significant that respondents in arguing the matter on brief have abandoned the phrase "without jurisdiction" in favor of the term "without authority". They cite as authority for their argument the case of *New Standard Publishing Co., Inc. v. Federal Trade Commission*, 194 F. 2d 181 [5 S. & D. 376] (4th Cir. 1952). That case involved such a peculiar and isolated set of facts that the action of the Court of Appeals therein can have no possible bearing on the instant matter.

The *New Standard Publishing Co.* [47 F.T.C. 1350] case involved a cease and desist order of the Commission entered more than 12 years after the commencement of the proceeding before the Commission, more than 6 years after the last evidence was taken, and 9 years after the involved petitioner had ceased handling a certain publication which was the basis of the deceptive and unfair trade practices charged therein. Under these circumstances, the Court of Appeals, on petitioner's motion, vacated the Commission's cease and desist order but it is obvious from even a cursory reading of the opinion in the case that the Court had great difficulty in finding a theory to support its order. It is suffice to state here that the Court's order vacating the Commission's cease and desist order was not made on the ground that the Commission lacked jurisdiction to enter its order; in fact the Court does not even use the word "jurisdiction" in the opinion.

The Court does not likewise anywhere expressly state that the Commission was "without authority" to enter the cease and desist order involved in the case. On the contrary, it reserved to the Commission the right to take "additional evidence that its [the cease and desist order] entry and enforcement is appropriate under present circumstances." Accordingly, the court although it vacated the Commission's cease and desist order did so "without prejudice, however, to the entry of such order as may be appropriate under present circumstances, should the commission see fit to pursue the matter further."

The instant case does not in any way involve the excessive delay present in *New Standard Publishing Co.* case. Bearing in mind the time that must necessarily elapse between the commission of an illegal act and the time such acts come to the attention of the Commission, the time it takes to investigate a case, the time it takes for the Commission's legal staff to familiarize itself with investigational files and prepare a complaint, and the heavy backlog of cases the Commission has, the lapse of the two year period in the instant case between the

commission of the challenged acts and the issuance of the complaint appears reasonable.

Thus the *New Standard Publishing Co.* case does not support respondents' contention that a discontinuance of an illegal practice before the issuance of a complaint deprives the Commission of jurisdiction to enter a cease and desist order to prohibit the recurrence of the illegal practice.

On the contrary, the non-jurisdictional effect of a discontinuance is shown to be firmly established law in *Marlene's Inc. v. Federal Trade Commission*, 216 F. 2d 556 [5 S. & D. 694] (7th Cir. 1954), where the Court stated: "That discontinuance of an unlawful practice, of itself, does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument."

The above concludes our discussion of the jurisdictional issue raised by the answer. However, in the interest of staying with the subject of "discontinuance of an illegal practice" until the remaining aspects of the subject is terminated although the consideration thereof would normally belong to the end of the discussion of the challenged practices, we turn next to a discussion of the non-jurisdictional effects of such discontinuances on the type of order to be entered by the Commission. The rule in such situations is that "* * * the Commission has broad discretion to determine whether such an order [cease and desist] is needed to prevent resumption of the [unlawful] practice." *Deer v. Federal Trade Commission*, 152 F. 2d 65 [4 S. & D. 437] (2d Cir. 1945). (Material in brackets supplied.)

In the instant matter, it is concluded that the involved unlawful practices, although discontinued, are of such exacerbated character that the public should be given the maximum protection within the authority of the Commission to prevent their recurrence through the issuance of an appropriate cease and desist order.

The unlawful practices here involved are, as seen, three in number. The first of these to be discussed will be the charge of the complaint that respondents made through the use of the described altered test report, and by its means furnished its dealers with instrumentality to make, the false, misleading and deceptive representations "That respondents' altered version of the testing company's report was authentic and represented a true and complete reproduction of the results of said test." Respondents, although admitting that the representations were made, deny that they are false, misleading and deceptive on the ground that "* * * that the portions complained of were a true, authentic and fair summary of the original."

A comparison of the altered test report with the original test report

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shows certain deletions from the original report and substitutions therefor in the altered report.

The portion of the original test report under the heading "Abrasion Test" reads in full as follows:

Abrasion Test

Abrasion tests were conducted using the United States Testing Co., Inc. Abrasion (Wear) Test Machine. Specimens clamped to a movable carriage were constantly in contact with a lever arm covered with 320 Aloxite cloth exerting a pressure of approximately 33 ounces.

The fabrics were abraded in the warp and filling directions until an examination of the tested specimens disclosed the nap or pile to be almost completely worn from the fabric face.

We list below the number of cycles necessary to produce the above mentioned degree of wear.

Best Quality Cashmere
Produced to Date
673

Country Tweeds
El Elegant
715

COMMENT: Test results indicate no significant difference in abrasive resistance between the two submitted samples. It is noted that there is no significant difference in "roughing up" in the intermediate stages of wear.

Tested specimens returned.

All of the above was omitted from the altered test report and in its place the following was substituted:

Abrasion Test: COUNTRY TWEEDS' El Elegant 100% Cashmere lasts 6.3% longer than Best Quality Cashmere produced to date.

The portion of the original report under the heading "Average Breaking Load (Pounds)" reads in full as follows:

Average Breaking Load (Pounds)			
<i>Best Quality Cashmere</i> <u>Produced to Date</u>		<i>Country Tweeds</i> <u>El Elegant</u>	
Warp	Filling	Warp	Filling
29.6	14.5	28.5	22.7

This test was conducted in accordance with Method 5100 of Federal Specification CCC-T-191b.

All of the above was omitted from the altered test report and in its place the following was substituted:

Breaking Load Test: COUNTRY TWEEDS' El Elegant 100% Cashmere proves 56.5% stronger than Best Quality Cashmere produced to date.

It is our opinion that the above-mentioned omissions in the altered test report of statements found in the original test report and the substitution of other statements therefor in the altered report distort the original findings of the testing company so materially as to make it

appear, contrary to any fair reading of the original test report, that the testing company was recommending respondents' "El Elegant Cashmere" as against the cashmere identified as the "Best Quality Cashmere Produced to Date". It is accordingly our conclusion that such distortions by respondent in the altered test report of the original findings of the testing company constitute *per se*, without the aid of any extrinsic evidence, false, misleading and deceptive statements and misrepresentations as charged in the complaint. The unlawful practice here considered, standing alone, would be in itself sufficient justification for the order entered below.

The other two unlawful practices charged by the complaint are related and will be considered together. These are that the respondents and its dealers through the use of the altered report made the following statements and representations and that they are false, misleading and deceptive:

"(1) That the cashmere fabric involved in the test with respondents' El Elegant fabric was the best quality cashmere fabric produced up to the date of the test and that United States Testing Company, Inc., had so found prior to the test.

"(2) That respondents' cashmere fabric was the best quality on the market at the time of the test."

The fact that the above statements and misrepresentations were made is, as shown, admitted in respondents' joint answer but wholly aside from such admissions it has been found above that the evidence of record establishes that such statements and representations were made as statements and representations of fact. Respondents, however, deny that these statements and representations are false, misleading and deceptive on the ground that the said statements and representations were merely respondent's *bona fide* "representations of opinion" as against representations of fact.

More particularly respondents' contention, and the background facts required for understanding the contention, may be summarized as follows. It will be recalled that respondents in the years prior to 1958 had manufactured their cashmere coats out of cashmere fabric produced by Einiger and that in 1958 and subsequent years they manufactured their cashmere coats out of cashmere supplied by Cashmere Fabrics. In early 1958 respondents submitted to the testing company a piece of the Einiger cashmere fabric under the designation "Best Quality Cashmere To Date" and a piece of cashmere fabric produced by Cashmere Fabrics under the designation "El Elegant Country Tweeds", together with a memorandum requesting a comparative test of the two pieces. The testing company in its comparative test report

on the two pieces of fabric used the same designations in referring to them as the respondents had given to them. The same designations were carried over without change into the altered report which was distributed by respondents to all of its dealers throughout the United States and used by some of these dealers in their local advertisements of respondents' El Elegant cashmere coats.

It is respondents' basic argument that the designation "Best Quality Cashmere To Date" which they had given the Einiger piece in their request to the testing company for a comparative test thereon with the "El Elegant" piece was merely an expression of their own opinion of the Einiger cashmere fabric and that the use of such designation in both the original unaltered test report and in the altered test report was similarly merely an expression of respondents' opinion and not a representation of actual fact and that, therefore, the phrase "Best Quality Fabric To Date", being merely a representation of respondents' opinion, cannot be deemed a false, misleading and deceptive representation of fact as alleged in the complaint.

There are at least two difficulties with respondents' contention. In discussing the first of these, we will assume *arguendo* that respondents, in transmitting the Einiger piece to the testing company under the label of the "Best Quality Cashmere To Date" for a comparative test with the "El Elegant" piece, were merely expressing their private, personal opinion that the Einiger fabric was the best quality fabric produced to the date of the requested test. We see no harm with having the respondents label the Einiger piece with any designation they chose in transmitting it to the testing company, *provided*, however, that such designation, especially if it might be considered misleading to respondents' dealers and the general public, is confined to private communications between respondents and the testing company.

The vice arises when a label intended as an opinion as to quality but expressed as a flat statement of fact is released for publication. Under such circumstances, the label *per se* upon publication becomes misleading. Thus, no matter how innocently intended as a private opinion, the designation "Best Quality Cashmere To Date", upon release on the letterhead of the testing company (actually unauthorized) to respondents' dealers and the general public, assumed immediately the character of a false, misleading and deceptive representation. This tendency of the words "Best Quality Cashmere To Date" to mislead and deceive becomes especially pronounced when the testing company, as in the instant case has a name, United

States Testing Company, Inc., which in itself is suggestive of being an agency of the Federal government.

Under these circumstances, it is our conclusion not only that the dealers and general public would be misled and deceived by the altered test report in believing that the testing company had found the piece identified as the "Best Quality Cashmere Fabric To Date" as actually being the best cashmere fabric produced to date, but that the public by reason of the same deception, constituting a false premise, would also be misled and deceived into believing that the testing company had found the "El Elegant" cashmere fabric to be better than any other cashmere fabric on the market. The capacity of the altered test report with its described designations to mislead and deceive is especially evident from the fact that even some of respondents' dealers, who are far more expert on judging fabrics than the average consumer, were also misled into believing that the testing company had actually certified the "El Elegant" cashmere fabric as being the best on the market, notwithstanding the testing company's opening statement in the altered report which also appears in the original unaltered test report, to wit: "Subject: Two samples of fabric sampled and identified by Client as below."

The above concludes our discussion of one of the difficulties inherent in respondents' contention that the descriptive reference in the altered report to the "Best Quality Cashmere To Date" was merely a representation of respondents' private opinion. The other difficulty with the contention is that the record does not bear it out. The joint answer does not anywhere contain an allegation that the representations of fact charged in the complaint⁵ were merely representations of respondents' private opinions. On the contrary, our analysis of the joint answer discloses that respondents in their answer admitted that they made these representations of fact. Furthermore, a piece of advertisement which respondents sent out to their dealers during the selling season of 1958 is strong indication that respondents intended the representations here under consideration to be representations of fact rather than of opinion. The advertisement in question, it will be recalled, reads: "Q. How do I know El Elegant Cashmere is my best buy? A. Recent test by U.S. Testing, world's largest independent testing laboratory, proclaimed El Elegant Cashmere the finest money can buy."

⁵ For the convenience of the reader, these representations as charged in the complaint are repeated below: "(1) That the cashmere fabric involved in the test with respondents' El Elegant fabric was the best quality cashmere fabric produced up to the date of the test and that the United States Testing Company, Inc., has so found prior to the test. (2) That respondents' cashmere fabric was the best quality on the market at the time of the test."

The record contains a considerable amount of expert testimony on the relative merits of the Einiger cashmere fabric (i.e., identified in altered report as the "Best Quality Cashmere Produced To Date"), the El Elegant cashmere fabric and various other cashmere fabrics by other manufacturers. No cognizance has been taken of this expert testimony in the findings of fact herein as we are of the opinion that such testimony is not necessary or even relevant for the proper disposition of the issues in the case. One of the allegations in the complaint charges respondents with representing "(3) That respondents' altered version of the testing company's report was authentic and represented a true and complete reproduction of the results of said test." As heretofore shown, the answer admits this charge but takes issue with the further charge in the complaint that the representation is false, misleading and deceptive. Respondents sought to utilize some of the aforementioned expert testimony to show that the representation here under consideration was not misleading, false, and deceptive. Our prior analysis has shown that the altered report omitted certain statements found in the original test report and substituted other statements therefor in the altered report. In another portion of the answer the respondents admit "that through the use of the altered and paraphrased report, a representation was made * * * that the quality of corporate respondent's cashmere fabric was superior to any other cashmere fabric previously produced and that the testing company had so found." The original test report under the subject of "Abrasion Test" had this to say about the two pieces of cashmere fabric identified therein as "Best Quality Cashmere Produced To Date" and "Country Tweeds El Elegant", respectively, to wit: "*COMMENT: Test results indicate no significant difference in abrasive resistance between the two submitted samples. * * **"

This comment, among others, was omitted from the altered report. It is thus self-demonstrative that no expert testimony on the relative merits of various cashmere fabrics is required to show that the aforementioned admitted representation was false, misleading and deceptive. As heretofore indicated, it is our opinion that this false, misleading and deceptive representation is sufficient in itself to justify the order entered below.

The other allegations of the complaint on which expert testimony was received are the related charges that respondents "*through the use of said altered report*" made still other additional representations heretofore set forth but here repeated for the convenience of the reader, to wit: "(1) That the cashmere fabric [i.e., the Einiger fabric

identified by respondents under the designation "Best Quality Cashmere To Date"] involved in the test with respondents' El Elegant fabric was the best quality cashmere fabric produced to the date of the test and that the United States Testing Company, Inc., had so found prior to the test. (2) That respondents' cashmere fabric was the best quality on the market at the time of the test." (Italics supplied.)

As heretofore shown, respondents' by their failure in their answer to deny the representation shown as (1) above are deemed to have admitted that such representation was made through the use of the altered report. Our findings of fact herein show that the testing company had never engaged in any studies for the purpose of determining what cashmere fabric was the best cashmere fabric produced "to date", that it had not made any findings in its original test report that the fabric identified therein as the "Best Quality Cashmere Fabric Produced To Date" was actually such, and that it had not made any finding in its original test report that the El Elegant fabric was the best quality cashmere fabric on the market at the time of the test. From this it necessarily follows that the representations shown in (1) above are false, misleading and deceptive. It is thus self-evident that expert testimony on the relative merit of various cashmere fabrics also would add nothing to the inquiry here discussed.

Even if we choose to ignore the admission in the answer of the representations shown in (1) above and accept *arguendo* the contention in respondents' brief that its said representation was merely an expression of respondents' private opinion on the Einiger fabric (i.e., "Best Quality Fabric Produced To Date"), it is evident that the testimony of expert witnesses on the relative merit of various cashmere fabrics herein would be irrelevant because as respondents state in their brief (page 24) their said opinion was based, not on the opinions of others, but on respondent Weisman's "experience and prior purchase of millions of dollars of Einiger's fabric".

Similarly, the expert testimony in the record is not needed with respect to respondents' representation shown in (2) above. As heretofore noted, this representation is conceded by respondents since they admit in their answer "that through the use of the altered and paraphrased report, a representation was made * * * that the quality of corporate respondent's cashmere fabric was superior to any other cashmere fabric previously produced and that the testing company had so found." The original unaltered report shows that the testing company had not made therein any test findings which would in any way support or justify respondents' representation through the use

of the altered report "that the quality of corporate respondent's cashmere fabric was superior to any other cashmere fabric previously produced." The answer not only admits that respondent had made this representation through the use of the altered report but also alleges as noted above that representation had been made "that the testing company had so found". Our findings of fact herein show that the original unaltered report is devoid of any such finding by the testing company. Thus the original unaltered report conclusively establishes that the representations shown in (2) above are false, misleading and deceptive. It is thus again self-demonstrative that the expert testimony herein on the relative merits of various cashmere fabrics could not have any possible bearing on the issue discussed in this paragraph.

It may be stated in summary that no findings of fact have been made on the expert testimony in the record on the relative merits of various cashmere fabrics produced in the years prior to 1959 because, as shown in our analysis, such testimony is irrelevant and immaterial to the issues in the proceeding. In *Zenith Radio Corp. v. Federal Trade Commission*, 143 F. (2d) 29 (7th Cir. 1944), it was held: "The Commission had a right to look at the advertisements in question, consider the relevant evidence in the record that would aid it in interpreting the advertisements, and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive, as charged in the complaint." See also *Charles of The Ritz Dist. Corp. v. Federal Trade Commission*, 143 F. (2d) 676 (2d Cir. 1944); *Exposition Press, Inc., et al. v. Federal Trade Commission*, 295 F. (2d) 869, (2d Cir. 1961).

The final matter for consideration is the scope of the order to be entered in this matter. Counsel supporting the complaint requests an order covering not only the types of unlawful practices here involved but one also prohibiting respondents from "representing in any manner the quality of their [respondents'] cashmere fabrics or any other fabric." Respondents, on the other hand, in the event of an adverse decision, request a cease and desist order limited to the types of violation involved in the proceeding.

The portion of the proposed order of counsel supporting the complaint here being discussed prohibits, in pertinent part, respondents from representing, directly or by implication, the following:

[A] That a comparative test of the fabric in respondents' cashmere coats with another cashmere fabric, shows that respondents' fabric is the best quality cashmere fabric produced or on the market when the test does not so show; or [B] or misrepresenting in any manner the quality of their cashmere fabrics or any other fabric. (The bracketed capital letters are supplied.)

In our opinion the parts of the above proposed order marked [A] and [B], when each is considered separately under the views hereinafter expressed, are both too narrow and too broad. Part [A] is too narrow in that it is confined to prohibitions against the misuse of "comparative" tests of fabrics and does not prohibit the misuse of tests of every kind and description, including the non-comparative type of test, as required in the interest of giving the public the maximum protection possible against misrepresentation by distortions of a test. It is also too narrow because it is confined to cashmere coats whereas it should cover coats made out of any type of fabric and also because it is confined to coats whereas it should cover any merchandise offered for sale, sold, or distributed by respondents.

Part [B], on the other hand, is too broad in that it covers in sweeping general terms every possible type of misrepresentation and is thus wholly unrelated to the type of misrepresentations here involved through the use of a test. It is possible that in some cases the factual situation may make such a broad order desirable and necessary for the protection of the public in addition to the narrower specific order directed against a particular kind of unlawful practice but that does not appear to be the case here.

Respondents have been engaged in the manufacture of ladies' coats for many years. Their coats are nationally advertised in a fashionable women's magazine. They are handled by the better department stores and ladies' apparel specialty stores in the country. They are of good quality. One of the leading ladies' apparel department stores in New York City regarded respondents' El Elegant cashmere coats as "a fine coat for the money". Their retail price of \$135 is large enough to generally assure good quality fabric, good styling and good tailoring. With the presence of these factors, the probability of the more usual or typical kinds of misrepresentation appears remote.

The misrepresentations here involved were largely directed to respondents' dealers and seem to have been motivated by respondents' panicky fear of losing their customer-dealers because of the shift in the source of respondents' supply of cashmere fabric from the well known and respected mill of Einiger to an obscure broker (supplier since 1958 of the fabric identified as El Elegant), apparently in the interest of obtaining the fabric at less than standard mill prices. Hence the involved misrepresentations by distortion of a test made by a well known testing laboratory for the purpose of trying to prove that the new El Elegant cashmere fabric was better than the Einiger cashmere. These misrepresentations which appear to have backfired almost immediately were never resumed after the year of their launch-

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ing in 1958. The cease and desist order entered below will give further assurance that the reprehensible practice will never again be resumed.

But a broader order for the reasons indicated is not required herein in the interest of the public and would unnecessarily subject respondents to the possibility of heavy fines for inadvertent or unwitting violations of the Act. The provisions of the Federal Trade Commission Act were not intended to be retributive or punitive in nature. The Commission in a recent proceeding, involving as in the instant matter a violation of Section 5 of the Act, indicated a preference for "a more narrow and specific prohibition" to a "broad and indefinite command." *Colgate Palmolive Company*, No. 7736, FTC, Dec. 29, 1961. A similar preference is indicated here.

From the findings of the evidentiary facts as heretofore set forth, the examiner reaches the following ultimate findings of fact and law:

1. That the Federal Trade Commission has jurisdiction of the subject-matter of this proceeding and of the respondents hereinabove named.

2. That the complaint states a cause of action against said respondents under the Federal Trade Commission Act.

3. That this proceeding is in the interest of the public.

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

ORDER

It is ordered, That respondents Country Tweeds, Inc., a corporation, and its officers, and Marcus Weisman, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of ladies' cashmere coats, or any other merchandise, composed of fabrics of any kind, or products made therefrom, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

- (a) That a comparative test of the fabric in respondents' cashmere coats with another cashmere fabric, shows that respondents' fabric is the best quality cashmere fabric produced or on the market when the test does not so show.

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(b) That an altered report of a test, comparative or otherwise, is a true and complete copy or reproduction of the report of such test.

2. Misrepresenting in any manner by means of a test, comparative or otherwise, the quality of any merchandise offered for sale, sold, or distributed by respondents or the quality of the fabric in such merchandise.

3. Misrepresenting the results of a test, comparative or otherwise, by altering the report of the test.

4. Furnishing means and instrumentalities to others whereby they may mislead the public as to any of the matters and things set out above.

OPINION OF THE COMMISSION

By Anderson, *Commissioner*:

Respondents were charged with violation of Section 5 of the Federal Trade Commission Act by engaging in unfair and deceptive acts and practices in connection with the sale and distribution of their products. This matter is now before us on respondents' exceptions to the initial decision sustaining the allegations of the complaint as well as on the exceptions of counsel supporting the complaint to the breadth of the order entered below.

Respondent Country Tweeds, Inc., is a manufacturer of ladies' coats and this proceeding is concerned with representations made by respondents in connection with their distribution of garments made of cashmere fabric purchased by Country Tweeds from other concerns. In 1957, and preceding years, respondents purchased their cashmere fabric requirements from Einiger Mills, Inc., a textile manufacturer. Thereafter, at some time in 1957, Country Tweeds switched from Einiger and bought the cashmere fabrics it needed from Cashmere Fabrics, Ltd. The latter was not a manufacturer but subcontracted with various other firms for the processing required to turn the raw fiber into finished fabric. Respondents sold the coats made from cloth supplied by Cashmere Fabrics, Ltd., under the brand name "Country Tweeds El Elegant". The hearing examiner also found in this connection, and the finding is not disputed, that in 1958, 80% of Cashmere Fabric's total sales were to Country Tweeds and by 1960, the percentage had increased to 90%.

The complaint charges in substance that respondents placed the means of misrepresenting their products in the hands of their distributors by furnishing these dealers with a deceptively altered report of a test by the United States Testing Company, Inc. The record

shows that the test involved a comparison of two cashmere fabrics: the first produced by Einiger Mills, the other, El Elegant cashmere, purchased from Cashmere Fabrics, Ltd.

The complaint further alleges that respondents submitted to the United States Testing Company the two pieces of fabric respectively designated as "Best Quality Cashmere produced to date",¹ and as "Country Tweeds El Elegant Cashmere", and that the testing company subjected these materials to an abrasion, a breaking load and a dry cleaning test. The complaint notes the testing company in its report to respondents adhered to respondents' identification of the fabrics tested, namely, "Best Quality Cashmere produced to date" and "Country Tweeds El Elegant Cashmere".

The complaint charges that respondents altered the body of the testing company's report by deleting certain portions thereof and adding new statements, but that they nevertheless reproduced on the altered version the testing company's letterhead, client designation, subject, number, and date, as well as the signatures of the testing company's officials in order to give the altered version of the report the appearance of authenticity.

The complaint sets forth verbatim, as follows, the omissions, changes, and product designation in the altered report in connection with the abrasion and breaking load tests constituting the alleged misrepresentations:

. . . The body of the report was changed. The testing company's report of the abrasion test, besides other information, contained the following statement:

We list below the number of cycles necessary to produce the above mentioned degree of wear.

*Best Quality Cashmere
Produced to Date*

673

*Country Tweeds
El Elegant*

715

Comment: Test results indicate no significant difference in abrasive resistance between the two submitted samples. It is noted that there is no significant difference in "roughing up" in the intermediate stages of wear.

In the altered report produced by respondents the foregoing quoted statement was excised and the following paragraph was substituted:

Abrasion Test: Country Tweeds El Elegant 100% Cashmere last 6.3% longer than Best Quality Cashmere produced to date.

The testing company's report of the breaking load test was as follows:

Average Breaking Load (Pounds)

<i>Best Quality Cashmere Produced to Date</i>		<i>Country Tweeds El Elegant</i>	
Warp	Filling	Warp	Filling
29.6	14.5	28.5	22.7

¹ The Einiger fabric.

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This portion of the testing company's report was deleted and respondents' version was substituted which was as follows:

Breaking Load Test: Country Tweeds El Elegant 100% Cashmere proves 56.5% stronger than Best Quality Cashmere produced to date.

The complaint alleges that through the use of the altered report respondents falsely represented and enabled their dealers to represent that:

1. The cashmere fabric involved in the test with respondents' El Elegant cashmere was the best quality cashmere fabric produced up to the date of the test and that United States Testing Company, Inc., had so found prior to the test.
2. That respondents' cashmere fabric was the best quality on the market at the time of the test.
3. That respondents' altered version of the testing company's report was authentic and represented a true and complete reproduction of the results of said test.

Respondents do not dispute that they altered the United States Testing Company's report in the manner set forth in the complaint. They do, however, contend that the complaint wrongly alleges, and that the hearing examiner erroneously found, that respondents, by circulating the altered report, made the misrepresentations charged. In fact, among the multiple exceptions taken to the initial decision, respondents strenuously urge that the altered version of the report is a truthful summary of the original.²

We find it difficult to credit that respondents, in all seriousness, assert that the altered version was a truthful summary of the testing company's original report. Nowhere on respondent's version is there any indication that it is a condensation of another document. A simple comparison of the statements of the United States Testing Company's report with those in respondents' hybrid document compels the finding that respondents' license in making the omissions and changes already noted in the case of the abrasion and breaking load tests so distorted the test results that for all practical purposes respondents' version inevitably had the tendency to create an impression as to the significance of the test results sharply at variance with the statements previously made by the testing company. Respondents' argument that the alterations in issue here consist merely of stating results in mathematically correct percentages rather than the number

² In view of respondents' stout assertion that the report as altered was a truthful representation of the original, we are constrained, at the risk of being facetious, to note the analogy of this situation in which we are faced with the phenomenon arising out of the amalgamation of the heading and conclusion of one document with a body not incorporated in the original, to the classroom incident, where a learned professor, confronted by several of his students with a bug incorporating the wings of one insect, the body of another and the head of a third, identified this marvel, in response to their question, as a "humbug".

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of cycles (abrasion test) or pounds (breaking load test) is wholly without merit. The percentages, although mathematically correct, by virtue of respondents' omissions, were placed in a wholly different context than the figures from which they were derived. Respondents' percentages were, therefore, necessarily misleading and inevitably distorted the test results in favor of the product then currently sold by Country Tweeds.

We find, therefore, that the complaint's allegation that respondents falsely represented their altered version as an authentic, true, and complete reproduction of the United States Testing Company's report is amply supported by the record.

As heretofore noted, the complaint also charges that respondents falsely represented that the fabric compared to Country Tweeds El Elegant cashmere was the best quality cashmere produced up to the date of the test and that the United States Testing Company had so found prior to the test, as well as that respondents misrepresented their product as the best quality cashmere on the market at the time of the test.

The hearing examiner held these allegations sustained by the record on the ground that the original report was devoid of any finding supporting these representations and for the additional reason that the testing company had never made any studies to determine what cashmere fabric was the best produced "to date". He refused to consider the expert testimony on the relative merits of various cashmere fabrics as irrelevant, concluding that these representations were necessarily false since the testing company's findings were unrelated to the question of which cashmere was the best quality prior to or at the time of the test.

Respondents contend in effect that there has been a failure of proof and that these allegations of the complaint have not been sustained since the hearing examiner failed to make a finding on the merits of the different cashmere fabrics. Because of the examiner's refusal to consider the expert testimony on this point and his resultant failure to make a finding thereon, we agree that he had no basis for making the ultimate finding that respondents' representations that the Eini-ger fabric was the best on the market up to the date of the test and that respondents' cashmere was the best quality on the market at the time of the test were false.

However, an examination of the two documents suffices for a determination of whether respondents represented that the testing company, prior to the test, had found that the fabric compared to El

Elegant cashmere was the best quality produced up to that time,³ and, if so, whether that representation was false.

Respondents claim that on its face the altered report did not create a representation that the testing company had found that the Einiger fabric was the best quality cashmere produced in the period preceding the test. They invite our attention to the heading in both the altered and original reports, stating that the two samples had been identified by the client,⁴ as well as to the fact that "Best Quality Cashmere" was capitalized in both versions. Respondents argue that consequently the only reasonable interpretation of the test reports they circulated is that they, as a client of the testing company, either arbitrarily or as a matter of honest opinion, designated one of the fabrics as "Best Quality Cashmere produced to date" and that under no conceivable construction could this language be interpreted as implying that the testing company itself had determined that the Einiger fabric was the best quality produced up to the time of the test.

It is conceivable that some individuals, upon prolonged and careful scrutiny of the reports' subject heading, spelling, etc., might conclude that the designation "Best Quality Cashmere produced to date" had originated with respondents rather than the testing company. We are persuaded, however, that the net impression created by the description in issue here in the context of the altered report as a whole is necessarily that it stemmed from a qualitative judgment by the testing company on the basis of an objective test of the fabric's properties.

It is, of course, immaterial that a phrase considered separately may technically be construed so as not to constitute a misrepresentation.⁵ In deciding whether an advertisement or other statement is deceptive, we must look to the over-all impression it is likely to make on the buying public,⁶ and in those instances where statements are susceptible of either a misleading or a truthful interpretation they must be construed against the person making them.⁷ In our interpretation of the representations here, we must, of course, be guided by the maxim that impressions are the primary target of the ad writer.⁸ The only

³ In making this determination, we do not find it necessary to rely on the admissions in the respondents' answer. We, therefore, need not consider the examiner's rulings and findings on such admissions or respondents' exceptions to the findings and evidentiary rulings thereon.

⁴ "Two samples of fabric sampled and identified by Client as below. Order No. 4424 dated 2/4/58."

⁵ *Kalwaity v. Federal Trade Commission*, 237 F. 2d 654 (7th Cir. 1956), cert. denied 352 U.S. 1025 [6 S. & D. 72] (1957).

⁶ *Murray Space Shoe Corporation, et al. v. Federal Trade Commission*, 304 F. 2d 270 [7 S. & D. 480] (2d Cir. 1962).

⁷ Id. See also *United States v. 95 Barrels of Vinegar*, 265 U.S. 438 (1924).

⁸ *Stanley Laboratories, Inc., et al. v. Federal Trade Commission*, 138 F. 2d 388, 392 [3 S. & D. 596] (9th Cir. 1943).

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motivation which may reasonably be ascribed to respondents' actions in circulating their version of the report is, of course, that they desired to attribute to the testing company a finding as to the quality of the Einiger fabric which the testing company had never made.

Respondents' own statement at the time they circulated their version of the test report indicates expressly that this is the impression they intended to create, for a brochure they furnished Country Tweeds' dealers makes the following statement in question and answer form:

Q. How do I know El Elegant cashmere is my best buy?

A. Recent tests by U.S. Testing, the world's largest independent testing laboratory, proclaimed El Elegant cashmere the finest money could buy.

This representation can only be interpreted as meaning that the United States Testing Company had found El Elegant the finest cashmere money could buy because the testing company found El Elegant superior to a cashmere fabric the testing concern had previously determined to be the best quality up to the date of the test. Any other construction of respondents' statements concerning the test results is inconceivable and obviously this was the interpretation of Country Tweeds' customer-dealer in Tulsa, Oklahoma, which advertised El Elegant cashmere coats as "proven the country's finest by the United States Testing Company".

Respondents' argument that there was no deception in the use of the altered report because the description "Best Quality Cashmere produced to date" appeared in the United States Testing Company's original report deserves only short shrift. As respondents state, the complaint does not allege that respondents have misrepresented their products through the medium of the original report. This allegation is not made for the simple reason that respondents did not make public the original report, and the deception, of course, could result only through the medium of the document actually circulated, viz., the altered report. Had respondents circulated the original report without change, they would thereby also have misrepresented the testing company's actual findings as to the quality of the Einiger fabric, because of their designation of the latter as "Best Quality Cashmere produced to date". By altering the test report and exaggerating the rather minor differences revealed by the original report as to the quality of the fabrics compared, respondents accentuated the misrepresentation they had previously carefully planted in the original report and thereby created a context in which the phrase "Best Quality Cashmere produced to date" had an even greater tendency to create a false

impression as to the testing company's actual findings than this description had in its original setting.

The argument is also made that this proceeding should be dismissed because it is not in the public interest for the Commission to concern itself with matters of opinion, harmless blurbs or representations only remotely referring to the quality of products. Respondents, however, have misrepresented and distorted the findings of a testing company; the description "Best Quality Cashmere" in that context does not imply that this was a mere representation of respondents' opinion but, rather, represents that this was a finding made on the basis of objective data by the testing company. Nor is this a private controversy between the testing company and respondents. The practice employed by respondents in misrepresenting and distorting test results to enhance the saleability of their products is an unfair trade practice which it is the duty of the Commission to prohibit.

The next question that presents itself is the adequacy of the order entered below to protect the public from further deception in connection with the distribution and sale of respondents' products. Counsel supporting the complaint has taken exception to the examiner's order as inadequate on the ground that it prohibits only the means of deception, namely, the use of distorted test reports but not the practice of misrepresentation. He advocates that the order be broadened by the addition of the following prohibition:

Misrepresenting in any manner the quality of their cashmere fabrics or any other fabric.

Respondents, in effect, counter with the argument that at best the violation of law found and charged is limited to the misquotation of a testimonial and that the prohibition proposed by counsel supporting the complaint goes beyond prohibiting similar or related practices and, in effect, would enjoin respondents from violating the law.

In determining the proper scope of the order, we, of course, must take into consideration the charges of the complaint and the violations of law proven; only in this manner can we fashion a proper remedy to prevent repetition of the unfair trade practices previously committed as well as the commission of unfair and deceptive acts related to the illegal acts substantiated by this record.

We agree that one of the central allegations of the complaint is the charge that respondents misrepresented the report of the United States Testing Company, an act which is, in a sense, analogous to the misquotation of a testimonial. The complaint,

however, is not limited to that charge alone, and the allegations make it clear that a misrepresentation as to the facts of the quality of respondents' cashmere is inherent in the distortion of the testing company's report. Respondents clearly went beyond the mere misquotation of the test results when they directly misrepresented the quality of their products with a statement that the El Elegant cashmere proved "56.5% stronger" than Best Quality Cashmere produced to date. In taking this figure out of context, they, in effect, attributed to their cashmere a strength which it did not possess. This percentage, derived from a figure relating to only one portion of the breaking load test, does not pertain to the over-all strength of one fabric as compared to another as respondents represented in this distortion; for all practical purposes, therefore, it has no basis in fact. The falsity of this statement as to the quality of the El Elegant cashmere is apparent on the face of the complaint and fully documented by the record.⁹

This direct misrepresentation as to the strength of respondents' cashmere fabric is obviously related to and interwoven with respondents' misrepresentation of the test results and, therefore, goes beyond the mere misquotation of a testimonial or endorsement. To protect the public from further deception we are, therefore, compelled to prohibit respondents from misrepresenting the quality of their fabric irrespective of whether such deceptive claims result from the misquotation of a test or other testimonial. In view of the flagrantly fraudulent nature of respondents' deception, we do not agree with the examiner that an order limited to representations arising in connection with their use of tests, comparative or otherwise, will adequately insure that respondents will refrain in the future from misrepresenting the quality of their fabrics.

In framing remedial measures to prevent the recurrence of unfair trade practices, we are not required to confine the order to a narrow prohibition of the illegal practices in the precise forms in which they have existed in the past¹⁰ as long as the remedy imposed is reasonably related to the unlawful practices found to exist.¹¹ The additional prohibition sought by counsel supporting the complaint meets this criterion and we will, therefore, amend the hearing examiner's order by requiring respondents to refrain from misrepresenting

⁹ In determining the proper remedy it is, therefore, not necessary to determine whether respondents' representation that their cashmere was the best on the market at the time of the test was, in fact, false.

¹⁰ *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 [5 S.&D. 388], (1952).

¹¹ *Federal Trade Commission v. National Lead Company, et al.*, 352 U.S. 419 [6 S.&D. 193] (1957).

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senting in any manner the cashmere or other fabrics in their merchandise.

The exceptions of counsel supporting the complaint to the initial decision are granted while those of respondents, except as heretofore noted, are denied. The initial decision as modified by our order will be adopted as the decision of the Commission.

ORDER MODIFYING INITIAL DECISION AND PROVIDING FOR THE FILING
OF OBJECTIONS TO PROPOSED FINAL ORDER AND REPLY*

This matter having been heard by the Commission upon the exceptions of respondents and counsel supporting the complaint to the initial decision and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having ruled on said exceptions and having determined that the findings and order to cease and desist in the initial decision should be supplemented to conform to the views expressed in the accompanying opinion:

It is ordered, That the findings in the initial decision be modified by striking therefrom that section beginning on page 1261 with the words "It has heretofore been noted" and ending on page 1262 with the words "these representations are false, misleading and deceptive" and substituting therefor the following findings of fact:

Respondents have falsely and deceptively represented that the United States Testing Company, Inc., found, prior to a comparative test of their El Elegant cashmere with another fabric (the Einiger cashmere), that the second fabric was the best quality cashmere produced up to the date of the test.

Respondents, in distorting the findings of the United States Testing Company, have directly and factually misrepresented the quality of their El Elegant cashmere by ascribing, without any qualification, to it a strength 56.5% greater than another fabric (the Einiger cashmere). El Elegant cashmere was not "56.5% stronger" than the other fabric, and the percentage cited by respondents has no basis in fact since it was derived from only a portion of the breaking load test and does not relate to the overall strength of one fabric compared to another, as respondents represented.

Respondents also falsely represented that their altered version of the testing company's report was authentic and represented a true and complete reproduction of the results of said test.

Through the altered report respondents furnished their dealers the means and instrumentality of misrepresenting Country

* Issued September 21, 1962.

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Tweeds' cashmere coats, and those dealers of respondents who utilized the altered report in their advertising necessarily misrepresented the quality of respondents' products.

It is further ordered, That the initial decision be modified by striking therefrom the fourth paragraph on page 1262 thereof, beginning with the words "In summary" and ending with the words "in the proceeding."

It is further ordered, That the "DISCUSSION AND CONCLUSIONS" of the initial decision be modified by striking therefrom that section beginning on page 1269 with the words "The record contains" and ending on page 1271 with the words "*Exposition Press, Inc., et al. v. Federal Trade Commission*, 295 F. (2d) 869 (2d Cir. 1961)" and that section beginning on page 1271 with the words "The portion of the proposed order" and ending on page 1273 with the words "A similar preference is indicated herein."

It is further ordered, That respondents may, within twenty (20) days after service upon them of this order, file with the Commission their objections to the changes in the order to cease and desist contained in the initial decision, as shown by the following proposed order of the Commission, together with a statement of the reasons in support of their objections and a proposed alternative form of order appropriate to the Commission's decision.*

It is further ordered, That counsel in support of the complaint may, within ten (10) days after service upon him of respondents' memorandum or brief, file a reply thereto.

FINAL ORDER

Respondents having filed under § 4.22(c) of the Commission's Rules of Practice exceptions to the proposed order, reasons in support thereof and a proposed alternative form of order, and counsel supporting the complaint having filed a reply in opposition thereto; and

The Commission having determined that respondents' exceptions to the proposed final order are without merit and that said order should be entered as the final order of the Commission:

It is ordered, That respondents' exceptions to the proposed final order be, and they hereby are, denied.

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondents, Country Tweeds, Inc., a corporation, and its officers, and Marcus Weisman, individually and as an

*Proposed order is omitted since it was later issued as the Final Order.

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officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of ladies' cashmere coats or any other merchandise, composed of fabrics of any kind, or products made therefrom, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication:
 - a. That a comparative test of a fabric in respondents' merchandise with another fabric shows that respondents' fabric is the best quality produced or on the market when the test does not so show.
 - b. That an altered report of a test, comparative or otherwise, is a true and complete copy or reproduction of the report of such test.
2. Misrepresenting in any manner, by means of a test, comparative or otherwise, the quality of any merchandise offered for sale, sold or distributed by respondents or the quality of the fabric in such merchandise.
3. Misrepresenting the results of a test, comparative or otherwise, involving fabrics in their merchandise by altering the report of the test.
4. Misrepresenting in any manner the quality of cashmere or other fabric in their merchandise.
5. Furnishing means and instrumentalities to others whereby they may mislead the public as to any of the matters and things set out above.

It is further ordered, That the initial decision as modified by the Commission's order issued September 21, 1962, and as modified herein, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents, Country Tweeds, Inc., and Marcus Weisman, 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 set forth herein.

By the Commission, Commissioner Higginbotham not participating.

Complaint

IN THE MATTER OF

BRUCE OF CALIFORNIA ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS*Docket C-270. Complaint, Nov. 29, 1962—Decision, Nov. 29, 1962*

Consent order requiring Oakland, Calif., furriers to cease violating the Fur Products Labeling Act by labeling as "natural," fur which was in fact artificially colored; failing, on labels and invoices, to show the true animal name of fur and the country of origin of imported furs and to disclose when fur products contained artificially colored fur; failing to identify the manufacturer, etc., on labels, and to describe as "natural" on invoices, fur products which were not artificially colored; invoicing fur products falsely with respect to the names of animals producing furs; advertising falsely by radio that all their furs were labeled to show the true name of the animal producing them and the correct country of origin of imports; failing to maintain adequate records as a basis for price and value claims; and failing in other respects to comply with requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Bruce of California, a corporation, and Bruce Evander, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bruce of California is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 521 Fourteenth Street, Oakland 12, Calif.

Respondent Bruce Evander is an officer of the said corporate respondent and controls, directs and formulates the acts, practices and policies of the said corporate respondent. His office and principal place of business is the same as that of the said corporate respondent.

The corporate respondent and the individual respondent manufacture, wholesale and retail fur products.