

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

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"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)	(by weight)
By the Commission's expert:		Percent	Percent
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	3.3661
By respondents' expert:		Percent	Percent
Goose feathers		68.4	82.8
Duck feathers		15.0	None
Down and downy-type feathers		15.2	15.6
Waste		11.4	1.6
Pillows designated "Ajax"		Pillow 1	Pillow 2
		(by weight)	(by weight)
By the Commission's expert:		Percent	Percent
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:		Percent	Percent
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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		Pillows designated "Dayton"	
		Pillow 1	Pillow 2
		(by weight)	(by weight)
By the Commission's expert:		Percent	Percent
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	3.757
By respondents' expert:		Percent	Percent
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 resterilization 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.

Decision

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.