

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:

By the Commission's expert:	<i>Percent by weight</i>
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-

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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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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. Sevik, 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-

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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

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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

requisite number of bags of each type of feather sufficient to produce from two to three hundreds 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 material 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

Final Order

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 or 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 the complaint herein be, and it hereby is, dismissed as to George W. Gartz, deceased.

After the filing of an answer, hearings were held in which testimony and other evidence was presented, fully recorded and filed in the office of the Commission. My organization and the evidence in the companion leather 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 leather samples in each of these cases. 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:

I. Respondent N. Shumyakov is a United partnership organized under the laws of the State of New York, consisting of three general partners: (a) Respondent Edward H. Shumyakov and respondent (b) Shumyakov, N. O. (hereinafter referred to as respondent (b) N. Shumyakov) as a party respondent. Such management was allowed and he will have to be considered as a party respondent. There are

¹ The reproduction number was used to predict the impact of the 1968 Hong Kong flu pandemic. The 1968 Hong Kong flu pandemic was caused by a novel influenza A virus, H3N2, which was first identified in Hong Kong in 1968. The virus spread rapidly across the world, causing an estimated 1 million deaths. The reproduction number was used to predict the impact of the pandemic, and it was found that the virus had a high reproduction number, indicating that it was highly contagious.

IN THE MATTER OF

BERNARD H. SUMERGRADE ET AL. TRADING AS
N. SUMERGRADE & SONSORDER, 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.