

Decision

IN THE MATTER OF

THE L. BUCHMAN CO., INCORPORATED, ET AL.

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

Docket 6133. Complaint, Oct. 28, 1953—Decision, June 30, 1955

Order requiring a manufacturer in Brooklyn, N. Y., to cease misrepresenting the feather and down content of its pillows on labels affixed thereto or otherwise.

Mr. Ames W. Williams for the Commission.

Davidson, Cohen & Zelkin, of New York City, for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that the respondents have violated the provisions of the Federal Trade Commission Act by misrepresenting the contents of feather pillows which they manufacture and distribute in commerce.

After the filing of an answer, hearings were held, in which testimony and other evidence was presented, duly recorded and filed in the office of the Commission. By stipulation all the evidence in the companion feather cases was made a part of the record in this case, except so far as such evidence relates exclusively to the identification, contents and analyses of the feather samples in each of those cases.¹ Proposed findings of fact, conclusions and order have been submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. Respondent, the L. Buchman Co., Incorporated, 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 100 Sutton Street, Brooklyn 22, New York.

Respondents Irving Buchman, Sylvan Buchman and Tillie Buchman are the officers of the corporate respondent. Irving Buchman and Sylvan Buchman, father and son, are active in the business and direct and control the policies and practices of the corporate respondent. Tillie Buchman is inactive in the business, and does not partici-

¹ The companion feather cases are: Docket 6132, National Feather & Down Company; Docket 6133, The L. Buchman Co., Inc., et al.; Docket 6134, Burton-Dixie Corp., et al.; Docket 6135, N. Sumergrade & Sons, et al.; Docket 6137, Northern Feather Works, Inc., et al.; Docket 6161, The Salisbury Co., et al.; Docket 6188, Globe Feather & Down Co., et al.; and Docket 6208, Sanitary Feather & Down Co., Inc., et al.

pate in the direction or control of said corporation. Respondent Murray Steinberg had severed his connection with the corporation and its business activities prior to the issuance of the complaint. During the proceeding a motion was made by counsel for respondents that the complaint be dismissed as to respondent Murray Steinberg, and counsel in support of the complaint stated that he did not object.

2. Respondent corporation and respondents Irving Buchman and Sylvan Buchman are now, and for more than one year last past have been, engaged in the manufacture and sale of pillows, and other products, designated as down and feather products, to dealers for resale to the public. Said respondents have caused and now cause said products, when sold, to be shipped from their place of business to purchasers thereof located in various other States of the United States.

Said respondents maintain, and at all times mentioned herein have maintained, a course of trade in said feather and down products, in commerce, among and between the various States of the United States.

3. In the course and conduct of their aforesaid business, said respondents are now, and have been, in substantial competition in commerce with other corporations, and with firms, partnerships, and individuals engaged in the sale and distribution of feather and down products, including pillows.

4. In the course and conduct of their aforesaid business, said respondents have caused labels to be affixed to certain of their pillows purporting to state and set out the kinds or types and proportions of filling materials contained therein, and have made representations with respect to respondents' pillows designated "Devon," as follows:

ALL NEW MATERIAL
consisting of
DOWN 10%
DUCK FEATHERS 90%

and with respect to one of respondents' pillows, designated "Mansfield,"

SECOND HAND MATERIAL
consisting of
WHITE GOOSE DOWN

5. Through the use of the aforesaid statements, said respondents have represented that the filling material in the pillows designated "Devon" is composed of 10% new down, and 90% new duck feathers; and that the filling material of the pillow designated "Mansfield" is composed entirely of second-hand white goose down.

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6. Two pillows designated "Devon," which were manufactured by respondents and filled from the same mixture of feather and down, were procured by a representative of the Commission from a retail dealer in Manchester, New Hampshire, and introduced in evidence. The contents of these pillows were analyzed by an expert for the Commission and by an expert for the respondents. The analyses made by the Commission's expert showed as follows:

	Pillow 1 (by weight)	Pillow 2 (by weight)	Computed average
	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Down.....	2.4	2.6	2.5
Duck feathers.....	91.5	87.4	89.45
Chicken feathers.....	2.5	6.9	4.7
Fibers.....	2.4	1.9	2.15
Pith and scale.....	1.2	1.2	1.2
	<i>Grams</i>	<i>Grams</i>	
Amount analyzed.....	5.073	4.1769	

Respondents' expert made but one analysis of the contents of the two pillows, which showed the following:

	<i>Percent by weight</i>
Feathers.....	97.0
Down.....	2.2
Waste.....	0.8

With respect to respondents' pillow designated "Mansfield," the analyses were as follows:

	<i>Percent by weight</i>
By the Commission's expert:	
Goose down (second-hand).....	80.3
Small downy goose feathers.....	14.9
Fibers.....	4.9
Pith and scale.....	0.8
By respondents' expert:	
Down and down fiber.....	97.6
Feathers.....	2.4

7. In determining whether or not the representations as to the pillow contents are false within the meaning of the Act, it is helpful to have an understanding of the manufacturing methods used in the feather industry.

(1) In general, three sources of feather supplies are or have been available.

(a) *The American Source*

First, there are the domestic feathers, which ordinarily are properly labeled, but are not available in sufficient quantities to meet the industry's requirements.

(b) *The European Source*

Second, there is the European source of supply from which feathers are procured, but from this source it is impossible to get unadulterated new stock, because of a common practice of mixing second-hand feathers with new. European feathers are purchased on the basis of samples, and each manufacturer must judge from these samples the quality and type of feathers available to him.

(c) *The Oriental Source*

The third source is the Orient, from which adequate supplies may be had; but in the Orient there is no careful sorting, and a bale of feathers purchased as goose feathers may contain substantial quantities of duck or chicken feathers. These feathers are usually purchased through importers and commission merchants who submit offers to manufacturers. A typical offer will show as available for purchase by respondents or other pillow manufacturers 100 bales of 200 pounds each at 90¢ per pound, the feathers being Formosan grey goose feathers, 90% clean, maximum 20% duck feathers, 5% chicken feathers, 3% quills, minimum 30% down. Oriental feathers are purchased on the basis of these representations, without sampling.

(2) After raw feathers are procured by the manufacturer they are thoroughly washed, dried and fluffed up. Then they are sorted by means of a machine which separates the various constituents of the feather bulk by a blowing or suction process. The feathers are put through the sorting machine in lots of fifty pounds. The down, being lighter, is more readily blown over the baffle in the sorting machine, and passes into its particular bin or container. Then follow the downy-type feathers, and the various other feathers, in appropriate classifications according to weight or specific gravity, each into a specially prepared container. By this process it is reasonably practical to segregate a high percentage of down, but in down, as in the other classifications, there are always some feathers which are inappropriate to the particular classification. In the downy-type feather receptacle will be some pure down and some heavier-type feathers. Similar discrepancies will occur in each of the other classifications. It is impossible to separate feathers according to type of fowl or to remove inferior or second-hand feathers. The only possible separations are those which can be obtained by the application of the principles of specific gravity. Feathers of the same degree of lightness will go over the baffle at the same time, irrespective of the kind of fowl from which they may have been plucked, or whether they are new or used.

(3) The down and feathers thus sorted and placed in separate containers have no uniformity or homogeneity; the heavier feathers will be at the bottom, the down at the top of each container. Although there be a vigorous agitation of the feathers and down in a storage bin, the resulting mixture will at no time be of uniform content throughout, and no mixture of feathers and down is or will remain uniform or constant throughout its bulk. When a pillow order is to be made up, the manufacturer puts into the filling bin the number of bags of each type of feather requisite to obtain the desired mixture. The filling bins usually are approximately 5 x 10 x 12 feet in size, and hold up to 350 or 400 pounds of feathers. Two or three hundred pairs of pillows may be filled out of one mixture, and it is not unusual for a manufacturer to fill from twelve to fourteen hundred pairs of pillows during a day.

(4) During the filling process, the feathers are agitated by means of wooden forks, and the pillows are filled by suction. The proportion of down and feathers that go into each pillow depends partly, of course, upon the filling-bin mixture, but also to a large extent upon what part of the bin the filling suction reaches. Even with the exercise of the greatest care, pillows filled from the same bin vary in content. Those being filled from the bottom of the bin will contain the heavier feathers, and the greater amounts of pith, scale, and other extraneous matter. The exact amount or proportion of down and feathers going into any particular pillow cannot be controlled by mechanical means. The expert whose testimony was presented in support of the complaint stated that the contents of pillows filled from the same bin will vary as much as 30%; that the same percentage will not be found in any two pillows; that the mixture in each pillow will vary from the mixture in the filling bin; that if any one pillow should contain exactly the same percentage of feathers and down as that originally placed in the filling bin, it would be pure accident; and that the closest practical indication of the contents of a pillow product of a manufacturer and the correctness of its labeling will result if several different pillows are sampled, preferably pillows obtained at different times and places.

(5) The same difficulties arise in analyzing the contents of a single pillow. Except by pure accident, no two samples will have the same content; so there is no sure or positive method of measuring the contents of feather pillows with scientific accuracy, other than by taking all of the content out of the pillow and separating it into its component elements, then weighing each element. Such a process is so completely impractical that, usually, a test is made by opening the pillow-ticking and taking samples from three different portions of the pillow. These

samples are thoroughly mixed and a smaller testing sample, of which the analysis is to be made, is taken from this mixture. The expert who testified in support of the complaint selected three samples from the opening by inserting his hand and reaching to different portions of the pillow. Samples selected by the respondents were obtained by taking a small quantity of feathers from each of three openings in each pillow. The hearing examiner was present when respondents' samples were taken. As each opening was made in the pillow ticking, some down escaped, and as each withdrawal was made, more down escaped before the sample could be enclosed in a container; while the feathers, being heavier and bulkier, were easier to retain. No sample can be exactly representative of the original content of the pillow, just as the content of no one pillow can be exactly representative of the original mixture in the filling bin. The average sample for analysis weighed approximately 3 grams, representing between $\frac{1}{4}$ and $\frac{1}{2}$ of 1% of the contents of a pillow, and the appearance of a single heavy feather in a sample of this size would make as much as 4% difference in the final result. This method is far from satisfactory, and the resulting percentages are not conclusive.

(6) The crushing or curling process is a manner of giving a twist or curl to landfowl feathers, such as chicken and turkey, to increase their resiliency and tend to prevent their matting, and thus improve their quality for use as pillow-filling material. The same process is applied to waterfowl quill feathers (that is, feathers from the wings and tails of ducks and geese), which otherwise would not be suitable for pillow-filling material. A considerable amount of fiber, pith and scale result from the crushing, and are carried over into the filling mixture. As to utility, crushed landfowl feathers are better than crushed waterfowl feathers, and crushed turkey feathers are better than crushed chicken feathers.

The mixture of crushed feathers is made by weighing out the proper proportions of the various kinds of crushed feathers that are to be mixed, and taking alternate handfuls of feathers from the separate containers and throwing these into the hopper of the curling or crushing machine. Because of the nature of these larger feathers, they frequently go through the hopper in lumps, so that it is impossible to get a mixture with any degree of homogeneity. Despite agitation in mixing, slugs of chicken or turkey feathers and slugs of quill feathers will get into the pillows without ever being separated or mixed. The label "Crushed Feathers," showing the types of feathers used, can indicate no more than that the mixture was made from the types or kinds of feathers stated on the label.

It is impossible to separate and analyze crushed feathers accurately. A pillow filled with crushed feathers is the cheapest product of the industry, and in the minds of the general public, there is very little distinction among the various kinds of crushed feathers, whether goose, duck, chicken or turkey. The expert who testified in support of the complaint indicated that pillows filled with crushed feathers are the least desirable of all pillows, and are the lowest class of pillows on the market. In his opinion, it is impractical to attempt to distinguish between the various types of crushed feathers in any batch of such pillows, and he suggested during the course of his tests for the Commission that no further pillows filled with crushed feathers be sent to him for analysis.

(7) On the basis of the foregoing, the conclusion is inescapable that as a practical matter, the contents of feather pillows cannot be accurately labeled. In fact, to require accurate labeling as to content, of a product such as feather pillows, which, by nature, vary constantly and at random in content, is to require an impossibility. No manufacturer of feather pillows could comply with such a requirement except by analyzing the filling of each pillow individually. Obviously that is an impossible task. Incidentally, it points up the dangers involved in attempting to reach a conclusion as to pillow content on the basis of testing two pillows out of a batch that may have included one hundred or two hundred pairs of pillows.

(8) Despite these facts, however, some 28 States have labeling requirements with which pillow manufacturers must comply; and the Federal Trade Commission, on April 26, 1951, promulgated Trade Practice Rules for the Feather and Down Products Industry, which undertake to interpret the Act and express the Commission's policy with respect to the practices complained of in this proceeding. Although these Rules are not binding upon the hearing examiner, they should be given careful consideration in applying the law to the facts of this proceeding. The pertinent parts of those Rules applicable thereto are as follows:

RULE 3—IDENTIFICATION AND DISCLOSURE OF KIND AND TYPE OF FILLING MATERIAL
IN INDUSTRY PRODUCTS

I. In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to misrepresent or deceptively conceal the identity of the kind or type of filling material contained in any of such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type. Such identification and disclosure shall be made by tag or label securely affixed to the outside covering of each product and in invoices and all advertising and trade promotional literature relating to the product; and when the filling material is a mixture of more than one

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kind or type, each kind and type shall either be listed in the order of its predominance by weight, or be listed with an accompanying disclosure of the fraction or percentage by weight of the entire mixture which it represents.

II. Identification of the kind and type of feather and down stock by use of any of the terms listed and defined below will be considered proper when in accord with the definition set forth for such term:

Definitions:

(a) *Down:* The undercoating of waterfowl, consisting of clusters of the light, fluffy filaments growing from one quill point but without any quill shaft.

(b) *Down fiber:* The barbs of down plumes separated from the quill points.

(c) *Waterfowl feathers:* Goose feathers, duck feathers, or any mixture of goose and duck feathers.

(d) *Feathers (or Natural Feathers):* Bird or fowl plumage having quill shafts and barbs and which has not been processed in any manner other than by washing, dusting, and sterilizing.

(e) *Quill feathers (or Quills):* Wing feathers or tail feathers or any mixture of wing and tail feathers.

(f) *Crushed feathers:* Feathers which have been processed by a crushing or curling machine which has changed the original form of the feathers without removing the quill.

* * * * *

(h) *Feather fiber:* The barbs of feathers which have been completely separated from the quill shaft and any aftershaft and which are in no wise joined or attached to each other.

* * * * *

(j) *Damaged feathers:* Feathers, other than crushed, chopped, or stripped, which are broken, damaged by insects, or otherwise materially injured.

III. *Tolerance:* (a) Subject to the restrictions and limitations hereinafter set forth, the filling material of an industry product may be represented as being of but one kind or type when 85% of the weight of all filling material contained in the product is of the represented kind or type; or may be represented as being of a mixture of two or more kinds or types with accompanying disclosure of a fraction or percentage of the weight of the entire mixture represented by each if the fraction or percentage shown is not at variance with the actual proportion of the weight of the entire mixture represented by each such kind or type by more than 15% of the stated fraction or percentage. (The tolerance provided for in this paragraph III is to be understood as being an allowance for error and as not embracing any intentional adulteration.)

Limitations and Restrictions

(b) When the filling material of an industry product is represented, directly or indirectly, as being wholly of down, any proportion within the tolerance percentage provided for in (a) above which is not down shall consist principally of down fiber and/or small, light, and fluffy waterfowl feathers, shall contain no quill feathers, crushed feathers, or chopped feathers, and shall not contain damaged feathers, quill pith, quill fragments, trash, or any matter foreign to feather and down stock in excess of 2% by weight of the filling material contained in the product, or which in the aggregate exceeds 5% of such weight.

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(e) When the filling material of an industry product is represented, directly or indirectly, as being wholly of a mixture of down and feathers, or of down and more than one kind or type of feathers, or of feathers of more than one kind or type, any proportion, or the aggregate of any proportions, of the filling material of the product at variance with the representation, but within the tolerance percentage provided for in (a) above, shall not contain quill pith, quill fragments, trash, or any matter foreign to feather and down stock, in excess of 2% by weight of the filling material in the product of which in the aggregate exceeds 5% of such weight; and, unless nondeceptively disclosed in the representation, not in excess of 5% by weight of the filling material of the product shall consist of crushed feathers, chopped feathers, quill feathers, or damaged feathers.

Note.—It is the consensus of the industry that determination as to whether any representation is violative of the provisions of this Rule should be based on an average of the results of tests of at least two products of the same type when same are readily available for testing.

The Rules further provide that samples of equal weight and size be drawn from at least three different locations in the product; that such samples be thoroughly mixed; and that a test be made of not less than 3 grams of the mixture. Application of the law and a reasonable interpretation of these Rules to the facts of this proceeding results in the following

Conclusions:

I. The test procedure adopted and followed by the experts who made the analyses of the pillow contents in this proceeding comply with the Trade Practice Rules.

II. Respondents' "Devon" pillows contain duck feathers substantially in the proportion indicated in the labels attached thereto. However, the down content is only 2.4%, as shown by the average of the three separate analyses. This is substantially below the down content of 10% as shown by the label, and not within the 15% tolerance.

The expert who testified in support of the complaint stated that he would concede that the mixture from which these pillows were filled contained 10% down and 90% duck feathers when the filling process was started. One of the respondents' witnesses stated that the original mixture contained approximately 12% down. It is interesting to note that the analysis made by the respondents' expert showed the lowest down content, and it may be significant that his samples were extracted from the pillows after the issuance of the complaint and long after the extraction of samples by the other expert. It is impossible to determine how much down escaped in the sampling and testing process, but certainly it was not enough to bring the down content within the allowable tolerance. Moreover, the labeling purports to disclose the contents of the pillow labeled, not the content of the mix-

ture from which it was filled. The labeling is therefore faulty and the representation false.

III. Only one of respondents' "Mansfield" pillows was submitted for testing. This does not conform to the requirement of the Rules, and the results of the analyses of the contents of this single pillow cannot be accepted as conclusive with respect to respondents' representations of the contents of their "Mansfield" pillows. No finding or conclusion is reached with respect to the truth or falsity of the labeling with respect thereto. The allegations of the complaint as they relate to respondents' "Mansfield" pillows have not been supported by reliable, probative and substantial evidence.

IV. The labeling and representations hereinabove found to be false (Conclusion II) constitute unfair trade practices, are to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce.

V. The use by respondents of the false and misleading statements on the labels affixed to their pillows has had and now has the tendency and capacity to mislead and deceive dealers and the purchasing public into the erroneous and mistaken belief that such statements are true, and to induce the purchase of substantial quantities of said pillows because of such mistaken and erroneous belief.

VI. Since respondent Murray Steinberg, as shown by the evidence, severed his connection with the corporate respondent prior to the issuance of the complaint herein, said complaint, insofar as it relates to him, should be dismissed.

VII. This proceeding is found to be in the public interest and the following order is issued:

It is ordered, That respondent The L. Buchman Co., Incorporated, a corporation, its officers, Irving Buchman, Sylvan Buchman and Tillie Buchman, and respondents Irving Buchman and Sylvan Buchman individually, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' feather and down products, do forthwith cease and desist from:

Misrepresenting in any manner, or by any means, directly or by implication, the identity of the kind or type of filling material contained in any such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type.

It is further ordered, That the complaint, insofar as it relates to respondent Murray Steinberg, be, and the same hereby is, dismissed.

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Final Order

ON APPEAL FROM INITIAL DECISION

By SECREST, Commissioner:

This is one of a group of ten cases, all tried and considered together, involving the use on labels of allegedly false and deceptive representations with respect to the filling material contained in feather and down pillows. The initial decision filed by the hearing examiner dismissed the complaint in its entirety as to one of the respondent individuals named in this proceeding and additionally held that certain of the charges of the complaint were sustained as to the remaining respondents and that other charges were not adequately supported by the record. No appeal was filed by counsel supporting the complaint but the respondents to whom the rulings of the initial decision were adverse have appealed and the case has been heard by the Commission upon briefs and oral arguments of counsel.

Except as to the results of the analyses of the different pillows used as exhibits, as to which the record in each of these cases is specific and definite, this case is not unlike that in the matter of Bernard H. Sumergrade, et al., Docket 6135, in which case the Commission has written an opinion setting forth in some detail its views on the various issues involved. In view of this similarity between the cases, the opinion in that case is equally applicable here and, for the reasons there stated, the Commission is of the view that the hearing examiner's findings and conclusions that the respondents, there designated, have misrepresented the contents of certain of their pillows in violation of the Federal Trade Commission Act, and the order to cease and desist contained in the initial decision are correct.

The appeal accordingly is denied and the initial decision is affirmed.

FINAL ORDER

Certain of the respondents having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having been heard on briefs and oral argument, and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It is ordered, That the respondents named in the order to cease and desist contained in the aforesaid initial decision shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

BURTON-DIXIE CORPORATION ET AL.

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

Docket 6134. Complaint, Oct. 28, 1953—Decision, June 30, 1955

Order requiring a manufacturer in Chicago, to cease misrepresenting the
feather and down content of its pillows on labels affixed thereto or otherwise.Mr. Ames W. Williams for the Commission,
Sidney, Austin, Burgess & Smith, of Chicago, Ill., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that the respondents have violated the provisions of the Federal Trade Commission Act by misrepresenting the contents of feather pillows which they manufacture and distribute in commerce. After the filing of an answer, hearings were held, in which testimony and other evidence was presented, duly recorded and filed in the office of the Commission. By stipulation all the evidence in the companion feather cases was made a part of the record of this case, except so far as such evidence relates exclusively to the identification, contents and analyses of the feather samples in each of those cases.¹ Proposed findings of fact, conclusions and order have been submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. Respondent, Burton-Dixie Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office located at 2024 South Racine Avenue, Chicago, Illinois.

Respondents John G. Sevick, A. T. Burton, George S. Knott, Oscar D. Wiley, George W. Gartz and Ira W. Spackey are the officers of said corporate respondent. These individuals direct and dominate the policies, acts, practices and business affairs of said corporate respondent, including the acts and practices hereinafter set out.

2. Respondents are now, and for more than one year last past have been, engaged in the manufacture and sale of pillows, and other prod-

¹The companion feather cases are: Docket 6132, National Feather & Down Company; Docket 6133, The L. Buchman Co., Inc., et al.; Docket 6134, Burton-Dixie Corp., et al.; Docket 6135, N. Sumergrade & Sons, et al.; Docket 6137, Northern Feather Works, Inc., et al.; Docket 6161, The Salisbury Co., et al.; Docket 6188, Globe Feather & Down Co., et al.; and Docket 6208, Sanitary Feather & Down Co., Inc., et al.

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ucts, designated as down and feather products, to dealers for resale to the general public. Respondents have caused and now cause their said products, when sold, to be transported from their place of business to purchasers thereof located in various other States of the United States.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said down and feather products, in commerce, among and between the various States of the United States.

3. In the course and conduct of their aforesaid business, respondents are now, and have been, in substantial competition in commerce with other corporations and with firms, individuals and partnerships engaged in the sale and distribution of feather and down products, including pillows.

4. In the course and conduct of their aforesaid business, respondents have caused labels to be affixed to certain of their pillows purporting to state and set out the kinds or types and proportions thereof of filling materials contained therein, and on said labels have made representations with respect to respondents' pillows designated "Countess," as follows:

- ALL NEW MATERIAL consisting of Down;
- with respect to respondents' pillows, designated "Chatham";
- ALL NEW MATERIAL consisting of 50% Crushed Chicken Feathers; 50% Crushed Duck Quill Feathers;
- and pillows designated "Spring" and "Keystone";
- ALL NEW MATERIAL consisting of 50% Crushed Goose Quill Feathers; 50% Crushed Turkey Feathers.

The same representations were made with respect to the pillows designated "Countess," "Chatham," and "Spring" in price lists supplied to dealers.

5. Through the use of the aforesaid statements, respondents have represented that the filling material in the pillows designated "Countess" is composed entirely of new down; that the filling material in the pillows designated "Chatham" is composed of 50% new crushed chicken feathers and 50% new crushed duck quill feathers; and that the filling material in the pillows designated "Spring" and "Keystone" is composed of 50% new crushed goose quill feathers and 50% new crushed turkey feathers.

6. Two pillows designated "Countess," which were manufactured by respondents and filled from the same mixture of feathers and down, were procured by a representative of the Commission at the same time from the same retail dealer, and were introduced in evidence. The

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contents of these pillows were analyzed by an expert for the Commission and by an expert for the respondents. The analyses made by the Commission's expert showed as follows:

	Pillow 1 (by weight)	Pillow 2 (by weight)	Computed average
	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Down.....	82.2	80.3	81.25
Feathers (small downy type).....	15.7	15.7	15.7
Fibers.....	1.3	2.5	1.9
Pith and scale.....	.8	1.5	1.15
	<i>Grams</i>	<i>Grams</i>	
Amount analyzed.....	3.329	3.7796	

Respondents' expert made analyses of the contents of the two "Countess" pillows, which showed the following:

	<i>Pillow 1</i> <i>Percent</i>	<i>Pillow 2</i> <i>Percent</i>
Down and down fiber.....	86.2	90.7
Waterfowl feathers (predominantly duck).....	13.8	9.3

With respect to respondents' pillows designated "Chatham," the analyses were as follows:

	<i>Pillow 1</i> <i>Percent</i>	<i>Pillow 2</i> <i>Percent</i>
By the Commission's expert:		
Chicken feathers and fibers.....	63.7	48.8
Duck feathers and fibers.....	20.1	38.7
Pith and scale.....	16.2	12.5
	<i>Grams</i>	<i>Grams</i>
Amount analyzed.....	3.1499	3.3164
By respondents' expert:	<i>Percent</i>	
Duck feathers and fibers.....	45.3	---
Chicken feathers and fibers.....	48.0	---
Pith and scale.....	6.7	---

With respect to respondents' pillows designated "Spring" and "Keystone," the analyses were as follows:

	<i>Pillow 1</i> <i>"Spring"</i> <i>Percent</i>	<i>Pillow 2</i> <i>"Keystone"</i> <i>Percent</i>
By the Commission's expert:		
Turkey feathers.....	40.4	46.3
Turkey fibers.....	53.3	22.4
Pith and scale.....	6.3	5.0
Goose feathers.....	None	15.8
Goose fibers.....	None	7.6
Quills.....	---	2.9
	<i>Grams</i>	
Amount analyzed.....	3.1722	---

Respondents' expert made no analysis of these last two pillows.

7. In determining whether or not the representations as to the pillow contents are false within the meaning of the Act, it is helpful to have

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an understanding of the manufacturing methods used in the feather industry.

(1) In general, three sources of feather supplies are or have been available:

(a) *The American Source*

First, there are the domestic feathers, which ordinarily are properly labeled, but are not available in sufficient quantities to meet the industry's requirements.

(b) *The European Source*

Second, there is the European source of supply from which feathers are procured, but from this source it is impossible to get unadulterated, new stock, because of a common practice of mixing second-hand feathers with new. European feathers are purchased on the basis of samples, and each manufacturer must judge from these samples the quality and type of feathers available to him.

(c) *The Oriental Source*

The third source is the Orient, from which adequate supplies may be had; but in the Orient there is no careful sorting, and a bale of feathers purchased as goose feathers may contain substantial quantities of duck or chicken feathers. These feathers are usually purchased through importers and commission merchants to submit offers to manufacturers. A typical offer will show as available for purchase by respondents or other pillow manufacturers 100 bales of 200 pounds each at 90¢ per pound, the feathers being Formosan grey goose feathers, 90% clean, maximum 20% duck feathers, 5% chicken feathers, 3% quills, minimum 30% down. Oriental feathers are purchased on the basis of these representations, without sampling.

(2) After raw feathers are procured by the manufacturer they are thoroughly washed, dried and fluffed up. Then they are sorted by means of a machine which separates the various constituents of the feather bulk by a blowing or suction process. The feathers are put through the sorting machine in lots of fifty pounds. The down, being lighter, is more readily blown over the baffle in the sorting machine, and passes into its particular bin or container. Then follow the downy-type feathers, and the various other feathers, in appropriate classifications according to weight or specific gravity, each into a specially prepared container. By this process it is reasonably practical to segregate a high percentage of down, but in down, as in the other classifications, there are always some feathers which are in-

appropriate to the particular classification. In the downy-type feather receptacle will be some pure down and some heavier-type feathers. Similar discrepancies will occur in each of the other classifications. It is impossible to separate feathers according to type of fowl or to remove inferior or second-hand feathers. The only possible separations are those which can be obtained by the application of the principles of specific gravity. Feathers of the same degree of lightness will go over the baffle at the same time, irrespective of the kind of fowl from which they may have been plucked, or whether they are new or used.

(3) The down and feathers thus sorted and placed in separate containers have no uniformity or homogeneity; the heavier feathers will be at the bottom, the down at the top of each container. Although there be a vigorous agitation of the feathers and down in a storage bin, the resulting mixture will at no time be of uniform content throughout, and no mixture of feathers and down is or will remain uniform or constant throughout its bulk. When a pillow order is to be made up, the manufacturer puts into the filling bin the number of bags of each type of feather requisite to obtain the desired mixture. The filling bins usually are approximately 5 x 10 x 12 feet in size, and hold up to 350 or 400 pounds of feathers. Two or three hundred pairs of pillows may be filled out of one mixture, and it is not unusual for a manufacturer to fill from twelve to fourteen hundred pairs of pillows during a day.

(4) During the filling process, the feathers are agitated by means of wooden forks, and the pillows are filled by suction. The proportion of down and feathers that go into each pillow depends partly, of course, upon the filling-bin mixture, but also to a large extent upon what part of the bin the filling suction reaches. Even with the exercise of the greatest care, pillows filled from the same bin will vary in content. Those being filled from the bottom of the bin will contain the heavier feathers, and the greater amounts of pith, scale, and other extraneous matter. The exact amount or proportion of down and feathers going into any particular pillow cannot be controlled by mechanical means. The expert whose testimony was presented in support of the complaint stated that the contents of pillows filled from the same bin will vary as much as 30%; that the same percentage will not be found in any two pillows; that the mixture in each pillow will vary from the mixture in the filling bin; that if any one pillow should contain exactly the same percentage of feathers and down as that originally placed in the filling bin, it would be pure accident; and that the closest practical indication of the contents of a pillow

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product of a manufacturer and the correctness of its labeling will result if several different pillows are sampled, preferably pillows obtained at different times and places.

(5) The same difficulties arise in analyzing the contents of a single pillow. Except by pure accident, no two samples will have the same content; so there is no sure or positive method of measuring the contents of feather pillows with scientific accuracy, other than by taking all of the content out of the pillow and separating it into its component elements, then weighing each element. Such a process is so completely impractical that, usually, a test is made by opening the pillow-ticking and taking samples from three different portions of the pillow.

These samples are thoroughly mixed and a smaller testing sample, of which the analysis is to be made, is taken from this mixture. The expert who testified in support of the complaint selected three samples from the opening by inserting his hand and reaching to different portions of the pillow. Samples selected by the respondents were obtained by taking a small quantity of feathers from each of three openings in each pillow. The hearing examiner was present when respondents' samples were taken. As each opening was made in the pillow-ticking, some down escaped, and as each withdrawal was made, more down escaped before the sample could be enclosed in a container; while the feathers, being heavier and bulkier, were easier to retain. No sample can be exactly representative of the original content of the pillow, just as the content of no one pillow can be exactly representative of the original mixture in the filling bin. The average sample for analysis weighed approximately 3 grams, representing between $\frac{1}{4}$ and $\frac{1}{2}$ of 1% of the contents of a pillow, and the appearance of a single heavy feather in a sample of this size would make as much as 4% difference in the final result. This method is far from satisfactory, and the resulting percentages are not conclusive.

(6) The crushing or curling process is a manner of giving a twist or curl to landfowl feathers, such as chicken and turkey, to increase their resiliency and tend to prevent their matting, and thus improve their quality for use as pillow-filling material. The same process is applied to waterfowl quill feathers (that is, feathers from the wings and tails of ducks and geese), which otherwise would not be suitable for pillow-filling material. A considerable amount of fiber, pith and scale result from the crushing, and are carried over into the filling mixture. As to utility, crushed landfowl feathers are better than crushed waterfowl feathers, and crushed turkey feathers are better than crushed chicken feathers.

The mixture of crushed feathers is made by weighing out the proper proportions of the various kinds of crushed feathers that are to be mixed, and taking alternate handfuls of feathers from the separate containers and throwing these into the hopper of the curling or crushing machine. Because of the nature of these larger feathers, they frequently go through the hopper in lumps, so that it is impossible to get a mixture with any degree of homogeneity. Despite agitation in mixing, slugs of chicken or turkey feathers and slugs of quill feathers will get into the pillows without ever being separated or mixed. The label "Crushed Feathers," showing the types of feathers used, can indicate no more than that the mixture was made from the types or kinds of feathers stated on the label.

It is impossible to separate and analyze crushed feathers accurately. A pillow filled with crushed feathers is the cheapest product of the industry, and in the minds of the general public, there is very little distinction among the various kinds of crushed feathers, whether goose, duck, chicken or turkey. The expert who testified in support of the complaint indicated that pillows filled with crushed feathers are the least desirable of all pillows, and are the lowest class of pillows on the market. In his opinion, it is impractical to attempt to distinguish between the various types of crushed feathers in any batch of such pillows, and he suggested during the course of his tests for the Commission that no further pillows filled with crushed feathers be sent to him for analysis.

(7) On the basis of the foregoing, the conclusion is inescapable that as a practical matter, the contents of feather pillows cannot be accurately labeled. In fact, to require accurate labeling as to content, of a product such as feather pillows, which, by nature, vary constantly and at random in content, is to require an impossibility. No manufacturer of feather pillows could comply with such a requirement except by analyzing the filling of each pillow individually. Obviously that is an impossible task. Incidentally, it points up the dangers involved in attempting to reach a conclusion as to pillow content on the basis of testing two pillows out of a batch that may have included one hundred or two hundred pairs of pillows.

(8) Despite these facts, however, some 28 States have labeling requirements with which pillow manufacturers must comply; and the Federal Trade Commission, on April 26, 1951, promulgated Trade Practice Rules for the Feather and Down Products Industry, which undertake to interpret the Act and express the Commission's policy with respect to the practices complained of in this proceeding. Although these Rules are not binding upon the hearing examiner, they

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should be given careful consideration in applying the law to the facts of this proceeding. The pertinent parts of those Rules applicable thereto are as follows:

RULE 3—IDENTIFICATION AND DISCLOSURE OF KIND AND TYPE OF FILLING MATERIAL
IN INDUSTRY PRODUCTS

I. In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to misrepresent or deceptively conceal the identity of the kind or type of filling material contained in any of such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type. Such identification and disclosure shall be made by tag or label securely affixed to the outside covering of each product and in invoices and all advertising and trade promotional literature relating to the product; and when the filling material is a mixture of more than one kind or type, each kind and type shall either be listed in the order of its predominance by weight, or be listed with an accompanying disclosure of the fraction or percentage by weight of the entire mixture which it represents.

II. Identification of the kind and type of feather and down stock by use of any of the terms listed and defined below will be considered proper when in accord with the definition set forth for such terms:

Definitions:

(a) *Down:* The undercoating of waterfowl, consisting of clusters of the light, fluffy filaments growing from one quill point but without any quill shaft.

(b) *Down fiber:* The barbs of down plumes separated from the quill points.

(c) *Waterfowl feathers:* Goose feathers, duck feathers, or any mixture of goose and duck feathers.

(d) *Feathers (or Natural Feathers):* Bird or fowl plumage having quill shafts and barbs and which has not been processed in any manner other than by washing, dusting, and sterilizing.

(e) *Quill feathers (or Quills):* Wing feathers or tail feathers or any mixture of wing and tail feathers.

(f) *Crushed feathers:* Feathers which have been processed by a crushing or curling machine which has changed the original form of the feathers without removing the quill.

* * * * *

(h) *Feather fiber:* The barbs of feathers which have been completely separated from the quill shaft and any aftershaft and which are in no wise joined or attached to each other.

* * * * *

(j) *Damaged feathers:* Feathers, other than crushed, chopped, or stripped, which are broken, damaged by insects, or otherwise materially injured.

III. *Tolerance:* (a) Subject to the restrictions and limitations hereinafter set forth, the filling material of an industry product may be represented as being of but one kind or type when 85% of the weight of all filling material contained in the product is of the represented kind or type; or may be represented as being of a mixture of two or more kinds or types with accompanying disclosure of a fraction or percentage of the weight of the entire mixture represented by each if the fraction or percentage shown is not at variance with the actual proportion of the weight of the entire mixture represented by each such kind or type by

more than 15% of the stated fraction or percentage. (The tolerance provided for in this paragraph III is to be understood as being an allowance for error and as not embracing any intentional adulteration.)

Limitations and Restrictions

(b) When the filling material of an industry product is represented, directly or indirectly, as being wholly of down, any proportion within the tolerance percentage provided for in (a) above which is not down shall consist principally of down fiber, and/or small, light, and fluffy waterfowl feathers, shall contain no quill feathers, crushed feathers, or chopped feathers, and shall not contain damaged feathers, quill pith, quill fragments, trash, or any matter foreign to feather and down stock in excess of 2% by weight of the filling material contained in the product, or which in the aggregate exceeds 5% of such weight.

(c) When the filling material of an industry product is represented, directly or indirectly, as being wholly of a mixture of down and feathers, or of down and more than one kind or type of feathers, or of feathers of more than one kind or type, any proportion, or the aggregate of any proportions, of the filling material of the product at variance with the representation, but within the tolerance percentage provided for in (a) above, shall not contain quill pith, quill fragments, trash, or any matter foreign to feather and down stock in excess of 2% by weight of the filling material in the product or which in the aggregate exceed 5% of such weight, and, unless nondeceptively disclosed in the representation, not in excess of 5% by weight of the filling material of the product shall consist of crushed feathers, chopped feathers, quill feathers, or damaged feathers.

Note.—It is the consensus of the industry that determination as to whether any representation is violative of the provisions of this Rule should be based on an average of the results of tests of at least two products of the same type when same are readily available for testing.

The Rules further provide that samples of equal weight and size be drawn from at least three different locations in the product; that such samples be thoroughly mixed; and that a test be made of not less than 3 grams of the mixture. Application of the law and a reasonable interpretation of these Rules to the facts of this proceeding results in the following:

Conclusions:

I. The test procedures adopted and followed by the experts who made the analyses of the pillow contents in this proceeding comply with the Trade Practice Rules.

II. Respondents' "Countess" pillows contain new down substantially in the proportion indicated on the label, taking into consideration the 15% tolerance, and including downy fiber as down. The average of the four tests shows the down content of the two pillows as 85.8%.

The downy fiber indicated in the test analyses is within the normal

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amount to be found in new down, and is properly included in the down content. Furthermore, the feather content of these pillows consists of small downy-type feathers, which, according to the testimony of the expert who testified in support of the complaint, improves the resiliency and usefulness of the pillows. In all respects these pillows meet the required test.

III. As to the pillows designated "Chatham," which contain crushed chicken feathers and crushed duck quill feathers, and the pillows designated, respectively, "Spring" and "Keystone," which contain crushed goose quill feathers and crushed turkey feathers, there is no reliable, probative and substantial evidence to show that there is any public interest either in the matter of the labeling or price-listing of such pillows, or in distinguishing between the various kinds of crushed feather content thereof. It is therefore concluded that no misrepresentation and no violation of the Act has been shown insofar as respondents' "Chatham," "Spring" or "Keystone" pillows are concerned.

The charges with respect to respondents' pillows not being supported by the evidence, and there being no public interest with respect to the charges relating to respondents' pillows designated "Chatham," "Spring," and "Keystone," respectively, it is concluded that the complaint herein should be dismissed. Accordingly,

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

ON APPEAL FROM INITIAL DECISION

By SECRET, Commissioner:

The complaint in this proceeding charged the respondent corporation and its several officers with having engaged in unfair and deceptive acts and practices and unfair methods of competition to the injury of the public and respondents' competitors through having falsely represented on labels attached to their feather and down pillows the kinds or types of filling material, and percentages of each, contained in such pillows. The respondents filed their answer admitting the jurisdictional allegations of the complaint, as well as the use of the representations alleged to have been false, but denied the falsity thereof. By stipulation it was agreed that:

"* * * there may be considered as part of the record in this case those portions of the records in the following cases, which relate to the feather and down industry generally; the practices in that industry, methods of sampling and analysis of feather and down products, the qualifications of and methods of analysis used by J. Davis Donovan

and his associates, and the qualifications of the employees of and methods of analysis used by United States Testing Co., it being intended to include in this stipulation all of such records except those portions relating specifically to the particular pillows involved therein and the results of their analysis: Dockets 6132, 6133, 6135, 6136, 6137, and 6208.”²

The instant case was tried before a hearing examiner of the Commission who, on December 6, 1954, filed his initial decision dismissing the complaint. From that initial decision counsel in support of the complaint has prosecuted this appeal.

The hearing examiner found substantially as follows with regard to the industry background. There are three sources of raw feather supplies upon which respondents are, or have been, drawing. Those three sources are domestic, European, and Oriental. Use of domestic feathers ordinarily does not result in labeling problems but that source does not furnish sufficient quantities to meet industry requirements. It is the practices followed in the gathering and sale of European and Oriental feathers, taken together with the procedures followed by pillow manufacturers in this country in the handling and processing of imported raw feathers, that have resulted in the alleged mislabeling in violation of Section 5 of the Federal Trade Commission Act which is sought to be corrected in this, and related, proceedings covering practically all pillow production in the industry.

It is the custom of industry members to purchase European feathers on the basis of samples from which the quality and type of offerings are determined, through visual examination or laboratory analysis of the samples, by each manufacturer. All new stock is seldom available from European markets, it being the common practice there to mix second-hand feathers with new.

Oriental feathers are purchased by manufacturers through importers and commission merchants who circularize the industry on the basis of “offers” (without samples). A typical offer would be 100 two-hundred-pound bales of Formosan grey goose feathers at 90¢ a pound, 90% clean, 20% maximum of duck feathers, 5% chicken feathers, 3% quills, and a minimum of 30% down. Quality and type are determined, after purchase, by each manufacturer through visual

² Further identified by principal respondents as: D. 6132, National Feather & Down Co.; D. 6133, The L. Buchman Co., Incorporated, et al.; D. 6135, N. Sumergrade & Sons; D. 6136, Premier Pillow Corporation, et al.; D. 6137, Northern Feather Works, Inc., et al.; D. 6208, Sanitary Feather & Down Co., Inc.

N. B. Other related cases not included in this stipulation are: D. 6161, The Salisbury Company, et al.; D. 6188, Globe Feather & Down Company; D. 6189, Columbia Bedding Company, et al.

examination or laboratory analysis of samples from 10% of the bales selected at random from the lot. Oriental feathers are not carefully sorted and a bale represented as goose feathers may, and usually does, contain substantial quantities of duck and chicken feathers.

The first step in processing feathers after purchase is for the manufacturer to dust, wash, sterilize, dry, and fluff them by mechanical means. They are then sorted into various bins or containers, customarily in lots of fifty pounds, through blowing or suction processes. Feathers of similar weight and specific gravity theoretically are deposited in the same bins or containers after being blown over baffles in the sorting. Types of pillow filling materials recognized in the industry in the order of their relative intrinsic value or utility are:

- (1) *down*—waterfowl undercoating—clusters of light, fluffy filaments attached to one quill point but without any quill shaft;
- (2) *down fiber*—down plumes or filaments separated from quill points, without any quill;
- (3) *waterfowl feathers*—goose, duck, or a mixture of both;
- (4) *natural feathers*—bird or fowl, having quill shafts and barbs;
- (5) *quill feathers*—wing or tail feathers, or any mixture of both;
- (6) *crushed feathers*—feathers, including quills, crushed or curled by machine;
- (7) *feather fiber*—feather barbs separated from quill shaft;
- (8) *damaged feathers*—other than crushed, chopped, or stripped, which are broken, damaged by insects, or otherwise materially injured.

It is reasonably practical to segregate high percentages of the various types of feathers and down into appropriate classification bins or containers. However, feathers cannot be segregated as to type of fowl or as to inferior or second-hand material. Feathers of the same degree of lightness, applying principles of specific gravity, will go over sorting machine baffles at the same time regardless of whether they are from waterfowl or landfowl or whether they are new or used. And, in each sorting bin or container, there will be some down and some heavier type feathers inappropriate to the particular classification. Further, in each sorting bin or container, the mixture will not consistently be of uniform content or bulk. Heavier feathers will be at the bottom and downy material at the top in lesser or greater degree. This is true even though there be vigorous agitation of the material in each sorting bin or container.

A manufacturer may fill from 1200 to 1400 *pairs* of pillows a day. In making up a pillow order the desired mixture is obtained by placing in each filling bin, holding up to about 400 pounds, the

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requisite number of bags of each type of feather sufficient to produce from two to three hundred pillows.

Pillows usually are filled from two spouts fed by suction from the filling bin. During the filling process feathers in the filling bin are agitated with wooden forks when contents of the filling bin get to the level where that is possible. Even so, pillows filled from the same bin will vary in content. At the bottom of the bin will be collected the heavier feathers and the greater amounts of pith, scale, and other extraneous matter.

The record is not clear as to the exact number but it appears that about twenty-eight States require labeling of the filling material content of feather and down pillows. Massachusetts seems to be the only State requiring labeling that permits the listing on labels of each type or kind of feather and down in the order of its predominance by weight, rather than on a percentage by weight, of the entire mixture. The other States require percentage of weight labeling usually with a 10% tolerance for variance allowed.

Prior to 1951 the Federal Trade Commission, upon application of the industry, held a trade practice conference as a result of which trade practice rules for the industry were formulated through the cooperative efforts of industry members and the Commission's staff. The Commission approved these rules and they were promulgated April 26, 1951, as a revision and supplementation of, and as superseding, 1932 trade practice rules for the Feather and Down Products Industry. The hearing examiner's initial decision recognizes that these rules are not substantive law and not binding upon him. Such rules are interpretations of the laws administered by this Commission and express Commission policy with respect to the practices involved in this proceeding.

The trade practice rules, in pertinent part, provide substantially as follows. It is an unfair practice to misrepresent or conceal identity of the kind or type of feather or down, and proportions of each, when pillow filling material is a mixture of more than one kind or type. Identification and disclosure is required to be made by tag or label as well as on invoices and all advertising and trade promotional literature. The rules permit listing each kind or type in order of its predominance by weight or by fraction or percentage by weight of the entire mixture. The rules define the kinds and type of feather and down stock in terms substantially as outlined above. They provide that a pillow may be represented as being filled with one kind or type of filling material when 85% of all such material contained therein is of the represented kind or type or that the filling material may be represented as a mixture of kinds or types with accompanying disclosure of the percentage

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by weight of the entire mixture represented by each if the percentage shown:

"is not at variance with the actual proportion of the weight of the entire mixture represented by each such kind or type by more than 15% of the stated * * * percentage." (Italics supplied.)

The rules parenthetically state that this tolerance is to allow for error and not for any intentional adulteration.

By way of limitation, or restriction, the rules provide that:

(a) When a pillow is represented as *all down*, any proportion of the 15% tolerance which is not down shall consist principally of down fiber and/or small, light, and fluffy waterfowl feathers and that the 15% tolerance shall not contain in excess of 2% each, or 5% in the aggregate, of damaged feathers, quill pith, quill fragments, trash or foreign material.

(b) When a pillow is represented as a mixture of down and feathers, or as a mixture of feathers, any proportion, or aggregate of proportions of the filling materials at variance with the representation, but within the 15% tolerance, shall not contain in excess of 2% each, or 5% in the aggregate, of quill pith, quill fragments, trash or foreign material. It is further provided with regard to mixed filling materials that, unless disclosed, not more than 5% thereof shall consist of crushed, chopped, quill, or damaged feathers.

Finally, the rules provide that, in testing feather and down content of pillows, samples of equal weight and size shall be drawn from three locations in each pillow, that the samples shall be thoroughly mixed and that not less than three grams of the resulting mixtures shall be tested. At least two pillows of the same type are required to be tested separately with the conclusions to be drawn therefrom to be based on an average of the test results.

As previously indicated, it was stipulated that the qualifications of expert witnesses appearing in support of the complaint and in opposition thereto in other related cases, where such qualifications appeared as a matter of record in each, would be considered as part of the record in the instant case. From the composite record resulting, the following facts with regard to qualifications of the two expert witnesses appearing herein are established.

The expert called in support of the complaint testified that he has been employed by the State of Maryland, Department of Health, since 1916 in various capacities and that he has been Chief, Division of Bedding and Upholstery since June of 1924. When he started in charge of bedding and upholstery, in 1924, he had to do all inspecting,

sampling and testing of materials. He has, therefore, had practical experience in each of those categories. His staff now consists of a secretary, two inspectors, and two qualified analytical chemists. His office has made thousands of feather analyses. The record also discloses that he is widely acquainted with the manufacturing processes in the industry and that he has been in every plant processing feather and down in the eastern part of the United States, except one, including the plant of respondents herein and plants of respondents in related cases. He is familiar with the processes of separation of feathers in the raw state into various grades and testified he had seen it done in every plant but one in the eastern United States.

The expert called as a witness for respondents testified that he has been employed by the United States Testing Company, Inc., since September 1948, and that he worked for the company in the summers of 1942 and 1943. He graduated from Seton Hall College with a degree in chemistry in 1953. At the time of his testimony he had made or supervised about 100 analyses or tests of feather samples since his graduation in 1953. He also testified that he has been testing pillows for about five years. Both he and his brother are directly responsible to the manager of the textile department. His brother is supervisor of the dye laboratory and the witness works under him "as more or less an assistant supervisor." The United States Testing Laboratory started out primarily as a silk testing house and now has engineering, electronic and psychometric departments as well as textile, chemical, biological, and bacteriological laboratories employing about 500 people. Feather testing is but a relatively small part of the company's over-all activities.

The record discloses that the witness in support of the complaint customarily followed the sampling and testing procedure contemplated in the trade practice rules mentioned above and that that method generally is approved by all States with labeling laws. Unopened pillows (with seams intact) in condition similar to when placed for sale in retail stores were delivered by a member of the Commission's staff to a chemist-analyst in the witness' office. The labels thereon were initialed and dated by the recipient. The pillows were then turned over to two laboratory chemists "with instructions to be particularly careful because * * * [these were] cases which might come up for hearing at a later date." In each other's presence a single incision was made in each pillow submitted for sampling. This had been the practice in the witness' office for thirty years. The chemist who was to make the analysis then drew a sample from each pillow as follows:

"A handful [of about three grams] was taken from the portion of the pillow nearest to the opening, placed in a cardboard box about three times the size of an ordinary shoe box; a second handful was taken from about the middle of the article, and a third handful was taken from the end of the article opposite to the opening. These three handfuls were then thoroughly agitated (sic) and a sample weighing approximately three grams was drawn [in pinches] from different portions of the box in which the three samples had been placed."

The sample thus obtained, the feathers, down, etc., was placed upon a wooden tray with three glass sides to prevent dissemination of the sample by air currents, the side towards the analyst being open. The sample was picked apart manually, tweezers with ivory tips being utilized to avoid the effect of static electricity and the various types of feathers and down were placed in glass beakers. The pith, quill scales and any miscellaneous material similarly were separated. Each feather was picked out individually with nothing else adhering to it. The analysts by training and experience were qualified to determine the characteristics of those feathers. Where characteristics of a feather were inconclusive, microscopic examination was utilized to place it in the proper category. Material in each beaker was then examined by the witness and by two inspectors, all three of whom agreed that the beaker with down contained nothing but down, the goose feather beaker nothing but goose feathers, etc. Each separation took from four to five hours and the witness testified that while the separation is a slow procedure, it is not difficult. The contents of each beaker were then weighed on a chain-o-matic scale and weight percentages calculated. All five employees in the department usually looked at each sample after separation and, in most instances, all five initialed analyses reports indicating their approval of the separation and of the approximation of percentages stated therein.

Reports and physical exhibits on each pillow were then prepared and sent by the witness to the Commission and subsequently introduced in evidence. While the witness was "not present at all times when all of these procedures were followed through," the record clearly establishes that the testing and analyses were performed strictly according to his directions and under his direct supervision.

Respondents' witness testified that he analyzed contents of the pillows from the standpoint of percentages as well as quality and that with regard to tests made by him they were performed on samples delivered to him by respondents in sealed containers. The samples consisted of feathers and down removed from each pillow from openings, or slits, made in the seam on each of three sides of each pillow.

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The samples were removed from the pillows and placed in the sealed containers for delivery to the United States Testing Laboratories by respondents. The removal was accomplished by a representative of respondents before the hearing examiner and in the presence of counsel for both sides.

The method generally utilized by this witness in analyzing samples was described by him on the record as follows: The contents of each sealed container were emptied into a large cardboard carton and thoroughly mixed. Aliquot portions of the material were then drawn by him from the four corners and center of the carton to obtain as representative a sample as possible. The resulting samples weighed between 3 and 5 grams. He then gave the samples to the "young lady" employed in his office. He stated that she then

"* * * weighs these on an analytical balance to four place accuracy, calculates the percentage and returns the paper to me. I check her figures and calculations to be sure they are proper, examine the portions which she returns, and then write up the report. * * * we examined them visually and tried to establish the type of feather or down just by visual examination."

In the instant case the witness testified that portions of the materials being tested were examined microscopically to ascertain definitely the type of feathers or down which had not been done previously.

On the basis of professional qualifications and experience and by comparing testing techniques, the Commission has weighed the expert testimony and evidence and is constrained to adopt as determinative of the questions herein the results of the tests performed under the witness in support of the complaint.

Respondents herein label their pillows designated "Countess" as

ALL NEW MATERIAL consisting of Down.

Two of these pillows were analyzed by the two expert witnesses appearing in support of and in opposition to the complaint. The results of the test conducted by the witness in support of the complaint disclosed one "Countess" pillow as containing but 82.2% of down and the other but 80.3% of down, with the balance accounted for by feather (small downy type), fibers, pith and scale. This was clearly outside the 15% tolerance limit contemplated by the rules. Respondents' expert found these pillows to contain 86.2% down and 90.7% down, respectively. In arriving at these results he failed to differentiate between down fiber content and down. The record is clear that down and down fiber have different physical characteristics. Moreover, the trade practice conference rules, representing the judgment of the Commission and the industry jointly as to the unfairness

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of the practices described in them; expressly provide that down fiber shall be included in the 15% tolerance allowance. The witness in support of the complaint, in his analysis of respondents' pillows represented as "down," did not include down fiber in computing the percentage of down content. And in a related case he testified in response to a direct question from the hearing examiner as follows:

"Hearing Examiner Cox: Under their [trade practice] rules, then, I cannot consider any of this downy fiber as being down?"

The Witness. That is the way I interpret their rules.
That is my interpretation of their rules. They are the Commission's rules, and I think they can make their own interpretation of them.

The hearing examiner, however, in his initial decision included downy fiber as down, and in computing the average of the four tests conducted by both experts computed the average down content for the two "Countess" pillows to be 85.8%. He concluded that these pillows, therefore, met the required test. In so doing, he found that the test procedures adopted and followed by both experts complied with the trade practice rules. The evidence is conflicting on whether down fiber should, as a practical matter, be included with down. We resolve that conflict by concluding that the trade practice rule providing that down fiber should not be included as down takes precedence; that the respondents' expert did not comply with those rules in making his analysis and that the hearing examiner was in error when he included downy fiber to arrive at the computed average of down content he did. We recognize that the record discloses the difficulties inherent in the mechanical processes of the industry in separating downy fiber and down, but we must give effect to the tolerance permitted under industry rules and emphasize that that tolerance, in our opinion, is adequate to allow for unavoidable error. In this connection we refer to the fact that on direct examination the witness in support of the complaint testified as to down pillows as follows:

Q. Is it your opinion, * * *, that in the filling of down pillows that the filling mixture or the filling content can be controlled to fall within a 15% tolerance:

A. I think the experiments I have conducted will show that they can be controlled within the 15% tolerance.

Also, the record shows that most of the twenty-eight States provide only for a 10% tolerance as compared to the more liberal 15% tolerance fraction set up in the trade practice rules here applicable. The record does not disclose that industry members have had any difficulty in meeting the State requirements.

Respondents also represent that their pillows designated "Chatham" are:

ALL NEW MATERIAL consisting of 50% Crushed Chicken Feathers 50% Crushed Duck Quill Feathers.

and pillows designated "Spring" and "Keystone" are:

ALL NEW MATERIAL consisting of 50% Crushed Goose Quill Feathers 50% Crushed Turkey Feathers.

At to the "Spring" and "Keystone" pillows, the respondents' expert made no analysis and testified he had written respondents to the effect that he did not feel accurate results could be given as to two of the samples and that " * * * we have attempted to analyze them and have issued reports on crushed feathers in the past, but we do not feel it is an accurate report because the crushed material is just what it is, it is crushed material and quite hard to separate." He stated his opinion to be that analysis of crushed feathers would be so inaccurate as to be without value.

The witness in support of the complaint's analysis of two "Chatham" pillows disclosed that they contained for the first pillow 63.7% crushed chicken feathers, 20.1% crushed duck feathers and for the second pillow 48.8% crushed feathers and 38.7% crushed duck feathers. The hearing examiner mistakenly found that the respondents' expert analyzed a sample from the first Chatham pillow only and arrived at 45.3% crushed duck feathers and 48.0% crushed chicken feathers.

The analysis made by the witness in support of the complaint of a "Spring" pillow showed 40.4% crushed turkey feathers and no crushed goose feathers, fibers or quill present at all. His analysis of a "Keystone" pillow revealed 46.3% crushed turkey feathers and 15.8% crushed goose feathers. The respondents' witness made no analysis of the "Spring" and "Keystone" pillows. Actually the analysis to which the hearing examiner had reference was made by the Commission's witness and is in analysis of a third "Chatham" pillow. The respondents' witness, therefore, appears to have made no tests at all of crushed feather pillows. The uncontroverted analysis, therefore, disclosed that the two "Chatham" pillows represented as containing 50% crushed duck quill feathers actually contained 20% and 38.7% of crushed duck quill feathers, substantially less than the amount of that type feather required with full tolerance. The "Spring" and "Keystone" pillows clearly are mislabeled insofar as their crushed goose quill feather content is concerned, the one "Spring" containing no trace of goose feathers whatever, and the other containing only 15.8% goose feathers.

The hearing examiner found that the crushing or curling process is a mechanical means of giving a twist or curl to a certain type of feathers to increase resiliency and to prevent matting, thus improving pillow quality. He further found that the method involves the placing of alternate quantities of different types of feathers from their separate containers into the cropper of the curling or crushing machine; that, because of the nature of the types of feathers used in this process, they frequently appear in pillows being filled as lumps or slugs without ever being separated or mixed; that a crushed feather pillow is the cheapest industry product; that in the minds of the public there is very little distinction among the various kinds of crushed feathers, whether goose, duck, chicken, or turkey; and that, as to utility, crushed landfowl feathers are better than crushed waterfowl feathers, with crushed turkey being considered better than crushed chicken feathers. He concluded also that: "It is impossible to separate and analyze crushed feathers accurately."

As to pillows represented as containing crushed feathers the hearing examiner found no reliable, probative, and substantial evidence to show any public interest either in the matter of labeling or price-listing, or in distinguishing between the various kinds of crushed feather content; that, therefore, there had not been shown any violation of the act through misrepresentation insofar as respondents' "Chatham," "Spring" or "Keystone" pillows are concerned. The charges, in his opinion, not being supported by the evidence and there being no public interest, the hearing examiner dismissed the complaint herein.

The record shows without a doubt that there is a difference in public preference as between landfowl and waterfowl feathers and that the preference decidedly is for waterfowl—"goose feathers and goose down are very decidedly preferred by consumers." In similar vein the witness in support of the complaint, testifying as to whether one type of crushed feather is better than another, stated that:

"It depends entirely on whether the customer decides he likes, desires a hard pillow or a soft pillow. Crushed turkey and chicken feathers produce a softer filling material than crushed goose and duck quills; and the medium pillow, between hard and soft, would be one that contained both chicken or turkey and goose and duck quills."

There has been no showing here that the public has any different feeling or preference as to utility when feathers are crushed. Having a preference for waterfowl feathers, they are entitled, when they see 50% crushed goose or other waterfowl on a pillow label, to get what they intend to purchase.

The corporate respondent's vice president, when asked how a retail purchaser selected its pillows testified as follows:

"Most good shoppers, when they go in to buy a down or a down and feather pillow, usually pick up the pillow, and the first thing they do is to pick it up to see how much it weighs. Any good shopper, any good housewife, knows that the pillow is the right pillow if it is a light pillow and well filled and it isn't dirty, and has no odor; it is a good pillow. She usually does that first.

"Then she will usually look at the law label to find out what it contains. But she usually picks it up, weighs it, puts it on the counter, presses her hands on it, sees how fast it comes back, what resiliency there is, what buoyancy it has, feels of the feathers in it, and then she looks at the label."

The evidence discloses that crushed feather pillows are the cheapest in the trade. As a matter of fact, this witness testified that, as to crushed feather pillows—

"They are mostly sold to the poor families who cannot afford a high priced pillow, and then to a large extent to summer hotels, motels, lodging houses, and the like."

We conclude that the evidence herein is reliable, probative, and substantial, as to consumer preference for waterfowl feathers; that that preference can be assumed to carry over to crushed feathers; that from the standpoint of utility there are distinct advantages and differences as between different types or kinds of crushed feathers and that while there may be no significant difference in price as between crushed waterfowl feathers and crushed landfowl feathers there is a significant difference in utility, and the pillow buyer is entitled to get what the label represents the contents to be. Insofar as purchasers of pillows are concerned, we see no justification for recognizing any different standards or requirements to be observed with respect to purchasers at the lower end of the economic ladder than those observed with respect to purchasers at the upper end.

To the extent that the findings of fact contained in the hearing examiner's initial decision are not inconsistent with the views expressed herein and in the Commission's opinion in the matter of Bernard H. Sumergrade and Harry Sumergrade, copartners, trading as N. Sumergrade & Sons, Docket No. 6135, such findings are affirmed. The conclusion and order dismissing the complaint as contained in the initial decision are reversed.

FINAL ORDER

Counsel in support of the complaint having filed an appeal from the hearing examiner's initial decision dismissing the complaint in this

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Final Order

proceeding; and the Commission having rendered its decision affirming in part the findings of fact contained in the initial decision, but reversing the conclusions and order contained therein:

It is ordered, That the respondents, Burton-Dixie Corporation, a corporation, and John G. Sevick, A. T. Burton, George S. Knott, Oscar D. Wiley, and Ira W. Spackey, individually and as officers of said corporation, and their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of feather and down products, do forthwith cease and desist from misrepresenting in any manner, or by any means, directly or by implication, the identity of the kind or type of filling material contained in any such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type.

It is further ordered, That said respondents 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 foregoing order to cease and desist.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to George W. Gartz, deceased.

After the filing of an answer, the Commission, on its own motion, and after a hearing, has found that the respondents have failed to establish that the filling material in the products in question is a mixture of more than one kind or type, and that the respondents have not complied with the order to file a report in writing, setting forth in detail the manner and form in which they have complied with the foregoing order to cease and desist.

I. Respondent, N. Respondent, M. Respondent, L. Respondent, K. Respondent, J. Respondent, I. Respondent, H. Respondent, G. Respondent, F. Respondent, E. Respondent, D. Respondent, C. Respondent, B. Respondent, A. Respondent.

1. The Commission has found that the respondents have failed to establish that the filling material in the products in question is a mixture of more than one kind or type, and that the respondents have not complied with the order to file a report in writing, setting forth in detail the manner and form in which they have complied with the foregoing order to cease and desist.

IN THE MATTER OF

BERNARD H. SUMERGRADE ET AL. TRADING AS
N. SUMERGRADE & SONS

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

Docket 6135. Complaint, Oct. 28, 1953—Decision, June 30, 1955

Order requiring manufacturers in New York City to cease misrepresenting the down and feather content of their pillows on labels affixed thereto or otherwise.

Mr. Ames W. Williams for the Commission.

Lowenstein, Pitcher, Spence, Hotchkiss, Amann & Parr, of New York City, for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that the respondents have violated the provisions of the Federal Trade Commission Act by misrepresenting the contents of feather pillows which they manufacture and distribute in commerce.

After the filing of an answer, hearings were held, in which testimony and other evidence was presented, duly recorded and filed in the office of the Commission. By stipulation all the evidence in the companion feather cases was made a part of the record in this case, except so far as such evidence relates exclusively to the identification, contents and analyses of the feather samples in each of those cases.¹ Proposed findings of fact, conclusions and order have been submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. Respondent, N. Sumergrade & Sons, is a limited partnership organized under the laws of the State of New York, consisting of three general partners, Saul R. Sumergrade, respondent Bernard H. Sumergrade, and respondent Harry Sumergrade. No objection was raised to amendment of the complaint to include Saul R. Sumergrade as a party respondent. Such amendment was allowed, and he will herein be treated and considered as a party respondent. There are,

¹ The companion feather cases are: Docket 6132, National Feather & Down Company; Docket 6133, The L. Buchman Co., Inc., et al.; Docket 6134, Burton-Dixie Corp., et al.; Docket 6135, N. Sumergrade & Sons, et al.; Docket 6137, Northern Feather Works, Inc., et al.; Docket 6161, The Salisbury Co., et al.; Docket 6188, Globe Feather & Down Co., et al.; and Docket 6208, Sanitary Feather & Down Co., Inc., et al.

in addition, limited partners in the nature of trusts of which the general partners are trustees and other members of the Sumergrade family are beneficiaries. These limited partners are not included as respondents in this proceeding.

Respondents Bernard H. Sumergrade, Harry Sumergrade and Saul R. Sumergrade are copartners trading as N. Sumergrade & Sons, with their office and principal place of business located at 191 Cypress Avenue, New York 54, New York.

2. Respondents are now, and for more than one year last past have been, engaged in the manufacture of feather pillows and other feather and down products, which they sell to dealers for resale to the general public, and have caused and now cause their said products, when sold, to be transported from their place of business to purchasers thereof located in various other States of the United States.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said down and feather products, in commerce, among and between the various States of the United States.

3. In the course and conduct of their aforesaid business, respondents are now, and have been, in substantial competition in commerce with other partnerships and with corporations, firms and individuals engaged in the sale and distribution of feather and down products, including pillows.

4. In the course and conduct of their aforesaid business, respondents have caused labels to be affixed to certain of their pillows purporting to state and set out the kinds or types and proportions thereof of filling material contained therein, and have similarly identified in invoices the composition of such filling material. On these labels and invoices, respondents have made representations with respect to their pillows designated "King," as follows:

New—50% White Goose Down,
50% White Goose Feathers,

and with respect to their pillows designated "Ajax,"

New—20% Goose Down,
80% Goose Feathers,

and with respect to their pillows designated "Dayton,"

New—50% Down,
50% Duck Feathers.

5. Through the use of the aforesaid statements appearing on the labels affixed to said pillows and on invoices therefor, respondents have represented that the filling material in the pillows designated

"King" is composed of 50% new white goose down and 50% new white goose feathers; that the filling material in the pillows designated "Ajax" is composed of 20% new goose down and 80% new goose feathers; and that the filling material in the pillows designated "Dayton" is composed of 50% new down and 50% new duck feathers.

6. Two pillows of each of the above-mentioned designations were procured by a representative of the Commission at the same time from the same retail dealer, and were introduced in evidence. The contents of these pillows were analyzed by an expert for the Commission and by an expert for the respondents. The analyses showed as follows:

Pillows designated "King"		
	Pillow 1	Pillow 2
	(by weight)	
	Percent	Percent
By the Commission's expert:		
White goose feathers.....	70.6	69.6
Second-hand goose feathers.....	4.8	8.0
Down.....	20.2	18.0
Chicken feathers.....	1.4	1.0
Fibers.....	.7	.7
Pith and scale.....	2.3	2.7
Amount analyzed.....	5,085	3,366
By respondents' expert:		
Goose feathers.....	68.4	82.8
Duck feathers.....	15.0	None
Down and downy-type feathers.....	15.2	15.6
Waste.....	1.4	1.6
Pillows designated "Ajax"		
	Pillow 1	Pillow 2
	(by weight)	
	Percent	Percent
By the Commission's expert:		
Goose feathers.....	12.2	14.0
Duck feathers.....	79.5	74.5
Down.....	4.4	5.0
Fibers.....	1.8	2.8
Pith and scale.....	2.1	3.7
Amount analyzed.....	4,1535	4,742
By respondents' expert:		
Goose feathers.....	86.8	None
Duck feathers.....	8.6	94.7
Down.....	2.5	2.5
Waste.....	2.1	2.8

It will be noted that there is a wide divergence as to goose and duck feathers in these two analyses.

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Decision

Pillows designated "Dayton"

	Pillow 1 (by weight) Percent	Pillow 2 (by weight) Percent
By the Commission's expert:		
Duck feathers	71.5	70.8
Chicken feathers	6.5	3.6
Second-hand feathers	1.9	None
Down	17.3	13.3
Fibers	2.4	2.1
Pith and scale	2.4	4.2
Amount analyzed	3.4588 Grams	3.757 Grams
By respondents' expert:		
Goose feathers	83.5	None
Duck feathers	None	87.1
Down	15.2	10.3
Waste	1.3	2.6

7. In determining whether or not the representations as to the pillow contents are false within the meaning of the Act, it is helpful to have an understanding of the manufacturing methods used in the feather industry.

(1) In general, three sources of feather supplies are or have been available: (a) *The American Source*

First, there are the domestic feathers, which ordinarily are properly labeled, but are not available in sufficient quantities to meet the industry's requirements.

(b) *The European Source*

Second, there is the European source of supply from which feathers are procured, but from this source it is impossible to get unadulterated, new stock, because of a common practice of mixing second-hand feathers with new. European feathers are purchased on the basis of samples, and each manufacturer must judge from these samples the quality and type of feathers available to him.

(c) *The Oriental Source*

The third source is the Orient, from which adequate supplies may be had; but in the Orient there is no careful sorting, and a bale of feathers purchased as goose feathers may contain substantial quantities of duck or chicken feathers. These feathers are usually purchased through importers and commission merchants who submit offers to manufacturers. A typical offer will show as available for purchase by respondents or other pillow manufacturers 100 bales of

200 pounds each at 90¢ per pound, the feathers being Formosan grey goose feathers, 90% clean, maximum 20% duck feathers, 5% chicken feathers 3% quills, minimum 30% down. Oriental feathers are purchased on the basis of these representations, without sampling.

(2) After raw feathers are procured by the manufacturer they are thoroughly washed, dried and fluffed up. Then they are sorted by means of a machine which separates the various constituents of the feather bulk by a blowing or suction process. The feathers are put through the sorting machine in lots of fifty pounds. The down, being lighter, is more readily blown over the baffle in the sorting machine, and passes into its particular bin or container. Then follow the downy-type feathers, and the various other feathers, in appropriate classifications according to weight or specific gravity, each into a specially prepared container. By this process it is reasonably practical to segregate a high percentage of down, but in down, as in the other classifications, there are always some feathers which are inappropriate to the particular classification. In the downy-type feather receptacle will be some pure down and some heavier-type feathers. Similar discrepancies will occur in each of the other classifications. It is impossible to separate feathers according to type of fowl or to remove inferior or second-hand feathers. The only possible separations are those which can be obtained by the application of the principles of specific gravity. Feathers of the same degree of lightness will go over the baffle at the same time, irrespective of the kind of fowl from which they may have been plucked, or whether they are new or used.

(3) The down and feathers thus sorted and placed in separate containers have no uniformity or homogeneity; the heavier feathers will be at the bottom, the down at the top of each container. Although there be a vigorous agitation of the feathers and down in a storage bin, the resulting mixture will at no time be of uniform content throughout, and no mixture of feathers and down is or will remain uniform or constant throughout its bulk. When a pillow order is to be made up, the manufacturer puts into the filling bin the number of bags of each type of feather requisite to obtain the desired mixture. The filling bins usually are approximately 5 x 10 x 12 feet in size, and hold up to 350 or 400 pounds of feathers. Two or three hundred pairs of pillows may be filled out of one mixture, and it is not unusual for a manufacturer to fill from twelve to fourteen hundred pairs of pillows during a day.

(4) During the filling process, the feathers are agitated by means of wooden forks, and the pillows are filled by suction. The propor-

tion of down and feathers that go into each pillow depends partly, of course, upon the filling-bin mixture, but also to a large extent upon what part of the bin the filling suction reaches. Even with the exercise of the greatest care, pillows filled from the same bin will vary in content. Those being filled from the bottom of the bin will contain the heavier feathers, and the greater amounts of pith, scale, and other extraneous matter. The exact amount or proportion of down and feathers going into any particular pillow cannot be controlled by mechanical means. The expert whose testimony was presented in support of the complaint stated that the contents of pillows filled from the same bin will vary as much as 30%; that the same percentage will not be found in any two pillows; that the mixture in each pillow will vary from the mixture in the filling bin; that if any one pillow should contain exactly the same percentage of feathers and down as that originally placed in the filling bin, it would be pure accident; and that the closest practical indication of the contents of a pillow product of a manufacturer and the correctness of its labeling will result if several different pillows are sampled, preferably pillows obtained at different times and places.

(5) The same difficulties arise in analyzing the contents of a single pillow. Except by pure accident, no two samples will have the same content; so there is no sure or positive method of measuring the contents of feather pillows with scientific accuracy, other than by taking all of the content out of the pillow and separating it into its component elements, then weighing each element. Such a process is so completely impractical that, usually, a test is made by opening the pillow-ticking and taking samples from three different portions of the pillow. These samples are thoroughly mixed and a smaller testing sample, of which the analysis is to be made, is taken from this mixture. The expert who testified in support of the complaint selected three samples from the opening by inserting his hand and reaching to different portions of the pillow. Samples selected by the respondents were obtained by taking a small quantity of feathers from each of three openings in each pillow. The hearing examiner was present when respondents' samples were taken. As each opening was made in the pillow-ticking, some down escaped, and as each withdrawal was made, more down escaped before the sample could be enclosed in a container; while the feathers, being heavier and bulkier, were easier to retain. No sample can be exactly representative of the original content of the pillow, just as the content of no one pillow can be exactly representative of the original mixture in the filling bin. The average sample for analysis weighed approximately 3 grams, representing be-

tween $\frac{1}{4}$ and $\frac{1}{2}$ of 1% of the contents of a pillow, and the appearance of a single heavy feather in a sample of this size would make as much as 4% difference in the final result. This method is far from satisfactory, and the resulting percentages are not conclusive.

(6) The crushing or curling process is a manner of giving a twist or curl to landfowl feathers, such as chicken and turkey, to increase their resiliency and tend to prevent their matting, and thus improve their quality for use as pillow-filling material. The same process is applied to waterfowl quill feathers (that is, feathers from the wings and tails of ducks and geese), which otherwise would not be suitable for pillow-filling material. A considerable amount of fiber, pith and scale result from the crushing, and are carried over into the filling mixture. As to utility, crushed landfowl feathers are better than crushed waterfowl feathers, and crushed turkey feathers are better than crushed chicken feathers.

The mixture of crushed feathers is made by weighing out the proper proportions of the various kinds of crushed feathers that are to be mixed, and taking alternate handfuls of feathers from the separate containers and throwing these into the hopper of the curling or crushing machine. Because of the nature of these larger feathers, they frequently go through the hopper in lumps, so that it is impossible to get a mixture with any degree of homogeneity. Despite agitation in mixing, slugs of chicken or turkey feathers and slugs of quill feathers will get into the pillows without ever being separated or mixed. The label "Crushed Feathers," showing the types of feathers used, can indicate no more than that the mixture was made from the types or kinds of feathers stated on the label.

It is impossible to separate and analyze crushed feathers accurately. A pillow filled with crushed feathers is the cheapest product of the industry, and in the minds of the general public, there is very little distinction among the various kinds of crushed feathers, whether goose, duck, chicken, or turkey. The expert who testified in support of the complaint indicated that pillows filled with crushed feathers are the least desirable of all pillows, and are the lowest class of pillows on the market. In his opinion, it is impractical to attempt to distinguish between the various types of crushed feathers in any batch of such pillows, and he suggested during the course of his tests for the Commission that no further pillows filled with crushed feathers be sent to him for analysis.

(7) On the basis of the foregoing, the conclusion is inescapable that as a practical matter, the contents of feather pillows cannot be accurately labeled. In fact, to require accurate labeling as to content, of

a product such as feather pillows, which, by nature, vary constantly and at random in content, is to require an impossibility. No manufacturer of feather pillows could comply with such a requirement except by analyzing the filling of each pillow individually. Obviously that is an impossible task. Incidentally, it points up the dangers involved in attempting to reach a conclusion as to pillow content on the basis of testing two pillows out of a batch that may have included one hundred or two hundred pairs of pillows.

(8) Despite these facts, however, some 28 States have labeling requirements with which pillow manufacturers must comply; and the Federal Trade Commission, on April 26, 1951, promulgated Trade Practice Rules for the Feather and Down Products Industry, which undertake to interpret the Act and express the Commission's policy with respect to the practices complained of in this proceeding. Although these Rules are not binding upon the hearing examiner, they should be given careful consideration in applying the law to the facts of this proceeding. The pertinent parts of those Rules applicable thereto are as follows:

RULE 3—IDENTIFICATION AND DISCLOSURE OF KIND AND TYPE OF FILLING MATERIAL
IN INDUSTRY PRODUCTS

I. In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to misrepresent or deceptively conceal the identity of the kind or type of filling material contained in any of such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type. Such identification and disclosure shall be made by tag or label securely affixed to the outside covering of each product and in invoices and all advertising and trade promotional literature relating to the product; and when the filling material is a mixture of more than one kind or type, each kind and type shall either be listed in the order of its predominance by weight, or be listed with an accompanying disclosure of the fraction or percentage by weight of the entire mixture which it represents.

II. Identification of the kind and type of feather and down stock by use of any of the terms listed and defined below will be considered proper when in accord with the definition set forth for such term:

Definitions:

(a) *Down:* The undercoating of waterfowl, consisting of clusters of the light, fluffy filaments growing from one quill point but without any quill shaft.

(b) *Down fiber:* The barbs of down plumes separated from the quill points.

(c) *Waterfowl feathers:* Goose feathers, duck feathers, or any mixture of goose and duck feathers.

(d) *Feathers (or Natural Feathers):* Bird or fowl plumage having quill shafts and barbs and which has not been processed in any manner other than by washing, dusting, and sterilizing.

(e) *Quill feathers (or Quills):* Wing feathers or tail feathers or any mixture of wing and tail feathers.

(f) *Crushed feathers*: Feathers which have been processed by a crushing or curling machine which has changed the original form of the feathers without removing the quill.

* * * * *

(h) *Feather fiber*: The barbs of feathers which have been completely separated from the quill shaft and any aftershaft and which are in nowise joined or attached to each other.

* * * * *

(j) *Damaged feathers*: Feathers, other than crushed, chopped, or stripped, which are broken, damaged by insects, or otherwise materially injured.

III. *Tolerance*: (a) Subject to the restrictions and limitations hereinafter set forth, the filling material of an industry product may be represented as being of but one kind or type when 85% of the weight of all filling material contained in the product is of the represented kind or type; or may be represented as being of a mixture of two or more kinds or types with accompanying disclosure of a fraction or percentage of the weight of the entire mixture represented by each if the fraction or percentage shown is not at variance with the actual proportion of the weight of the entire mixture represented by each such kind or type by more than 15% of the stated fraction or percentage. (The tolerance provided for in this paragraph III is to be understood as being an allowance for error and as not embracing any intentional adulteration.)

Limitations and Restrictions

(b) When the filling material of an industry product is represented, directly or indirectly, as being wholly of down, any proportion within the tolerance percentage provided for in (a) above which is not down shall consist principally of down fiber and/or small, light, and fluffy waterfowl feathers, shall contain no quill feathers, crushed feathers, or chopped feathers, and shall not contain damaged feathers, quill pith, quill fragments, trash, or any matter foreign to feather and down stock in excess of 2% by weight of the filling material contained in the product, or which in the aggregate exceeds 5% of such weight.

* * * * *

(e) When the filling material of an industry product is represented, directly or indirectly, as being wholly of a mixture of down and feathers, or of down and more than one kind or type of feathers, or of feathers of more than one kind or type, and proportion, or the aggregate of any proportions, of the filling material of the product at variance with the representation, but within the tolerance percentage provided for in (a) above, shall not contain quill pith, quill fragments, trash, or any matter foreign to feather and down stock in excess of 2% by weight of the filling material in the product or which in the aggregate exceeds 5% of such weight; and, unless nondeceptively disclosed in the representation, not in excess of 5% by weight of the filling material of the product shall consist of crushed feathers, chopped feathers, quill feathers, or damaged feathers.

Note.—It is the consensus of the industry that determination as to whether any representation is violative of the provisions of this Rule should be based on an average of the results of tests of at least two products of the same type when same are readily available for testing, * * *.

RULE 5—SECOND-HAND FEATHERS, DOWN, AND OTHER COMPONENTS

To offer for sale, sell, or distribute any industry product containing any component which has previously been used in any product, or used for any purpose, without clearly disclosing that fact in describing, advertising, labeling, invoicing and selling such product, and in all representations concerning the product, is an unfair trade practice. It is likewise an unfair trade practice to misrepresent or deceptively conceal the type, kind, or amount of such components, or to use with reference to said products descriptive words, phrases, labels, or other representations which have the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers concerning the effect on said material of such prior use or concerning the type, extent, method, or effect of any reprocessing, renovation, or reesterilization of such material.

The Rules further provide that samples of equal weight and size be drawn from at least three different locations in the product; that such samples be thoroughly mixed; and that a test be made of not less than 3 grams of the mixture. Application of the law and a reasonable interpretation of these Rules to the facts of this proceeding results in the following:

Conclusions:

I. The test procedures adopted and followed by the experts who made the analyses of the pillow contents in this proceeding comply with the Trade Practice Rules.

II. Respondents' "King" pillows contain more than 50% white goose feathers, but less than one-half of the 50% down which they are represented to contain. The down content of the two pillows tested, based on the average of four analyses, amounted to only 17.25%.

Respondents' analysis made no mention of second-hand feathers, but the analyses made by the expert who testified in support of the complaint showed, respectively, 4.8% and 8.0% of second-hand goose feathers in the two pillows. The record indicates that the second-hand feather content of these pillows may have been unavoidably present, yet the rules, if not the law, require that the second-hand content be disclosed, and no percentage of tolerance is provided. There was a complete failure on respondents' part insofar as disclosing on their labels the second-hand feather content of their pillows was concerned. But even if this failure be disregarded, the pillow labels were false and deceptive in that they do not disclose the correct actual down content.

III. Respondents' "Ajax" pillows, represented as containing 20% new goose down and 80% goose feathers, actually contained less than 5% down, and the feathers were predominantly duck, not goose. Respondents asserted that the white duck feathers were in the "Ajax" pillows through the mistake or error of one of their employees, and,

therefore, that the mislabeling of these pillows should be disregarded. Respondents' contentions will be respected, and no conclusions will be based on the analysis of the contents of the "Ajax" pillows. Any order, however, based on the mislabeling of other pillows will be applicable to "Ajax" pillows as well as to all other of respondents' pillows.

IV. Respondents' "Dayton" pillows, represented as containing 50% new down and 50% new duck feathers, contained less than 17.5% down (the average of four analyses was 14.03%, the highest being 17.3%, the lowest 10.3%). The duck feather content varied from 71.5% to 87.1%. These pillows were unmistakably mislabeled.

V. The labeling and representations hereinabove found to be false (Conclusions II and IV) constitute unfair trade practices, are to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce.

VI. The use by respondents of the false and misleading statements on the labels affixed to their pillows has had and now has the tendency and capacity to mislead and deceive dealers and the purchasing public into the erroneous and mistaken belief that such statements are true, and to induce the purchase of substantial quantities of said pillows because of such mistaken and erroneous belief.

VII. This proceeding is found to be in the public interest, and the following order is issued:

It is ordered, That respondents Bernard H. Sumergrade, Harry Sumergrade, and Saul R. Sumergrade, copartners, trading as N. Sumergrade & Sons, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' feather and down products, do forthwith cease and desist from:

Misrepresenting in any manner, or by any means, directly or by implication, the identity of the kind or type of filling material contained in any such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type.

ON APPEAL FROM INITIAL DECISION

By SECRET, Commissioner:

Respondents have appealed from the initial decision which was filed by the hearing examiner at the conclusion of hearings at which evidence was presented in support of and in opposition to the allegations of the complaint.

The initial decision held that certain labels affixed by the respondents to their feather and down pillows and statements in invoices therefor which purported to show the types and proportions of their filling materials were false and had the capacity to mislead purchasers. The hearing officer additionally found that respondents' acts and practices in those connections have constituted unfair and deceptive acts and practices and unfair methods of competition in commerce and he held them to be unlawful under Section 5 of the Federal Trade Commission Act. The order contained in the initial decision would require respondents, in connection with the offering for sale and distribution of their feather and down pillows in commerce, to cease and desist from misrepresenting the identity of the type of filling material contained therein or the types and proportions of each when the filling material is a mixture of more than one kind or type.

Respondents urge that the samples of filling materials which were analyzed and were reported on in the course of the hearings do not accurately reflect the contents of the particular pillows from which they were taken and that, even if it were concluded that those samples were representative of the tested pillows, such pillows should not be regarded as necessarily representative of pillows generally produced and sold by the respondents under the trade names adopted by them.

Among the pillows manufactured by respondents are those distributed under the names of "King," "Ajax" and "Dayton," the down contents of which were respectively designated on their labels as 50%, 20% and 50%. Samples comprising several grams of filling material obtained from two pillows in each category were analyzed and testimony relating to analyses as independently conducted by two groups of technicians was received into the record. One group performing the separation and weighing procedures comprised personnel of the Division of Bedding and Upholstery, Maryland State Department of Health, their work being conducted under the supervision of the Chief of that Division who subsequently was called as a witness in this proceeding by counsel supporting the complaint. Called by the respondents was the chemist who had supervision of analyses performed by United States Testing Company, Inc., Hoboken, New Jersey.

The test data submitted by both witnesses showed that the samples of the fillings which were examined contained substantially less down than the amounts designated on the labels. Respondents' King pillows, for example, were labeled as 50% white goose down and 50% white goose feathers and as composed of new materials, but the sample analysis performed by the Division's technicians revealed, among other things, a down content of 20.2% for one pillow and 18.0% for

the other. The test results of the United States Testing Company, Inc., on samples secured from the same pillows, were reported as 15.2% and 15.6%.

Only through analysis of its entire contents can the exact proportions of various filling materials contained in a pillow be determined with scientific exactness. In view of the inordinate amount of time required for separating such a large mass of minute constituents, projects in that respect have long been regarded as unfeasible. On the other hand, however, a procedure entailing careful withdrawals of three separate samples from different parts in a pillow and thoroughly mixing them, and subjecting a random sample of several grams of that mixture to separation and analysis, appears well designed to afford a representative sample of the filling contained in a down and feather product; and analytical studies so based are especially conclusive when corroborated by a separate analysis of a related product. The foregoing procedure was followed by the personnel who performed the Division's testing work. We think the sampling methods followed there were valid and hold that such analyses constitute probative evidence as to the percentages of filling materials contained in the sample pillows.

We turn now to consideration of respondents' contentions that the pillows which were sources of the test samples should not be regarded as representative of respondents' production of those particular brands of pillows. It is true that the percentage of each filling material component of a particular pillow is not likely to correspond precisely to the proportions of down and feathers contained in the mixture from which the product was filled. This occurs because down and feathers have no uniformity or homogeneity. After cleaning of the raw stock, the constituents of the down and feather mass are sorted by a blowing or suction process and while it is reasonably practicable to segregate a high percentage of down, marked discrepancies occur in the feather classifications. Later, when the materials are blended in the mixing bin, gravity forces tend to separate the lighter down from the feathers and to separate light feathers from heavier ones. Thus, in the filling of large numbers of pillows, particularly under mechanical methods, the proportion of down and feathers afforded depends not only on the filling blend but also varies with other factors, one being the height in the bin from which the suction machine happens to be drawing filling. The filling material in the lower sections of a conventional sized bin suffices for a substantial number of pillows.

The foregoing considerations, however, are not primarily controlling to determination of the issues here, nor is it material that some of

the pillows filled during the course of the various "runs" in which the test pillows were processed may have contained larger proportions of down than the sample pillows. Controlling, however, is the circumstance that the latter did not contain the amounts of down represented on their labels and that the shortages in those respects substantially exceeded the tolerances recognized under Rule 3, subparagraph III. (a) of the Trade Practice Rules for the Feather and Down Products Industry, which rules, while not having the force and effect of law, represent the considered judgment of the Commission and the industry jointly as to the unfairness and the unlawfulness of the practices described in them. The tolerances recognized under the Rule are those not varying over 15% from the actual proportion of the weight of the entire mixture represented by each kind or type of filling.

Other exceptions are directed to the initial decision's conclusion as to the presence of second-hand feathers. The test data submitted by the witness called by counsel supporting the complaint indicated that second-hand goose feathers constituted 4.8% of the sample taken from one of respondents' King pillows, and 8% from the other. The reports submitted by the witness called by the respondents stated that the filling materials were apparently new materials. The feathers used in those pillows were obtained from European sources where it is apparently a common practice to mix previously used feathers with new feathers. While the amounts of second-hand feathers revealed under the Maryland tests tend to negate possibilities of intentional adulteration, they nevertheless correspond to those sometimes found in importations from Europe. In the circumstances here, including due regard for the extensive experience of the personnel performing those studies and their apparently superior qualifications, in the aggregate, over the respondents' expert witness, we deem the analyses reported on by the witness called by counsel supporting the complaint to be the more persuasive and entitled to the greater weight. Hence, we concur in the hearing examiner's conclusions that respondents have failed to disclose the second-hand feather contents of certain of their pillows.

Respondents additionally state that inasmuch as the alleged deficiencies in labeling pertain to but six pillows which were all secured from the same retailer, those matters were erroneously held below to constitute unfair and deceptive acts and practices. Under the Federal Trade Commission Act, however, it is not necessary for the proof to show a long succession of acts which are deceptive or unfair. It is more than sufficient that the practices challenged in this proceeding relate to pillows sold under three different brand names and that each

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of the labels was false in one or more respects and manifestly had the capacity and tendency to deceive. Furthermore, the pillows came from regular commercial channels and the record contains testimony indicating that they were apparently intact when received for laboratory examination.

The appeal also urges that the variations between the contents of the filling and respondents' labeling are unavoidable and have occurred notwithstanding respondents' exercise of due care. It is true that the variations between the filling materials of finished pillows and those deemed by respondents to be represented in their filling mixes will result, in instances, from matters over which the respondents have only partial control. These include unsolved technical problems relating to sorting and uniformity of mixes and others concerning alleged unethical practices of foreign sources of supply, and compliance with State bedding laws. The tolerances recognized in the Trade Practice Rules take cognizance of certain of these problems. The considerations emphasized by respondents in this connection, however, do not justify deceptive labeling or false statements respecting the essential nature of their products. We reject respondents' arguments that compliance with the order is impossible and are of the view that the protection of the public interest requires that we affirm the order contained in the initial decision.

Likewise considered have been respondents' additional objections to the initial decision, including their exceptions to the hearing examiner's rejection of certain of respondents' proposed findings and conclusions. The rulings objected to appear free from prejudicial error and respondents' exceptions are not being granted. The appeal accordingly is denied and the initial decision affirmed.

FINAL ORDER

The respondents having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having been heard on briefs and oral argument, and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It is ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.

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IN THE MATTER OF
NORTHERN FEATHER WORKS, INC., ET AL.ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6137. Complaint, Oct. 28, 1953—Decision, June 30, 1955*

Order requiring a manufacturer in Newark, N. J., to cease misrepresenting the feather and down content of its pillows on labels affixed thereto or otherwise.

Mr. Ames W. Williams for the Commission.

Thacher, Proffitt, Prizer, Crawley & Wood, of New York City, for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that the respondents have violated the provisions of the Federal Trade Commission Act by misrepresenting the contents of feather pillows which they manufacture and distribute in commerce.

After the filing of an answer, hearings were held, in which testimony and other evidence was presented, duly recorded and filed in the office of the Commission. By stipulation all the evidence in the companion feather cases was made a part of the record in this case, except so far as such evidence relates exclusively to the identification, contents and analyses of the feather samples in each of those cases.¹ Proposed findings of fact, conclusions and order have been submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. Respondent Northern Feather Works, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 31-39 Backus Street, Newark, N. J. Respondent Joseph P. Jespersen (erroneously designated in the complaint as Joseph P. Jespersen), an individual, is the president of said corporate respondent.

¹ The companion feather cases are: Docket 6132, National Feather & Down Company; Docket 6133, The L. Buchman Co., Inc., et al.; Docket 6134, Burton-Dixie Corp., et al.; Docket 6135, N. Sumergrade & Sons, et al.; Docket 6137, Northern Feather Works, Inc., et al.; Docket 6161, The Salisbury Co., et al.; Docket 6188, Globe Feather & Down Co., et al.; and Docket 6208, Sanitary Feather & Down Co., Inc., et al.

2. Respondents are now, and for more than one year last past have been, engaged in the manufacture and sale of pillows, and other products, designated as feather and down products, to dealers for resale to the public. Said respondents have caused and now cause said products, when sold, to be shipped from their place of business to purchasers thereof located in various other States of the United States.

Said respondents maintain, and at all times mentioned herein have maintained, a course of trade in said feather and down products, in commerce, among and between the various States of the United States.

3. In the course and conduct of their aforesaid business, said respondents are now, and have been, in substantial competition in commerce with other corporations, and with firms, partnerships, and individuals engaged in the sale and distribution of feather and down products, including pillows.

4. In the course and conduct of their aforesaid business, respondents have caused labels to be affixed to certain of their pillows purporting to state and set out the kinds or types and proportions thereof of filling material contained therein, and have similarly identified in invoices the composition of such filling material. On these labels and invoices, respondents have made representations with respect to their pillows designated "Victor," as follows:

All New Material consisting of 50% Crushed Duck Feathers
50% Crushed Chicken Feathers,

and with respect to respondents' pillows, designated "Olive,"

All New Material consisting of Crushed White Goose
Feathers,

and with respect to respondents' baby pillows,

All New Material consisting of Down.

5. Through the use of the aforesaid statements, said respondents have represented that the filling material in the pillows designated "Victor" is composed of 50% new crushed duck feathers and 50% new crushed chicken feathers; that the filling material of the pillows designated "Olive" is composed entirely of new crushed white goose feathers; and that the filling material of respondents' baby pillows is composed entirely of new down.

6. Two pillows of each of the above-mentioned designations were procured by a representative of the Commission at the same time from the same retail dealer, and were introduced in evidence. The contents of these pillows were analyzed by an expert for the Commission and by an expert for the respondents. The analyses showed as follows:

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Pillows designated "Victor"

	Pillow 1 (by weight)	Pillow 2 (by weight)	Computed average
By the Commission's expert:	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Duck feathers.....	41.8)	38.2)	47.8
Duck fibers.....	9.6)51.4	6.0)44.2	
Chicken feathers.....	35.4)	43.5)	47.0
Chicken fibers.....	8.2)43.6	6.9)50.4	
Pith and scale.....	5.0	5.4	5.2
Amount analyzed.....	<i>Grams</i> 3.746	Not shown	
By respondents' expert:	<i>Percent</i>		
Crushed feathers.....	91.7)	76.9)	92.75
Feather fibers.....	4.7)96.4	12.2)89.1	
Down.....	1.0	2.5	1.75
Waste.....	2.6	8.4	5.5

Pillows designated "Olive"

	<i>Percent</i>	<i>Percent</i>	
By the Commission's expert:	<i>Percent</i>	<i>Percent</i>	
Goose feathers.....	48.0)	61.2)	82.6
Goose fibers.....	28.4)76.4	21.4)82.6	
Chicken feathers.....	7.3	6.9	
Chicken fibers.....	4.3	2.4	
Pith and scale.....	12.0	8.1	
Amount analyzed.....	<i>Grams</i> 3.3475	<i>Grams</i> (inc. quills) 3.440	
By respondents' expert:	<i>Percent</i>		
Crushed feathers.....	76.9)		89.1
Feather fiber.....	12.2)89.1		
Down.....	2.5		
Waste.....	8.4		

Baby pillows

	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
By the Commission's expert:	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Down.....	58.8)	47.0)	69.3
Downy fiber.....	15.3)74.1	17.5)64.5	
New waterfowl feathers.....	14.8	15.5	15.15
Second-hand waterfowl feathers.....	2.4	2.1	2.25
New chicken feathers.....	2.7	.6	1.65
Second-hand chicken feathers.....	1.1	.2	.65
Feather fiber.....	4.2	17.0	10.6
Pith and scale.....	.7	.1	.4
By respondents' expert:			
Down.....	95.0	93.7	94.35
Feathers.....	5.0	6.3	5.65

7. In determining whether or not the representations as to the pillow contents are false within the meaning of the Act, it is helpful to have an understanding of the manufacturing methods used in the feather industry.

(1) In general, three sources of feather supplies are or have been available:

(a) *The American Source*

First, there are the domestic feathers, which ordinarily are properly labeled, but are not available in sufficient quantities to meet the industry's requirements.

(b) *The European Source*

Second, there is the European source of supply from which feathers are procured, but from this source it is impossible to get unadulterated, new stock, because of a common practice of mixing second-hand feathers with new. European feathers are purchased on the basis of samples, and each manufacturer must judge from these samples the quality and type of feathers available to him.

(c) *The Oriental Source*

The third source is the Orient, from which adequate supplies may be had; but in the Orient there is no careful sorting, and a bale of feathers purchased as goose feathers may contain substantial quantities of duck or chicken feathers. These feathers are usually purchased through importers and commission merchants who submit offers to manufacturers. A typical offer will show as available for purchase by respondents or other pillow manufacturers 100 bales of 200 pounds each at 90¢ per pound, the feathers being Formosan grey goose feathers, 90% clean, maximum 20% duck feathers, 5% chicken feathers, 3% quills, minimum 30% down. Oriental feathers are purchased on the basis of these representations, without sampling.

(2) After raw feathers are procured by the manufacturer they are thoroughly washed, dried and fluffed up. Then they are sorted by means of a machine which separates the various constituents of the feather bulk by a blowing or suction process. The feathers are put through the sorting machine in lots of fifty pounds. The down, being lighter, is more readily blown over the baffle in the sorting machine, and passes into its particular bin or container. Then follow the downy-type feathers, and the various other feathers, in appropriate classifications according to weight or specific gravity, each into a specially prepared container. By this process it is reasonably practical to segregate a high percentage of down, but in down, as in the other classifications, there are always some feathers which are inappropriate to the particular classification. In the downy-type feather receptacle will be some pure down and some heavier-type feathers. Similar discrepancies will occur in each of the other classifications. It is impossible to separate feathers according to type of fowl or to remove inferior or second-hand feathers. The only possible separations are those which can be obtained by the application of the principles of specific gravity. Feathers of the same degree of lightness will go over the baffle at the same time, irrespective of the kind

of fowl from which they may have been plucked, or whether they are new or used.

(3) The down and feathers thus sorted and placed in separate containers have no uniformity or homogeneity; the heavier feathers will be at the bottom, the down at the top of each container. Although there be a vigorous agitation of the feathers and down in a storage bin, the resulting mixture will at no time be of uniform content throughout, and no mixture of feathers and down is or will remain uniform or constant throughout its bulk. When a pillow order is to be made up, the manufacturer puts into the filling bin the number of bags of each type of feather requisite to obtain the desired mixture. The filling bins usually are approximately 5 x 10 x 12 feet in size, and hold up to 350 or 400 pounds of feathers. Two or three hundred pairs of pillows may be filled out of one mixture, and it is not unusual for a manufacturer to fill from twelve to fourteen hundred pairs of pillows during a day.

(4) During the filling process, the feathers are agitated by means of wooden forks, and the pillows are filled by suction. The proportion of down and feathers that go into each pillow depends partly, of course, upon the filling-bin mixture, but also to a large extent upon what part of the bin the filling suction reaches. Even with the exercise of the greatest care, pillows filled from the same bin will vary in content. Those being filled from the bottom of the bin will contain the heavier feathers, and the greater amounts of pith, scale, and other extraneous matter. The exact amount or proportion of down and feathers going into any particular pillow cannot be controlled by mechanical means. The expert whose testimony was presented in support of the complaint stated that the contents of pillows filled from the same bin will vary as much as 30%; that the same percentage will not be found in any two pillows; that the mixture in each pillow will vary from the mixture in the filling bin; that if any one pillow should contain exactly the same percentage of feathers and down as that originally placed in the filling bin, it would be pure accident; and that the closest practical indication of the contents of a pillow product of a manufacturer and the correctness of its labeling will result if several different pillows are sampled, preferably pillows obtained at different times and places.

(5) The same difficulties arise in analyzing the contents of a single pillow. Except by pure accident, no two samples will have the same content; so there is no sure or positive method of measuring the contents of feather pillows with scientific accuracy, other than by taking all of the content out of the pillow and separating it into its com-

ponent elements, then weighing each element. Such a process is so completely impractical that, usually, a test is made by opening the pillow-ticking and taking samples from three different portions of the pillow. These samples are thoroughly mixed and a smaller testing sample, of which the analysis is to be made, is taken from this mixture. The expert who testified in support of the complaint selected three samples from the opening by inserting his hand and reaching to different portions of the pillow. Samples selected by the respondents were obtained by taking a small quantity of feathers from each of three openings in each pillow. The hearing examiner was present when respondents' samples were taken. As each opening was made in the pillow ticking, some down escaped, and as each withdrawal was made, more down escaped before the sample could be enclosed in a container; while the feathers, being heavier and bulkier, were easier to retain. No sample can be exactly representative of the original content of the pillow, just as the content of no one pillow can be exactly representative of the original mixture in the filling bin. The average sample for analysis weighed approximately 3 grams, representing between $\frac{1}{4}$ and $\frac{1}{2}$ of 1% of the contents of a pillow, and the appearance of a single heavy feather in a sample of this size would make as much as 4% difference in the final result. This method is far from satisfactory, and the resulting percentages are not conclusive.

(6) The crushing or curling process is a manner of giving a twist or curl to landfowl feathers, such as chicken and turkey, to increase their resiliency and tend to prevent their matting, and thus improve their quality for use as pillow-filling material. The same process is applied to waterfowl quill feathers (that is, feathers from the wings and tails of ducks and geese), which otherwise would not be suitable for pillow-filling material. A considerable amount of fiber, pith and scale result from the crushing, and are carried over into the filling mixture. As to utility, crushed landfowl feathers are better than crushed waterfowl feathers, and crushed turkey feathers are better than crushed chicken feathers.

The mixture of crushed feathers is made by weighing out the proper proportions of the various kinds of crushed feathers that are to be mixed, and taking alternate handfuls of feathers from the separate containers and throwing these into the hopper of the curling or crushing machine. Because of the nature of these larger feathers, they frequently go through the hopper in lumps, so that it is impossible to get a mixture with any degree of homogeneity. Despite agitation in mixing, slugs of chicken or turkey feathers and slugs of quill feathers will get into the pillows without ever being separated or mixed. The

label "Crushed Feathers," showing the types of feathers used, can indicate no more than that the mixture was made from the types or kinds of feathers stated on the label.

It is impossible to separate and analyze crushed feathers accurately. A pillow filled with crushed feathers is the cheapest product of the industry, and in the minds of the general public, there is very little distinction among the various kinds of crushed feathers, whether goose, duck, chicken or turkey. The expert who testified in support of the complaint indicated that pillows filled with crushed feathers are the least desirable of all pillows, and are the lowest class of pillows on the market. In his opinion, it is impractical to attempt to distinguish between the various types of crushed feathers in any batch of such pillows, and he suggested during the course of his tests for the Commission that no further pillows filled with crushed feathers be sent to him for analysis.

(7) On the basis of the foregoing, the conclusion is inescapable that as a practical matter, the contents of feather pillows cannot be accurately labeled. In fact, to require accurate labeling as to content, of a product such as feather pillows, which by nature, vary constantly and at random in content, is to require an impossibility. No manufacturer of feather pillows could comply with such a requirement except by analyzing the filling of each pillow individually. Obviously that is an impossible task. Incidentally, it points up the dangers involved in attempting to reach a conclusion as to pillow content on the basis of testing two pillows out of a batch that may have included one hundred or two hundred pairs of pillows.

(8) Despite these facts, however, some 28 States have labeling requirements with which pillow manufacturers must comply; and the Federal Trade Commission, on April 26, 1951, promulgated Trade Practice Rules for the Feather and Down Products Industry, which undertake to interpret the Act and express the Commission's policy with respect to the practices complained of in this proceeding. Although these Rules are not binding upon the hearing examiner, they should be given careful consideration in applying the law to the facts of this proceeding. The pertinent parts of those Rules applicable thereto are as follows:

RULE 3—IDENTIFICATION AND DISCLOSURE OF KIND AND TYPE OF FILLING MATERIAL
IN INDUSTRY PRODUCTS

I. In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to misrepresent or deceptively conceal the identity of the kind or type of filling material contained in any of such products, or of the kinds or types, and proportions of each, when the filling material is a mixture

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of more than one kind or type. Such identification and disclosure shall be made by tag or label securely affixed to the outside covering of each product and in invoices and all advertising and trade promotional literature relating to the product; and when the filling material is a mixture of more than one kind or type, each kind and type shall either be listed in the order of its predominance by weight, or be listed with an accompanying disclosure of the fraction or percentage by weight of the entire mixture which it represents.

II. Identification of the kind and type of feather and down stock by use of any of the terms listed and defined below will be considered proper when in accord with the definition set forth for such term:

Definitions:

(a) *Down:* The undercoating of waterfowl, consisting of clusters of the light, fluffy filaments growing from one quill point but without any quill shaft.

(b) *Down fiber:* The barbs of down plumes separated from the quill points.

(c) *Waterfowl feathers:* Goose feathers, duck feathers, or any mixture of goose and duck feathers.

(d) *Feathers (or Natural Feathers):* Bird and fowl plumage having quill shafts and barbs and which has not been processed in any manner other than by washing, dusting, and sterilizing.

(e) *Quill feathers (or Quills):* Wing feathers or tail feathers or any mixture of wing and tail feathers.

(f) *Crushed feathers:* Feathers which have been processed by a crushing or curling machine which has changed the original form of the feathers without removing the quill.

* * * * *

(h) *Feather fiber:* The barbs of feathers which have been completely separated from the quill shaft and any aftershaft and which are in nowise joined or attached to each other.

* * * * *

(j) *Damaged feathers:* Feathers, other than crushed, chopped, or stripped, which are broken, damaged by insects, or otherwise materially injured.

III. *Tolerance:* (a) Subject to the restrictions and limitations hereinafter set forth, the filling material of an industry product may be represented as being of but one kind or type when 85% of the weight of all filling material contained in the product is of the represented kind or type; or may be represented as being of a mixture of two or more kinds or types with accompanying disclosure of a fraction or percentage of the weight of the entire mixture represented by each if the fraction or percentage shown is not at variance with the actual proportion of the weight of the entire mixture represented by each such kind or type by more than 15% of the stated fraction or percentage. (The tolerance provided for in this paragraph III is to be understood as being an allowance for error and as not embracing any intentional adulteration.)

Limitations and Restrictions

(b) When the filling material of an industry product is represented, directly or indirectly, as being wholly of down, any proportion within the tolerance percentage provided for in (a) above which is not down shall consist principally of down fiber and/or small, light, and fluffy waterfowl feathers, shall contain no quill feathers, crushed feathers, or chopped feathers, and shall not contain

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damaged feathers, quill pith, quill fragments, trash, or any matter foreign to feather and down stock in excess of 2% by weight of the filling material contained in the product or which in the aggregate exceeds 5% of such weight.

* * * * *

(e) When the filling material of an industry product is represented, directly or indirectly, as being wholly of a mixture of down and feathers, or of down and more than one kind or type of feathers, or of feathers of more than one kind or type, any proportion, or the aggregate of any proportions, of the filling material of the product at variance with the representation, but within the tolerance percentage provided for in (a) above, shall not contain quill pith, quill fragments, trash, or any matter foreign to feather and down stock in excess of 2% by weight of the filling material in the product or which in the aggregate exceeds 5% of such weight; and, unless nondeceptively disclosed in the representation, not in excess of 5% by weight of the filling material of the product shall consist of crushed feathers, chopped feathers, quill feathers, or damaged feathers.

Note.—It is the consensus of the industry that determination as to whether any representation is violative of the provisions of this Rule should be based on an average of the results of tests of at least two products of the same type when same are readily available for testing, * * *.

RULE 5—SECOND-HAND FEATHERS, DOWN, AND OTHER COMPONENTS

To offer for sale, sell, or distribute any industry product containing any component which has previously been used in any product, or used for any purpose, without clearly disclosing that fact in describing, advertising, labeling, invoicing and selling such product, and in all representations concerning the product, is an unfair trade practice. It is likewise an unfair trade practice to misrepresent or deceptively conceal the type, kind, or amount of such components, or to use with reference to said products descriptive words, phrases, labels, or other representations which have the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers concerning the effect on said material of such prior use or concerning the type, extent, method, or effect of any reprocessing, renovation, or reesterilization of such material.

The Rules further provide that samples of equal weight and size be drawn from at least three different locations in the product; that such samples be thoroughly mixed; and that a test be made of not less than 3 grams of the mixture. Application of the law and a reasonable interpretation of these Rules to the facts of this proceeding results in the following:

Conclusions:

I. The test procedures adopted and followed by the experts who made the analyses of the pillow contents in this proceeding comply with the Trade Practice Rules.

II. Respondents' "Victor" pillows contain crushed duck feathers and crushed chicken feathers in substantially the same proportions as indicated on the label. This conclusion is reached by combining the

fiber with the crushed feather content, which, according to the testimony of the experts, is proper. Respondents' "Olive" pillows likewise contain crushed goose feathers substantially within the allowable tolerance if all the constituents of crushed feathers are included, to wit, crushed feathers, goose feather fibers, pith, scale and quills—all of which are the normal resultants of the crushing process.

Furthermore, respondents' pillows designated "Victor" and "Olive" are crushed-feather pillow products, and there is no reliable, probative and substantial evidence to show that there is any public interest either in the matter of the labeling or price-listing of such pillows, or in distinguishing between the various kinds of crushed feather content thereof. It is therefore concluded that no misrepresentation and no violation of the Act has been shown insofar as respondents' "Victor" and "Olive" pillows are concerned.

III. Respondents' two baby pillows are represented as containing all new down. The test results do not justify such a representation. The careful and obviously complete separation performed by the Commission's expert shows an average down content of 69.3% if downy fiber is included as down. While there is justification for including some downy fiber as down content, the proportion of downy fiber shown in the analysis is excessive, over 5%, and the 69.3% average is therefore unduly weighted in respondents' favor.

The analyses made by respondents' expert were much less detailed, hence less conclusive; but, assuming the results are of equal validity with those shown by the Commission's expert, and using the weighted one, 69.3%, with the 94.35% average reached by respondents' expert, the down content of the two pillows as disclosed by the average of all four tests is 81.825%. This is slightly more than 3% below the 85% down content permissible, tolerance being considered.

The Commission's expert shows a total average fiber content (downy fiber and feather fiber) of 27.0%; new and second-hand waterfowl feathers, 17.40%; new and second-hand chicken feathers, 2.30%. These factors militate against extending any further conclusions to respondents as to these particular pillows.

Respondents urge that two baby pillows containing only a small amount of filling material, estimated at from 8 ounces to 19 ounces, cannot be taken as representative of respondents' baby pillows or of the contents of the bin from which they were filled. Accepting that argument at face value, the facts must be recognized that the representations are made on each separate pillow, and there is a strong presumption that an individual purchaser at retail would seldom buy more than one or two baby pillows at any one time. Such a purchaser would be

interested in the content of the pillows which he was purchasing, not in the content of the bin from which they were filled, nor in the average content of all the pillows in any given batch. One of the purposes of the Act is to protect the consumer, and that can be done only if each pillow is properly labeled. It must be concluded, therefore, that respondents' baby pillows are not properly labeled, and that the representations on the labels attached to those pillows are false and deceptive.

IV. The labeling and representations hereinabove found to be false (Conclusion III) constitute unfair trade practices, are to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce.

V. The use by respondents of the false and misleading statements on the labels affixed to their pillows has had and now has the tendency and capacity to mislead and deceive dealers and the purchasing public into the erroneous and mistaken belief that such statements are true, and to induce the purchase of substantial quantities of said pillows because of such mistaken and erroneous belief.

VI. This proceeding is found to be in the public interest, and the following order is issued:

It is ordered, That respondents Northern Feather Works, Inc., a corporation, and Joseph P. Jespersen (erroneously designated in the complaint as Joseph P. Jesperson) individually, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' feather and down products, do forthwith cease and desist from:

Misrepresenting in any manner, or by any means, directly or by implication, the identity of the kind or type of filling material contained in any such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type.

ON APPEAL FROM INITIAL DECISION

By SECREST, Commissioner:

This is one of a group of ten cases, all tried and considered together, involving the use on labels of allegedly false and deceptive representations with respect to the filling materials contained in feather and down pillows. The hearing examiner having filed his initial decision in which he found that the respondents have in fact mislabeled certain of their pillows and in which he included an order directing them to forthwith cease and desist from such practices, the respondents ap-

pealed. The case was heard on the appeal brief and opposing brief filed by counsel supporting the complaint and oral arguments of counsel.

Except as to the result of the analyses of the different pillows used as exhibits, as to which the record in each of these cases is specific and definite, this case is not unlike that in the matter of Burton-Dixie Corporation, et al., Docket No. 6134, in which the Commission has written an opinion setting forth in some detail its views on the issues involved. In view of this similarity between the cases, the opinion in that case is equally applicable here except as noted hereinafter, and, for the reasons stated, the Commission is of the view that the hearing examiner's findings and conclusions that the respondent corporation has misrepresented the contents of certain of its pillows in violation of the Federal Trade Commission Act are correct.

The initial decision dismissed the charges of mislabeling as they pertained to certain other pillows including those sold under the name "Olive." The filling materials of the latter pillows were represented on labels as new and consisting of crushed white goose feathers. Analyses of samples of filling material from two of those pillows revealed an aggregate of 11.6% chicken feathers and chicken feather fiber in one and 9.3% in the other. The pillow samples also contained an average of 10% pith and scale and the remainder of their contents comprised crushed goose feathers and fibers. Pith and scale are natural to crushed feather products and the preponderance of the pith and scale present there undoubtedly originated with the crushed goose feathers. The chicken feather and fiber content being proportionately small in relation to the goose feather material, the situation presented with respect to the "Olive" pillows is to be distinguished from that in the Burton-Dixie Corporation case in which we have reversed the hearing examiner's finding that public interest is lacking with respect to the labeling of the crushed feather products there considered.

The order to cease and desist which is contained in the initial decision is directed not only against the corporate respondent but also against its president in his individual capacity. The president of the corporation is P. Jespersen who was erroneously named in the complaint as Joseph P. Jespersen. Since the proof was deficient as to his participation in the practices engaged in by the respondent corporation, the charges of the complaint are accordingly dismissed as to him and the initial decision is so modified hereby.

The appeal is granted as to respondent P. Jespersen and denied as to respondent Northern Feather Works, Inc., and the initial decision as it relates to the respondent corporation is affirmed.

FINAL ORDER

The respondents having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having been heard on briefs and oral argument, and the Commission having rendered its decision granting the appeal of respondent P. Jespersen and dismissing the proceeding as to him and denying the appeal of respondent Northern Feather Works, Inc., and affirming the initial decision as thus modified:

It is ordered, That the respondent, Northern Feather Works, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the aforesaid initial decision.

IN THE MATTER OF
THE SALISBURY COMPANY ET AL.

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

Docket 6161. Complaint, Feb. 2, 1954—Decision, June 30, 1955

Order requiring a manufacturer in Minneapolis, Minn., to cease misrepresenting the down and feather content of its pillows on labels affixed thereto or otherwise.

Mr. Ames W. Williams for the Commission.

Faegre & Benson, of Minneapolis, Minn., and *Davidson, Cohen & Zelkin*, of New York City, for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that the respondents have violated the provisions of the Federal Trade Commission Act by misrepresenting the contents of feather pillows which they manufacture and distribute in commerce.

After the filing of an answer, hearings were held, in which testimony and other evidence was presented, duly recorded and filed in the office of the Commission. By stipulation all the evidence in the companion feather cases was made a part of the record in this case, except so far as such evidence relates exclusively to the identification, contents and analyses of the feather samples in each of those cases.¹ Proposed findings of fact, conclusions and order have been submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. Respondent, The Salisbury Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1042 Second Avenue, S. E., Minneapolis, Minnesota. Respondents W. R. Salisbury, E. D. Salisbury, Fred Salisbury and Maurice E. Salisbury are the officers of said corporate respondent.
2. Respondents are now, and for more than one year last past have been, engaged in the manufacture and sale of pillows, and other prod-

¹ The Companion feather cases are: Docket 6132, National Feather & Down Company; Docket 6133, The L. Buchman Co., Inc., et al.; Docket 6134, Burton-Dixie Corp., et al.; Docket 6135, N. Sumergrade & Sons, et al.; Docket 6137, Northern Feather Works, Inc., et al.; Docket 6161, The Salisbury Co., et al.; Docket 6188, Globe Feather & Down Co., et al.; and Docket 6208, Sanitary Feather & Down Co., Inc., et al.

ucts, designated as feather and down products, to dealers for resale to the public. Said respondents have caused and now cause said products, when sold, to be shipped from their place of business to purchasers thereof located in various other States of the United States.

Said respondents maintain, and at all times mentioned herein have maintained, a course of trade in said feather and down products, in commerce, among and between the various States of the United States.

3. In the course and conduct of their aforesaid business, said respondents are now, and have been, in substantial competition in commerce with other corporations, and with firms, partnerships, and individuals engaged in the sale and distribution of feather and down products, including pillows.

4. In the course and conduct of their aforesaid business, respondents have caused labels to be affixed to certain of their pillows purporting to state and set out the kinds or types and proportions thereof of filling material contained therein. On these labels, respondents have made representations with respect to their pillows designated "Crown," as follows:

All New Material Consisting of Goose Feathers;

and with respect to their pillows designated "Royal Slumber":

All New Material Consisting of Down;

and with respect to their pillows designated "Swan Down":

All New Material Consisting of White Goose Down;

and with respect to their pillows designated "Premium":

All New Material Consisting of 50% Goose Down and 50% Downy Feathers.

5. Through the use of the aforesaid statements, said respondents have represented that the filling material in the pillows designated "Crown" is composed wholly of new goose feathers; that the filling material of the pillows designated "Royal Slumber" is composed wholly of new down; that the filling material of the pillows designated "Swan Down" is composed wholly of new white goose down; and that the filling material of the pillows designated "Premium" is composed of 50% new goose down and 50% new downy feathers.

6. Two pillows of each of the above-mentioned designations were procured by a representative of the Commission at the same time from the same retail dealer, and were introduced in evidence. The contents of these pillows were analyzed by an expert for the Commission; respondents made no analyses thereof. The analyses made by the Commission's expert showed as follows:

Decision

51 F. T. C.

Pillows designated "Crown"

	Pillow 1 (by weight)	Pillow 2 (by weight)	Computed average
	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Down.....	7.7	4.4	5.55
Goose feathers.....	19.8	21.2	20.5
Damaged feathers.....	9.4	14.2	11.8
Second-hand feathers.....	18.1	10.9	14.5
Chicken feathers.....	5.2	3.1	4.15
Duck feathers.....	1.4	None	.7
Fiber.....	35.4	43.7	39.55
Pith and scale.....	3.0	2.5	2.75
	<i>Grams</i>	<i>Grams</i>	
Amount analyzed.....	4.531	5.375	

Pillows designated "Royal Slumber"

	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Down.....	70.0	68.0	69.0
Feathers (small).....	19.0	17.4	18.2
Damaged feathers (small).....	7.0	8.3	7.65
Fiber.....	2.6	5.3	3.95
Pith and scale.....	1.4	1.0	1.2
	<i>Grams</i>	<i>Grams</i>	
Amount analyzed.....	3.483	3.363	

Pillows designated "Swan Down"

	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Down.....	74.3	67.9	71.1
Feathers.....	15.6	18.7	17.15
Fibers.....	8.0	11.2	9.6
Pith and scale.....	2.1	2.2	2.15
	<i>Grams</i>	<i>Grams</i>	
Amount analyzed.....	3.2490	3.270	

Pillows designated "Premium"

	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Down.....	27.7	23.3	25.5
Goose feathers.....	23.4	24.3	23.85
Second-hand feathers.....	17.4	10.4	13.9
Damaged feathers.....	9.4	9.3	9.35
Chicken feathers.....	1.6	0.7	1.15
Duck feathers.....	.9	None	.45
Fiber.....	18.1	30.4	24.25
Pith and scale.....	1.5	1.6	1.55
	<i>Grams</i>	<i>Grams</i>	
Amount analyzed.....	4.900	5.173	

7. In determining whether or not the representations as to the pillow contents are false within the meaning of the Act, it is helpful to have an understanding of the manufacturing methods used in the feather industry.

(1) In general, three sources of feather supplies are or have been available:

(a) *The American Source*

First, there are the domestic feathers, which ordinarily are properly labeled, but are not available in sufficient quantities to meet the industry's requirements.

(b) *The European Source*

Second, there is the European source of supply from which feathers are procured, but from this source it is impossible to get unadulterated, new stock, because of a common practice of mixing second-hand feathers with new. European feathers are purchased on the basis of samples, and each manufacturer must judge from these samples the quality and type of feathers available to him.

(c) *The Oriental Source*

The third source is the Orient, from which adequate supplies may be had; but in the Orient there is no careful sorting, and a bale of feathers purchased as goose feathers may contain substantial quantities of duck or chicken feathers. These feathers are usually purchased through importers and commission merchants who submit offers to manufacturers. A typical offer will show as available for purchase by respondents or other pillow manufacturers 100 bales of 200 pounds each at 90¢ per pound, the feathers being Formosan grey goose feathers, 90% clean, maximum 20% duck feathers, 5% chicken feathers, 3% quills, minimum 30% down. Oriental feathers are purchased on the basis of these representations, without sampling.

(2) After raw feathers are procured by the manufacturer they are thoroughly washed, dried and fluffed up. Then they are sorted by means of a machine which separates the various constituents of the feather bulk by a blowing or suction process. The feathers are put through the sorting machine in lots of fifty pounds. The down, being lighter, is more readily blown over the baffle in the sorting machine, and passes into its particular bin or container. Then follow the downy-type feathers, and the various other feathers, in appropriate classifications according to weight or specific gravity, each into a specially prepared container. By this process it is reasonably practical to segregate a high percentage of down, but in down, as in the other classifications, there are always some feathers which are inappropriate to the particular classification. In the down-type feather receptacle will be some pure down and some heavier-type feathers. Similar discrepancies will occur in each of the other classifications.

It is impossible to separate feathers according to type of fowl or to remove inferior or second-hand feathers. The only possible separations are those which can be obtained by the application of the principles of specific gravity. Feathers of the same degree of lightness will go over the baffle at the same time, irrespective of the kind of fowl from which they may have been plucked, or whether they are new or used.

(3) The down and feathers thus sorted and placed in separate containers have no uniformity or homogeneity; the heavier feathers will be at the bottom, the down at the top of each container. Although there be a vigorous agitation of the feathers and down in a storage bin, the resulting mixture will at no time be of uniform content throughout, and no mixture of feathers and down is or will remain uniform or constant throughout its bulk. When a pillow order is to be made up, the manufacturer puts into the filling bin the number of bags of each type of feather requisite to obtain the desired mixture. The filling bins usually are approximately 5 x 10 x 12 feet in size, and hold up to 350 or 400 pounds of feathers. Two or three hundred pairs of pillows may be filled out of one mixture, and it is not unusual for a manufacturer to fill from twelve to fourteen hundred pairs of pillows during a day.

(4) During the filling process, the feathers are agitated by means of wooden forks, and the pillows are filled by suction. The proportion of down and feathers that go into each pillow depends partly, of course, upon the filling-bin mixture, but also to a large extent upon what part of the bin the filling suction reaches. Even with the exercise of the greatest care, pillows filled from the same bin will vary in content. Those being filled from the bottom of the bin will contain the heavier feathers, and the greater amounts of pith, scale, and other extraneous matter. The exact amount or proportion of down and feathers going into any particular pillow cannot be controlled by mechanical means. The expert whose testimony was presented in support of the complaint stated that the contents of pillows filled from the same bin will vary as much as 30%; that the same percentage will not be found in any two pillows; that the mixture in each pillow will vary from the mixture in the filling bin; that if any one pillow should contain exactly the same percentage of feathers and down as that originally placed in the filling bin, it would be pure accident; and that the closest practical indication of the contents of a pillow product of a manufacturer and the correctness of its labeling will result if several different pillows are sampled, preferably pillows obtained at different times and places.

(5) The same difficulties arise in analyzing the contents of a single pillow. Except by pure accident, no two samples will have the same content; so there is no sure or positive method of measuring the contents of feather pillows with scientific accuracy, other than by taking all of the content out of the pillow and separating it into its component elements, then weighing each element. Such a process is so completely impractical that, usually, a test is made by opening the pillow-ticking and taking samples from three different portions of the pillow. These samples are thoroughly mixed and a smaller testing sample, of which the analysis is to be made, is taken from this mixture. The expert who testified in support of the complaint selected three samples from the opening by inserting his hand and reaching to different portions of the pillow. The average sample for analysis weighed approximately 3 grams, representing between $\frac{1}{4}$ and $\frac{1}{2}$ of 1% of the contents of a pillow, and the appearance of a single heavy feather in a sample of this size would make as much as 4% difference in the final result. This method is far from satisfactory, and the resulting percentages are not conclusive.

(6) The crushing or curling process is a manner of giving a twist or curl to landfowl feathers, such as chicken and turkey, to increase their resiliency and tend to prevent their matting, and thus improve their quality for use as pillow-filling material. The same process is applied to waterfowl quill feathers (that is, feathers from the wings and tails of ducks and geese), which otherwise would not be suitable for pillow-filling material. A considerable amount of fiber, pith and scale result from the crushing, and are carried over into the filling mixture. As to utility, crushed landfowl feathers are better than crushed waterfowl feathers, and crushed turkey feathers are better than crushed chicken feathers.

The mixture of crushed feathers is made by weighing out the proper proportions of the various kinds of crushed feathers that are to be mixed, and taking alternate handfuls of feathers from the separate containers and throwing these into the hopper of the curling or crushing machine. Because of the nature of these larger feathers, they frequently go through the hopper in lumps, so that it is impossible to get a mixture with any degree of homogeneity. Despite agitation in mixing, slugs of chicken or turkey feathers and slugs of quill feathers will get into the pillows without ever being separated or mixed. The label "Crushed Feathers," showing the types of feathers used, can indicate no more than that the mixture was made from the types or kinds of feathers stated on the label.

It is impossible to separate and analyze crushed feathers accurately. A pillow filled with crushed feathers is the cheapest product of the industry, and in the minds of the general public, there is very little distinction among the various kinds of crushed feathers, whether goose, duck, chicken or turkey. The expert who testified in support of the complaint indicated that pillows filled with crushed feathers are the least desirable of all pillows, and are the lowest class of pillows on the market. In his opinion, it is impractical to attempt to distinguish between the various types of crushed feathers in any batch of such pillows, and he suggested during the course of his tests for the Commission that no further pillows filled with crushed feathers be sent to him for analysis.

(7) On the basis of the foregoing, the conclusion is inescapable that as a practical matter, the contents of feather pillows cannot be accurately labeled. In fact, to require accurate labeling as to content, of a product such as feather pillows, which, by nature, vary constantly and at random in content, is to require an impossibility. No manufacturer of feather pillows could comply with such a requirement except by analyzing the filling of each pillow individually. Obviously that is an impossible task. Incidentally, it points up the dangers involved in attempting to reach a conclusion as to pillow content on the basis of testing two pillows out of a batch that may have included one hundred or two hundred pairs of pillows.

(8) Despite these facts, however, some 28 States have labeling requirements with which pillow manufacturers must comply; and the Federal Trade Commission, on April 26, 1951, promulgated Trade Practice Rules for the Feather and Down Products Industry, which undertake to interpret the Act and express the Commission's policy with respect to the practices complained of in this proceeding. Although these Rules are not binding upon the hearing examiner, they should be given careful consideration in applying the law to the facts of this proceeding. The pertinent parts of those Rules applicable thereto are as follows:

**RULE 3—IDENTIFICATION AND DISCLOSURE OF KIND AND TYPE OF FILLING MATERIAL
IN INDUSTRY PRODUCTS**

I. In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to misrepresent or deceptively conceal the identity of the kind or type of filling material contained in any of such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type. Such identification and disclosure shall be made by tag or label securely affixed to the outside covering of each product and in invoices and all advertising and trade promotional literature relating to the product; and when the filling material is a mixture of more than one kind or

type, each kind and type shall either be listed in the order of its predominance by weight, or be listed with an accompanying disclosure of the fraction or percentage by weight of the entire mixture which it represents.

II. Identification of the kind and type of feather and down stock by use of any of the terms listed and defined below will be considered proper when in accord with the definition set forth for such term:

Definitions:

(a) Down: The undercoating of waterfowl, consisting of clusters of the light, fluffy filaments growing from one quill point, but without any quill shaft.

(b) Down fiber: The barbs of down plumes separated from the quill points.

(c) Waterfowl feathers: Goose feathers, duck feathers, or any mixture of goose and duck feathers.

(d) Feathers (or Natural Feathers): Bird or fowl plumage having quill shafts and barbs and which has not been processed in any manner other than by washing, dusting, and sterilizing.

(e) Quill feathers (or Quills): Wing feathers or tail feathers or any mixture of wing and tail feathers.

(f) Crushed feathers: Feathers which have been processed by a crushing or curling machine which has changed the original form of the feathers without removing the quill.

* * * * *

(h) Feather fiber: The barbs of feathers which have been completely separated from the quill shaft and any aftershaft and which are in nowise joined or attached to each other.

* * * * *

(j) Damaged feathers: Feathers, other than crushed, chopped, or stripped, which are broken, damaged by insects, or otherwise materially injured.

III. Tolerance: (a) Subject to the restrictions and limitations hereinafter set forth, the filling material of an industry product may be represented as being of but one kind or type when 85% of the weight of all filling material contained in the product is of the represented kind or type; or may be represented as being of a mixture of two or more kinds or types with accompanying disclosure of a fraction or percentage of the weight of the entire mixture represented by each if the fraction or percentage shown is not at variance with the actual proportion of the weight of the entire mixture represented by each such kind or type by more than 15% of the stated fraction or percentage. (The tolerance provided for in this paragraph III is to be understood as being an allowance for error and as not embracing any intentional adulteration.)

Limitations and Restrictions

(b) When the filling material of an industry product is represented, directly or indirectly, as being wholly of down, any proportion within the tolerance percentage provided for in (a) above which is not down shall consist principally of down fiber and/or small, light, and fluffy waterfowl feathers, shall contain no quill feathers, crushed feathers, or chopped feathers, and shall not contain damaged feathers, quill pith, quill fragments, trash, or any matter foreign to feather and down stock in excess of 2% by weight of the filling material contained in the product, or which in the aggregate exceeds 5% of such weight.

* * * * *

(e) When the filling material of an industry product is represented, directly or indirectly, as being wholly of a mixture of down and feathers, or of down and more than one kind or type of feathers, or of feathers of more than one kind or type, any proportion, or the aggregate of any proportions, of the filling material of the product at variance with the representation, but within the tolerance percentage provided for in (a) above, shall not contain quill pith, quill fragments, trash, or any matter foreign to feather and down stock in excess of 2% by weight of the filling material in the product or which in the aggregate exceeds 5% of such weight; and, unless nondeceptively disclosed in the representation, not in excess of 5% by weight of the filling material of the product shall consist of crushed feathers, chopped feathers, quill feathers, or damaged feathers.

Note.—It is the consensus of the industry that determination as to whether any representation is violative of the provisions of this Rule should be based on an average of the results of tests of at least two products of the same type when same are readily available for testing, * * *.

RULE 5—SECOND-HAND FEATHERS, DOWN, AND OTHER COMPONENTS

To offer for sale, sell, or distribute any industry product containing any component which has previously been used in any product, or used for any purpose, without clearly disclosing that fact in describing, advertising, labeling, invoicing and selling such product, and in all representations concerning the product, is an unfair trade practice. It is likewise an unfair trade practice to misrepresent or deceptively conceal the type, kind, or amount of such components, or to use with reference to said products descriptive words, phrases, labels, or other representations which have the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers concerning the effect on said material of such prior use or concerning the type, extent, method, or effect of any reprocessing, renovation, or reesterilization of such material.

The Rules further provide that samples of equal weight and size be drawn from at least three different locations in the product; that such samples be thoroughly mixed; and that a test be made of not less than 3 grams of the mixture. Application of the law and a reasonable interpretation of these Rules to the facts of this proceeding results in the following:

Conclusions:

I. The test procedures adopted and followed by the expert who made the analyses of the pillow contents in this proceeding comply with the Trade Practice Rules.

II. The complaint charges that the respondents' representations as to the contents of their "Crown" pillows are false and deceptive in that "Crown" pillows contain substantial quantities of material other than new goose feathers, whereas the labels on these pillows represent that they contain all new goose feathers. This charge has been sustained beyond doubt by reliable, probative and substantial evidence.

Respondents submitted no evidence of any tests as to the contents of their pillows. An average of the two analyses made by the expert

whose testimony was presented to support the charges contained in the complaint shows that besides new goose feathers these pillows contained, among other elements, 14.5% second-hand feathers, 39.55% fiber, and 11.8% damaged feathers; the total goose-feather content which could clearly be considered new was 20.5%. Respondents' representations were, clearly, false and deceptive.

III. As to respondents' pillows designated "Royal Slumber," which were labeled as containing all new down, the average of the two analyses made by the expert whose testimony was presented to support the charges contained in the complaint shows that these pillows contained, in addition to 69% down, 18.2% small feathers and 7.65% damaged small feathers, with 3.95% fiber and 1.2% pith and scale. Ignoring these latter two components, there was a total of 25.85% small-feather content.

The reliable, probative and substantial evidence establishes the fact that these pillows were mislabeled, and that respondents' representations with respect to them were false and deceptive.

IV. As to respondents' pillows designated "Swan Down," which were labeled as containing all new white goose down, the average of the two analyses made by the expert whose testimony was presented to support the charges contained in the complaint shows that these pillows contained, in addition to 71.1% down, 17.15% feathers, 9.6% fibers and 2.15% pith and scale.

The reliable, probative and substantial evidence establishes the fact that these pillows were mislabeled, and that respondents' representations with respect to them were false and deceptive.

V. Respondents' pillows designated "Premium" were labeled as containing all new material consisting of 50% goose down and 50% downy feathers. The complaint charges that these representations were false and misleading in that these pillows contained substantially less than 50% of each of these elements, and that the pillows contained second-hand filling materials not disclosed on the labels.

The average of the two analyses made by the expert whose testimony was presented to support the charges contained in the complaint shows down content of these pillows to be 25.5%, goose feathers content 23.85%, damaged-feather content 9.35%, second-hand-feather content 13.9%, with 24.25% fiber and small percentages of chicken feathers, duck feathers, and pith and scale.

The down content is clearly below the represented amount; the record shows that it would be improper to consider the 24.25% fiber as down. Even if damaged feathers were considered as new goose feathers, which is unrealistic, the total goose feather content would be only

33.20%, which is still substantially less than the label representation of 50% goose feather content.

Likewise, the 13.9% of second-hand feather content is substantial, but is not indicated on the label.

The reliable, probative and substantial evidence establishes the fact that these pillows were mislabeled, and that respondents' representations with respect to them were false and deceptive.

VI. The reliable, probative and substantial evidence does not establish that the four respondents, W. R. Salisbury, E. D. Salisbury, Fred Salisbury and Maurice E. Salisbury, as individuals, direct and dominate the policies, acts, practices and business affairs of the corporate respondent; hence the complaint should be dismissed as to them as individuals. As officers of the corporate respondent, they cannot escape responsibility.

VII. The labeling and representations hereinabove found to be false (conclusions II, III, IV and V, above) constitute unfair trade practices; are to the prejudice and injury of the public; and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce.

VIII. The use by respondents of the false and misleading statements on the labels affixed to their pillows has had and now has the tendency and capacity to mislead and deceive dealers and the purchasing public into the erroneous and mistaken belief that such statements are true, and to induce the purchase of substantial quantities of their said pillows because of such erroneous and mistaken belief.

IX. This proceeding is found to be in the public interest, and the following order is found to be justified:

It is ordered, That respondents The Salisbury Company, a corporation, W. R. Salisbury, E. D. Salisbury, Fred Salisbury and Maurice E. Salisbury, the officers of said corporate respondent, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of feather pillows or other feather and down products, do forthwith cease and desist from misrepresenting in any manner, or by any means, directly or by implication, the identity of the kind or type of filling material contained in any such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type.

It is further ordered, That the complaint herein, insofar as it relates to respondents W. R. Salisbury, E. D. Salisbury, Fred Salisbury and

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Appeal

Maurice E. Salisbury individually, be, and the same hereby is, dismissed.

ON APPEAL FROM INITIAL DECISION

By SECREST, COMMISSIONER:

This is one of a group of ten cases, all tried and considered together, involving the use on labels of allegedly false and deceptive representations with respect to the filling materials contained in feather and down pillows. The hearing examiner having filed his initial decision in which he found that the respondents have in fact mislabeled certain of their pillows and in which he included an order directing them to forthwith cease and desist from such practices, the respondents appealed. The case was heard on the appeal brief and opposing brief filed by counsel supporting the complaint and oral arguments of counsel.

Among the pillows manufactured and sold by respondents in commerce were certain pillows identified on their labels as containing new material consisting of goose feathers. Analyses of samples of the filling material contained in two of them showed that they were composed in substantial part of materials other than goose feathers. While the hearing examiner correctly concluded that the goose feather content of those pillows was deficient and that they were mislabeled, the hearing examiner in determining the percentages of goose feathers present excluded from his computations, among other matters, the quantities shown of second-hand feathers and certain feathers which were broken, damaged or slightly injured. Even though the allegedly damaged feathers and second-hand feathers had been included and considered as goose feathers, the amounts as there represented would not have brought the goose feather content into conformity with the labels. Hence, the hearing examiner's action in those respects did not constitute prejudicial error. Accordingly, no determination is required as to whether the record would adequately support conclusions that the content of broken, damaged, and injured feathers designated in each of the analyses under an aggregate percentage figure has in fact constituted damaged feathers as that term is understood in the feather and down industry. The Commission, furthermore, is of the view that the hearing examiner correctly found that certain of respondents' pillows contained substantial quantities of second-hand feathers and that the respondents' failure to reveal the presence thereof was deceptive and constituted mislabeling.

The remaining issues presented under the appeal are essentially similar to those considered in the matters of Burton-Dixie Corpora-

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tion, et al., Docket No. 6134, and Bernard H. Sumergrade, et al., Docket No. 6135, in which the Commission has written opinions setting forth in some detail its views on the issues there involved. The similarity between those cases and the instant case renders the opinions in those cases equally applicable here and the Commission is of the view that the hearing examiner correctly concluded that respondents have misrepresented the contents of certain of their pillows in violation of the Federal Trade Commission Act and that the order to cease and desist contained in the initial decision is appropriate.

The appeal accordingly is denied and the initial decision is affirmed.

FINAL ORDER

The respondents having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having been heard on briefs and oral argument, and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It is ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.

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IN THE MATTER OF
BURYL J. LASER ET AL. TRADING AS GLOBE
FEATHER & DOWN COMPANY

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

Docket 6188. Complaint, Mar. 10, 1954—Decision, June 30, 1955

Order requiring manufacturers in Chicago, Ill., to cease misrepresenting the feather and down content of their pillows on labels affixed thereto or otherwise.

Mr. Ames W. Williams for the Commission.

Mr. Marshall M. Holleb, of Chicago, Ill., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that the respondents have violated the provisions of the Federal Trade Commission Act by misrepresenting the contents of feather pillows which they manufacture and distribute in commerce.

After the filing of an answer, hearings were held, in which testimony and other evidence was presented, duly recorded and filed in the office of the Commission. By stipulation all the evidence in the companion feather cases was made a part of the record in this case, except so far as such evidence relates exclusively to the identification, contents and analyses of the feather samples in each of those cases.¹ Proposed findings of fact, conclusions and order have been submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. Respondents Buryl J. Laser, Jorge Laser and Hattie Laser are co-partners trading as Globe Feather & Down Company, with their office and principal place of business at 1433 South Miller Street, Chicago, Illinois.

2. Respondents are now, and for more than one year last past have been, engaged in the manufacture of feather and down products, specifically pillows, which they sell to dealers for resale to the public.

Respondents have caused and now cause their pillows, when sold, to be transported from their place of business to purchasers thereof

¹ The companion feather cases are: Docket 6132, National Feather & Down Company; Docket 6133, The L. Buchman Co., Inc., et al.; Docket 6134, Burton-Dixie Corp., et al.; Docket 6135, N. Sumergrade & Sons, et al.; Docket 6137, Northern Feather Works, Inc., et al.; Docket 6161, The Salisbury Co., et al.; Docket 6188, Globe Feather & Down Co., et al.; and Docket 6208, Sanitary Feather & Down Co., Inc., et al.

located in various other States of the United States. Respondents maintain and, at all times mentioned herein, have maintained a course of trade in said pillows in commerce among and between the various States of the United States.

3. In the course and conduct of their aforesaid business respondents are now, and have been, in substantial competition in commerce with other partnerships, firms, corporations and individuals engaged in the sale and distribution of feather and down products, including pillows.

4. In the course and conduct of their aforesaid business, respondents have caused labels to be affixed to certain of their pillows purporting to state and set out the kinds or types and proportions of filling materials contained therein, and have made representations with respect to their pillows designated "Little Boy Blue," as follows:

ALL NEW MATERIAL consisting of
Imported White Goose Down,

and with respect to their pillows designated "Manchester,"

ALL NEW MATERIAL consisting of
50% Goose Down
50% Goose Feathers.

5. Through the use of the aforesaid statements, respondents have represented that the filling material in the pillows designated "Little Boy Blue" is composed wholly of new, imported white goose down, and that the filling material in the pillows designated "Manchester" is composed of 50% new goose down and 50% new goose feathers.

6. Two pillows of each of the above-mentioned designations were procured by a representative of the Commission at the same time from the same retail dealer, and were introduced in evidence. The contents of these pillows were analyzed by an expert for the Commission, and the contents of the two pillows designated "Little Boy Blue" were analyzed by an expert for the respondents. Respondents' expert made no analysis of the contents of the two pillows designated "Manchester." The analyses showed as follows:

Pillows designated "Little Boy Blue"

	Pillow 1 (by weight)	Pillow 2 (by weight)	Computed average
<i>By the Commission's expert:</i>	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Goose down.....	80.6	78.7	78.65
Goose feathers.....	18.0	19.3	18.65
Feather fiber.....	1.2	1.6	1.4
Pith and scale.....	.2	.4	.3
	<i>Grams</i>	<i>Grams</i>	
Amount analyzed.....	3.032	2.621	
<i>By respondents' expert:</i>	<i>Percent</i>	<i>Percent</i>	
Down and down fiber.....	89.3	88.8	89.05
White goose feathers.....	10.7	11.2	10.95

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Pillows designated "Manchester"

	Pillow 1 (by weight)	Pillow 2 (by weight)	Computed average
By the Commission's expert:	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Goose down.....	37.6	35.4	36.5
Goose feathers.....	49.0	46.8	47.9
Immature goose feathers.....		1.9	48.85
Damaged feathers.....	7.9	9.1	8.5
Duck feathers.....	2.5	2.7	2.6
Chicken feathers.....	.4	1.2	.8
Fiber.....	1.7	2.0	1.85
Pith and scale.....	.9	.9	.9
Amount analyzed.....	<i>Grams</i> 5.634	<i>Grams</i> 5.356	
Respondents' expert submitted no tests on these pillows.			

7. In determining whether or not the representations as to the pillow contents are false within the meaning of the Act, it is helpful to have an understanding of the manufacturing methods used in the feather industry.

(1) In general, three sources of feather supplies are or have been available:

(a) *The American Source*

First, there are the domestic feathers, which ordinarily are properly labeled, but are not available in sufficient quantities to meet the industry's requirements.

(b) *The European Source*

Second, there is the European source of supply from which feathers are procured, but from this source it is impossible to get unadulterated, new stock, because of a common practice of mixing second-hand feathers with new. European feathers are purchased on the basis of samples, and each manufacturer must judge from these samples the quality and type of feathers available to him.

(c) *The Oriental Source*

The third source is the Orient, from which adequate supplies may be had; but in the Orient there is no careful sorting, and a bale of feathers purchased as goose feathers may contain substantial quantities of duck or chicken feathers. These feathers are usually purchased through importers and commission merchants who submit offers to manufacturers. A typical offer will show as available for purchase by respondents or other pillow manufacturers 100 bales of 200 pounds each at 90¢ per pound, the feathers being Formosan grey goose feathers, 90% clean, maximum 20% duck feathers, 5% chicken feathers, 3% quills, minimum 30% down. Oriental feathers are purchased on the basis of these representations, without sampling.

(2) After raw feathers are procured by the manufacturer they are thoroughly washed, dried and fluffed up. Then they are sorted by means of a machine which separates the various constituents of the feather bulk by a blowing or suction process. The feathers are put through the sorting machine in lots of fifty pounds. The down, being lighter, is more readily blown over the baffle in the sorting machine, and passes into its particular bin or container. Then follow the downy-type feathers, and the various other feathers, in appropriate classifications according to weight or specific gravity, each into a specially prepared container. By this process it is reasonably practical to segregate a high percentage of down, but in down, as in the other classifications, there are always some feathers which are inappropriate to the particular classification. In the downy-type feather receptacle will be some pure down and some heavier-type feathers. Similar discrepancies will occur in each of the other classifications. It is impossible to separate feathers according to type of fowl or to remove inferior or second-hand feathers. The only possible separations are those which can be obtained by the application of the principles of specific gravity. Feathers of the same degree of lightness will go over the baffle at the same time, irrespective of the kind of fowl from which they may have been plucked, or whether they are new or used.

(3) The down and feathers thus sorted and placed in separate containers have no uniformity or homogeneity; the heavier feathers will be at the bottom, the down at the top of each container. Although there be a vigorous agitation of the feathers and down in a storage bin, the resulting mixture will at no time be of uniform content throughout, and no mixture of feathers and down is or will remain uniform or constant throughout its bulk. When a pillow order is to be made up, the manufacturer puts into the filling bin the number of bags of each type of feather requisite to obtain the desired mixture. The filling bins usually are approximately 5 x 10 x 12 feet in size, and hold up to 350 or 400 pounds of feathers. Two or three hundred pairs of pillows may be filled out of one mixture, and it is not unusual for a manufacturer to fill from twelve to fourteen hundred pairs of pillows during a day.

(4) During the filling process, the feathers are agitated by means of wooden forks, and the pillows are filled by suction. The proportion of down and feathers that go into each pillow depends partly, of course, upon the filling-bin mixture, but also to a large extent upon what part of the bin the filling suction reaches. Even with the exercise of the greatest care, pillows filled from the same bin will vary in

content. Those being filled from the bottom of the bin will contain the heavier feathers, and the greater amounts of pith, scale, and other extraneous matter. The exact amount or proportion of down and feathers going into any particular pillow cannot be controlled by mechanical means. The expert whose testimony was presented in support of the complaint stated that the contents of pillows filled from the same bin will vary as much as 30%; that the same percentage will not be found in any two pillows; that the mixture in each pillow will vary from the mixture in the filling bin; that if any one pillow should contain exactly the same percentage of feathers and down as that originally placed in the filling bin, it would be pure accident; and that the closest practical indication of the contents of a pillow product of a manufacturer and the correctness of its labeling will result if several different pillows are sampled, preferably pillows obtained at different times and places.

(5) The same difficulties arise in analyzing the contents of a single pillow. Except by pure accident, no two samples will have the same content; so there is no sure or positive method of measuring the contents of feather pillows with scientific accuracy, other than by taking all of the content out of the pillow and separating it into its component elements, then weighing each element. Such a process is so completely impractical that, usually, a test is made by opening the pillow-ticking and taking samples from three different portions of the pillow. These samples are thoroughly mixed and a smaller testing sample, of which the analysis is to be made, is taken from this mixture. The expert who testified in support of the complaint selected three samples from the opening by inserting his hand and reaching to different portions of the pillow. Samples selected by the respondents were obtained by taking a small quantity of feathers from each of three openings in each pillow. The hearing examiner was present when respondents' samples were taken. As each opening was made in the pillow ticking, some down escaped, and as each withdrawal was made, more down escaped before the sample could be enclosed in a container; while the feathers, being heavier and bulkier, were easier to retain. No sample can be exactly representative of the original content of the pillow, just as the content of no one pillow can be exactly representative of the original mixture in the filling bin. The average sample for analysis weighed approximately 3 grams, representing between $\frac{1}{4}$ and $\frac{1}{2}$ of 1% of the contents of a pillow, and the appearance of a single heavy feather in a sample of this size would make as much as 4% difference in the final result. This method is far from satisfactory, and the resulting percentages are not conclusive.

(6) The crushing or curling process is a manner of giving a twist or curl to landfowl feathers, such as chicken and turkey, to increase their resiliency and tend to prevent their matting, and thus improve their quality for use as pillow-filling material. The same process is applied to waterfowl quill feathers (that is, feathers from the wings and tails of ducks and geese), which otherwise would not be suitable for pillow-filling material. A considerable amount of fiber, pith and scale result from the crushing, and are carried over into the filling mixture. As to utility, crushed landfowl feathers are better than crushed waterfowl feathers, and crushed turkey feathers are better than crushed chicken feathers.

The mixture of crushed feathers is made by weighing out the proper proportions of the various kinds of crushed feathers that are to be mixed, and taking alternate handfuls of feathers from the separate containers and throwing these into the hopper of the curling or crushing machine. Because of the nature of these larger feathers, they frequently go through the hopper in lumps, so that it is impossible to get a mixture with any degree of homogeneity. Despite agitation in mixing, slugs of chicken or turkey feathers and slugs of quill feathers will get into the pillows without ever being separated or mixed. The label "Crushed Feathers," showing the types of feathers used, can indicate no more than that the mixture was made from the types or kinds of feathers stated on the label.

It is impossible to separate and analyze crushed feathers accurately. A pillow filled with crushed feathers is the cheapest product of the industry, and in the minds of the general public, there is very little distinction among the various kinds of crushed feathers, whether goose, duck, chicken or turkey. The expert who testified in support of the complaint indicated that pillows filled with crushed feathers are the least desirable of all pillows, and are the lowest class of pillows on the market. In his opinion, it is impractical to attempt to distinguish between the various types of crushed feathers in any batch of such pillows, and he suggested during the course of his tests for the Commission that no further pillows filled with crushed feathers be sent to him for analysis.

(7) On the basis of the foregoing, the conclusion is inescapable that as a practical matter, the contents of feather pillows cannot be accurately labeled. In fact, to require accurate labeling as to content, of a product such as feather pillows, which, by nature, vary constantly and at random in content, is to require an impossibility. No manufacturer of feather pillows could comply with such a requirement except by analyzing the filling of each pillow individually. Obviously

that is an impossible task. Incidentally, it points up the dangers involved in attempting to reach a conclusion as to pillow content on the basis of testing two pillows out of a batch that may have included one hundred or two hundred pairs of pillows.

(8) Despite these facts, however, some 28 States have labeling requirements with which pillow manufacturers must comply; and the Federal Trade Commission, on April 26, 1951, promulgated Trade Practice Rules for the Feather and Down Products Industry, which undertake to interpret the Act and express the Commission's policy with respect to the practices complained of in this proceeding. Although these Rules are not binding upon the hearing examiner, they should be given careful consideration in applying the law to the facts of this proceeding. The pertinent parts of those Rules applicable thereto are as follows:

RULE 3—IDENTIFICATION AND DISCLOSURE OF KIND AND TYPE OF FILLING MATERIAL
IN INDUSTRY PRODUCTS

I. In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to misrepresent or deceptively conceal the identity of the kind or type of filling material contained in any of such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type. Such identification and disclosure shall be made by tag or label securely affixed to the outside covering of each product and in invoices and all advertising and trade promotional literature relating to the product; and when the filling material is a mixture of more than one kind or type, each kind and type shall either be listed in the order of its predominance by weight, or be listed with an accompanying disclosure of the fraction or percentage by weight of the entire mixture which it represents.

II. Identification of the kind and type of feather and down stock by use of any of the terms listed and defined below will be considered proper when in accord with the definition set forth for such term:

Definitions:

(a) *Down:* The undercoating of waterfowl, consisting of clusters of the light, fluffy filaments growing from one quill point but without any quill shaft.

(b) *Down fiber:* The barbs of down plumes separated from the quill points.

(c) *Waterfowl feathers:* Goose feathers, duck feathers, or any mixture of goose and duck feathers.

(d) *Feathers (or Natural Feathers):* Bird or fowl plumage having quill shafts and barbs and which has not been processed in any manner other than by washing, dusting, and sterilizing.

(e) *Quill feathers (or Quills):* Wing feathers or tail feathers or any mixture of wing and tail feathers.

(f) *Crushed feathers:* Feathers which have been processed by a crushing or curling machine which has changed the original form of the feathers without removing the quill.

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(h) *Feather fiber*: The barbs of feathers which have been completely separated from the quill shaft and any aftershaft and which are in nowise joined or attached to each other.

* * * * *

(j) *Damaged feathers*: Feathers, other than crushed, chopped, or stripped, which are broken, damaged by insects, or otherwise materially injured.

III. *Tolerance*: (a) Subject to the restrictions and limitations hereinafter set forth, the filling material of an industry product may be represented as being of but one kind or type when 85% of the weight of all filling material contained in the product is of the represented kind or type; or may be represented as being of a mixture of two or more kinds or types with accompanying disclosure of a fraction or percentage of the weight of the entire mixture represented by each if the fraction or percentage shown is not at variance with the actual proportion of the weight of the entire mixture represented by each such kind or type by more than 15% of the stated fraction or percentage. (The tolerance provided for in this paragraph III is to be understood as being an allowance for error and as not embracing any intentional adulteration.)

Limitations and Restrictions

(b) When the filling material of an industry product is represented, directly or indirectly, as being wholly of down, any proportion within the tolerance percentage provided for in (a) above which is not down shall consist principally of down fiber and/or small, light, and fluffy waterfowl feathers, shall contain no quill feathers, crushed feathers, or chopped feathers, and shall not contain damaged feathers, quill pith, quill fragments, trash, or any matter foreign to feather and down stock in excess of 2% by weight of the filling material contained in the product, or which in the aggregate exceeds 5% of such weight.

* * * * *

(c) When the filling material of an industry product is represented, directly or indirectly, as being wholly of a mixture of down and feathers, or of down and more than one kind or type of feathers, or of feathers of more than one kind or type, any proportion, or the aggregate of any proportions, of the filling material of the product at variance with the representation, but within the tolerance percentage provided for in (a) above, shall not contain quill pith, quill fragments, trash, or any matter foreign to feather and down stock in excess of 2% by weight of the filling material in the product or which in the aggregate exceeds 5% of such weight; and, unless nondeceptively disclosed in the representation, not in excess of 5% by weight of the filling material of the product shall consist of crushed feathers, chopped feathers, quill feathers, or damaged feathers.

Note.—It is the consensus of the industry that determination as to whether any representation is violative of the provisions of this Rule should be based on an average of the results of tests of at least two products of the same type when same are readily available for testing, * * *.

The Rules further provide that samples of equal weight and size be drawn from at least three different locations in the product; that such samples be thoroughly mixed; and that a test be made of not less than 3 grams of the mixture. Application of the law and a reasonable interpretation of these Rules to the facts of this proceeding results in the following:

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Conclusions:

I. The test procedures adopted and followed by the experts who made the analyses of the pillow contents in this proceeding comply with the Trade Practice Rules.

II. Respondents' pillows designated "Little Boy Blue" are represented as consisting of new white goose down. The complaint charges that this is false and misleading in that the filling material in these pillows contains a substantial amount of material other than white goose down.

The average of the test results submitted by respondents shows that these pillows contained 89.05% down and down fiber. There is support in the record for including down fiber as part of the down content, so these test results must be considered as valid. The average of the test results submitted by the Commission's expert shows down content as being 78.65%, exclusive of fiber and small downy-type feathers which are normally found in all-down pillows. The average of all four test results using this latter conservative figure shows down content as 83.85%. Taking into consideration the numerous variables involved, and the lack of absolute accuracy in any of these tests, this percentage is found not to be substantially outside the reasonable tolerances applicable to pillows of this type, and the conclusion is reached that the charges of the complaint have not been adequately established by reliable, probative and substantial evidence as to these pillows.

III. Respondents' pillows designated "Manchester" are represented as being 50% goose down and 50% goose feathers. Respondents submitted no test results as to contents of these pillows. The average of the analyses made by the Commission's expert shows the down content as 36.5%. Adding the 1.85% of fiber, this down content may be raised to 38.35%, which is approximately 23% less than the amount of down the pillows should contain. This is substantially greater than the allowable, reasonable tolerance of 15%, and cannot be justified. It is concluded, therefore, that these pillows have been mislabeled and that the representations made by respondents in respect thereto are false and misleading.

IV. The labeling and representations hereinabove found to be false (Conclusion III) constitute unfair trade practices; are to the prejudice and injury of the public; and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce.

V. The use by respondents of the false and misleading statements on the labels affixed to their pillows has had and now has the tendency and capacity to mislead and deceive dealers and the purchasing public

into the erroneous and mistaken belief that such statements are true, and to induce the purchase of substantial quantities of their said pillows because of such erroneous and mistaken belief.

VI. This proceeding is found to be in the public interest, and the following order is found to be justified:

It is ordered, That respondents Buryl J. Laser, Jorge Laser and Hattie Laser, copartners, trading as Globe Feather & Down Company, or under any other name, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of feather pillows or other feather and down products, do forthwith cease and desist from misrepresenting in any manner, or by any means, directly or by implication, the identity of the kind or type of filling material contained in any such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type.

ON APPEAL FROM INITIAL DECISION

By SECRET, Commissioner:

This is one of a group of ten cases, all tried and considered together, involving the use on labels of allegedly false and deceptive representations with respect to the filling material contained in feather and down pillows. The hearing examiner having filed his initial decision in which he found that the respondents have in fact mislabeled certain of their pillows and in which he included an order directing them to forthwith cease and desist from such practices, the respondents appealed. The case was heard on the appeal brief, an opposing brief filed by counsel supporting the complaint and oral arguments of counsel.

Except as to the results of the analyses of the different pillows used as exhibits, as to which the record in each of these cases is specific and definite, and except for the differences in the initial decisions, this case is not unlike that in the matter of Burton-Dixie Corporation, et al., Docket No. 6134, in which case the Commission has written an opinion setting forth in some detail its views on the various issues involved. In view of the similarity between these cases, the opinion in that case is equally applicable here, and for the reasons there stated the Commission is of the view that the hearing examiner's findings of fact and conclusions that the respondents have misrepresented the contents of certain of their pillows in violation of the Federal Trade Commission Act, and the order to cease and desist contained in the

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initial decision are correct. For the same reasons, and for the additional reasons set forth in the decision in the matter of Bernard H. Sumergrade and Harry Sumergrade, copartners trading as N. Sumergrade & Sons, Docket No. 6135, the Commission is of the opinion, and finds, that the pillows referred to in Conclusion II of the initial decision, which pillows were represented as containing all new white goose down, but which actually contained an average of only 78.65%, were also mislabeled, and the hearing examiner's conclusion to the contrary and his reasoning in support thereof are rejected.

The respondents' appeal is accordingly denied and the initial decision as modified herein is affirmed.

FINAL ORDER

The respondents having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having been heard on briefs and oral argument, and the Commission having rendered its decision denying the appeal and affirming the initial decision as modified;

It is ordered, That the respondents named in the initial decision shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.

. IN THE MATTER OF
COLUMBIA BEDDING COMPANY ET AL.

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

Docket 6189. Complaint, Mar. 11, 1954—Decision, June 30, 1955

Order requiring a manufacturer in Chicago, Ill., to cease misrepresenting the feather and down content of its pillows on labels affixed thereto or otherwise.

Mr. Ames W. Williams for the Commission.

Mr. James Perkins Parker, of Washington, D. C., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that the respondents have violated the provisions of the Federal Trade Commission Act by misrepresenting the contents of feather pillows which they manufacture and distribute in commerce.

After the filing of an answer, hearings were held, at which testimony and other evidence were presented, duly recorded and filed in the office of the Commission. Proposed findings of fact, conclusions and orders have been submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. Respondent Columbia Bedding Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 1750 North Wolcott Street, Chicago, Illinois. Respondents L. Gerald Koch (erroneously named in the complaint as L. Gerald Couch), president, George M. Silverthorne, Jr., vice president, and Thomas W. Hellyer, Secretary-treasurer, are the officers of said corporate respondent.

2. Respondent corporation, Columbia Bedding Company, maintains factories in Philadelphia, Chicago, Kansas City and Dallas, and for the past fifty years has engaged in the manufacture and sale of pillows and other products, designated as down and feather products, to dealers for resale to the general public, which products said respondent has caused, when sold, to be transported from the various places of manufacture to purchasers located in various other States of the United States; and has maintained a course of trade in the said products in commerce.

Respondents L. Gerald Koch, George M. Silverthorne, Jr., and Thomas W. Hellyer are engaged in the manufacture, sale and inter-

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state distribution of pillows and other products designated as down and feather products, only to the extent that they may perform their duties as officers of respondent Columbia Bedding Company.

3. In the course and conduct of their aforesaid business, respondents are now, and have been, in substantial competition in commerce with other corporations and with firms, individuals and partnerships engaged in the sale and distribution of feather and down products, including pillows.

4. In the course and conduct of their aforesaid business, respondents have caused labels to be affixed to certain of their pillows purporting to state and set out the kinds and types and proportions of filling materials contained therein, and have made representations with respect to their pillows designated "Harmony House," as follows:

ALL NEW MATERIAL consisting of
Duck Down
ALL NEW MATERIAL consisting of
50% Duck Down
50% Duck Feathers.

5. Through the use of the statements appearing on the labels affixed to said pillows, respondents represent that the filling material in some of the pillows designated "Harmony House" is composed entirely of all new duck down and that the filling material in other pillows also designated "Harmony House" is composed of 50% new duck down and 50% new duck feathers.

6. Two pillows labeled "Harmony House" were obtained by a representative of the Commission from a retail store of Sears Roebuck and Company located in Grand Rapids, Michigan. They are two of a shipment of ten pillows from respondents in Chicago to Sears in Michigan. They were labeled as containing 50% duck down and 50% duck feathers. Separate analyses of the contents of these pillows by the Commission's expert showed as follows:

	Pillow 1 (by weight)	Pillow 2 (by weight)	Computed average
	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Duck down.....	29.5	30.4	29.95
Duck feathers.....	57.0	58.4	57.7
Damaged feathers.....	4.4	4.9	4.65
Chicken feathers.....	5.9	3.2	4.55
Feather fiber.....	1.8	1.3	1.55
Pith and scale.....	1.4	1.8	1.6
	<i>Grams</i>	<i>Grams</i>	
Amount analyzed.....	4.573	4.901	

Two other pillows, also labeled "Harmony House," were obtained by a representative of the Commission from a retail store of Sears

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Roebuck and Company in Minneapolis, Minnesota. The contents of these two pillows was represented as all new duck down. Analyses of the contents of these two pillows by the Commission's expert showed as follows:

	Pillow 3 (by weight)	Pillow 4 (by weight)	Computed average
	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Duck down.....	84.0	80.6	82.3
Duck feathers (light and downy).....	13.2	17.7	15.45
Feather fiber.....	2.1	1.1	1.6
Pith and scale.....	.7	.6	.65
	<i>Grams</i>	<i>Grams</i>	
Amount analyzed.....	3.191	3.495	

Although samples of the contents of all four of these pillows were taken by respondents, no report of the result of any analysis of these samples was submitted.

7. Respondents procure their feather supply from various sources. A large quantity of the feathers they use comes from various parts of the United States; some comes from Europe, particularly Austria and Czechoslovakia, and contains second-hand feathers (perhaps up to 5% or more), which cannot be segregated by any practical method; other feathers come from the Orient and are always of mixed composition—goose, duck and chicken feathers in various proportions. Respondents use no goose feathers from the Far East because they can procure better stock domestically.

8. After raw feathers are procured by respondents, they are thoroughly washed, dried and fluffed up. Then they are sorted by means of a machine which separates the various constituents of the feather bulk by a blowing or suction process. The feathers are put through the sorting machine in lots of fifty pounds. The down, being lighter, is more readily blown over the baffle in the sorting machine, and passes into its particular bin or container. Then follow the downy-type feathers, and the various other feathers, in appropriate classifications according to weight or specific gravity, each into a specially-prepared container. By this process it is reasonably practical to segregate a high percentage of down, but in down, as in the other classifications, there are always some feathers which are inappropriate to the particular classification. In the downy-type feather receptacle will be some pure down and some heavier-type feathers. Similar discrepancies will occur in each of the other classifications. It is impossible to separate feathers according to type or fowl or to remove inferior or second-hand feathers. The only possible separations are those which can be obtained by the application of the principals of

specific gravity. Feathers of the same degree of lightness will go over the baffle at the same time, irrespective of the kind of fowl from which they may have been plucked, or whether they are new or used.

9. The down and feathers thus sorted and placed in separate containers have no uniformity or homogeneity; the heavier feathers will be at the bottom, the down at the top of each container. Although there be a vigorous agitation of the feathers and down in a storage bin, the resulting mixture will at no time be of uniform content throughout, and no mixture of feathers and down is or will remain uniform or constant throughout its bulk. During the filling process, the feathers are agitated by means of wooden forks, and the pillows are filled by suction. The proportion of down and feathers that go into each pillow depends partly, of course, upon the filling-bin mixture, but also to a large extent upon what part of the bin the filling suction reaches. Even with the exercise of the greatest care, pillows filled from the same bin will vary in content. Those being filled from the bottom of the bin will contain the heavier feathers, and the greater amounts of pith, scale, and other extraneous matter. The exact amount or proportion of down and feathers going into any particular pillow cannot be controlled by mechanical means. No two pillows of the same batch, filled from the same bin, will have the same content in identical proportions, but under ordinary conditions the content of every pillow of the same batch should come within 15% of being in the same proportion as the materials in the filling bin, and therefore within 15% of the representations made on the pillow labels.

10. Difficulties arise in analyzing the contents of a pillow. Except by accident, no two samples will have the same proportion of each component, so there is no sure or positive method of measuring the contents of a feather pillow with scientific accuracy, other than by taking all of the content out of the pillow and separating it into its component elements, then weighing each element. Such a process is so completely impractical that, usually, a test is made by opening the pillow-ticking and taking samples from three different portions of the pillow. These samples are thoroughly mixed and a smaller testing sample, of which the analysis is to be made, is taken from this mixture. The various types of feathers in the sample, which ordinarily weighs three grams or more, are separated and carefully weighed. The percentages are then computed. Although no two tests of the contents of any one pillow will show exactly the same portions, they will or should be reasonably similar.

11. After tests had been made, the expert who later testified in support of the complaint sent typed reports to the Commission show-

ing the results of his analyses. Copies of these typed reports were furnished respondents' counsel in advance of hearing. At the hearing, the hand-written reports (from which such typed copies were made), which had been retained by the expert, were produced, and are in the record. These reports were initialled by the expert's assistant, who made each analysis, and by two supervisors who later examined the separations of feathers to determine if they were properly made. In the record also are envelopes in which the separated component parts of each sample tested have been preserved, and there is a larger envelope containing a portion of the original mixture from which the small testing sample was taken. Every opportunity was afforded respondents both to check on the analyses submitted by the Commission's expert, and to make tests of their own.

Conclusions:

I. The test results of the Commission's expert must be accepted as accurate and a representative of the contents of the pillows tested. The test procedures followed were those generally used in the industry and comply with the suggestions embodied in the Trade Practice Rules for the Feather and Down Products Industry promulgated by the Federal Trade Commission on April 26, 1951, following a conference of industry representatives.

II. Pillows 1 and 2, "Harmony House" pillows obtained from Sears Roebuck and Company, Grand Rapids, Michigan, are represented as containing 50% duck down and 50% duck feathers. Respondents admitted that the labels and the pillow ticking were their products, but expressed a doubt as to the pillow contents being the same as that originally placed in these pillows at their factory. The course of the pillows is shown in the record from respondents' factory to Sears Roebuck and Company in Grand Rapids, to the Commission's representative in Chicago, to the Commission in Washington, to the Commission's expert in Baltimore, back to the Commission in Washington, D. C., and into the record of this proceeding. There is no reasonable basis for believing that these pillows had been tampered with at any stage of their progress from respondents' factory to the time of their acceptance in this record. It is established by reliable, probative and substantial evidence that these two pillows were of respondents' manufacture, and that the contents analyzed by the Commission's expert were the identical contents contained in the pillows at the time they left respondents' factory.

The average of the analyses of the contents of these two pillows shows duck-feather content of 57.7%, and duck-down content of 31.50%, including 1.55% of feather fiber. Feather fiber is included

with the down to give respondents the benefit of any doubt. The down content, according to the label, should be 50%. Under a reasonable tolerance of 15%, the down content should be at least 42.5%. There is a substantial shortage of down content. The duck-feather content, 57.7%, excluding damaged feathers, is just slightly greater than the 57.5% which is justified under a reasonable tolerance of 15%, and there are some chicken feathers and some pith and scale, but not in excessive amounts. The substantial deviation from the representations made on the labels is with respect to the down content, and that is so great as to require a finding that the labels on these two pillows are incorrect, and that the representations made thereon are false and deceptive.

Against this conclusion, respondents urge the *de minimis* contention that they manufacture some 800,000 pillows per year, and that it is unfair to base a finding or an order upon an analysis of two pillows. But these two pillows are from one ten-pillow shipment, and were selected at random. Although respondents manufacture many different types of pillows containing varying proportions of different filling materials, there is no showing as to the number of pillows bearing the same labels as pillows 1 and 2. Certainly there is no requirement that a majority of respondents' pillows must be tested before a finding is made. These particular pillows were for sale at retail to individual customers, who have a right to believe that the products which they purchase are properly labeled. The *de minimis* argument is rejected.

III. Pillows 3 and 4, "Harmony House" pillows obtained from Sears Roebuck and Company, Minneapolis, Minnesota, are represented as containing all new duck down. Actually they contain an average of 82.3% duck down, but if even a minimum quantity of the light and downy feathers be added to the pure down, and, in the light of the record, this is reasonable and proper, the duck down content would come within the reasonable 15% tolerance. As to these pillows, therefore, the conclusion is reached that the allegations of the complaint that these pillows have been mislabeled are not sustained by substantial, reliable, and probative evidence. Upon all the facts of record, the conclusion is reached that these pillows were properly labeled. It is unnecessary to discuss respondents' contention that these pillows were not of their manufacture.

IV. The labeling and representations hereinabove found to be false (conclusion II, above) constitute unfair trade practices; are to the prejudice and injury of the public; and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce.

V. The use by respondents of the false and misleading statements on the labels affixed to their pillows has had and now has the tendency and capacity to mislead and deceive dealers and the purchasing public into the erroneous and mistaken belief that such statements are true, and to induce the purchase of substantial quantities of their said pillows because of such erroneous and mistaken belief.

VI. This proceeding is found to be in the public interest, and the following order is found to be justified:

It is ordered, That respondents Columbia Bedding Company, a corporation, and L. Gerald Koch (erroneously named in the complaint as L. Gerald Couch), George M. Silverthorne, Jr., and Thomas W. Hellyer as officers of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of feather pillows or other feather and down products, do forthwith cease and desist from misrepresenting in any manner, or by any means, directly or by implication, the identity of the kind or type of filling material contained in any such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type.

ON APPEAL FROM INITIAL DECISION

By SECREST, Commissioner:

This is one of a group of ten cases, all tried and considered together, involving the use on labels of allegedly false and deceptive representations with respect to the filling material contained in feather and down pillows. The hearing examiner having filed his initial decision in which he found that the respondents have in fact mislabeled certain of their pillows and in which he included an order directing them to forthwith cease and desist from such practices, the respondents appealed. The case was heard on the appeal brief, an opposing brief filed by counsel in support of the complaint and oral arguments of counsel.

Except as to the results of the analyses of the different pillows used as exhibits, as to which the record in each of these cases is specific and definite, this case is not unlike that in the matter of Bernard H. Sumergrade and Harry Sumergrade, copartners trading as N. Sumergrade & Sons, Docket No. 6135, in which case the Commission has written an opinion setting forth in some detail its views on the various issues involved. In view of the similarity between these cases, the opinion in that case is equally applicable here, and for the reasons there stated the Commission is of the view that the hearing examiner's findings

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Final Order

of fact and conclusions that the respondents have misrepresented the contents of certain of their pillows in violation of the Federal Trade Commission Act, and the order to cease and desist contained in the initial decision are correct. For the same reasons, and for the additional reasons set forth in the decision in the matter of Burton-Dixie Corporation, et al., Docket No. 6134, the Commission is of the opinion, and finds, that the pillows referred to in Conclusion III of the initial decision, which pillows were represented as containing all new duck down, but which actually contained an average of only 82.3% duck down, were also mislabeled, and the hearing examiner's conclusion to the contrary and his reasoning in support thereof are rejected.

In their brief on appeal, the respondents contend, among other things, that the initial decision fails to show what consideration, if any, was given to certain of the respondents' testimony and exhibits and that certain of the findings and conclusions are not based upon reliable, probative and substantial evidence. The Commission has considered each of these points, but finds no merit in any of them. The initial decision shows on its face that the findings and conclusions contained therein were based upon a careful consideration of the record as a whole, including the material evidence introduced by the respondents, and it appears to the Commission that the record not only supports such findings and conclusions, but also precludes any to the contrary. The respondents' appeal is accordingly denied and the initial decision as modified herein is affirmed.

FINAL ORDER

The respondents having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having been heard on briefs and oral argument, and the Commission having rendered its decision denying the appeal and affirming the initial decision as modified;

It is ordered, That the respondents named in the initial decision shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.