

IN THE MATTER OF
COLUMBIA BEDDING COMPANY ET AL.

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

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

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

Mr. Ames W. Williams for the Commission.

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

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions:

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

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

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

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

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

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

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

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

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

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

ON APPEAL FROM INITIAL DECISION

By SECRET, Commissioner:

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

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

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

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

FINAL ORDER

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

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

IN THE MATTER OF
SANITARY FEATHER & DOWN CO., INC., ET AL.

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

Docket 6208. Complaint, Mar. 27, 1954—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.

Mr. Selig Kaplan, of Brooklyn, N. Y., 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 Sanitary Feather & Down Co., 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 409-423 Willoughby Avenue, Brooklyn, New York. Respondents Martin Braff, Joe Braff, Philip Kestenbaum and Stanford W. Braff are the officers of said corporate respondent. Their address is the same as that of the 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.

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

2. Respondents are now, and for more than one year last past have been, engaged in the manufacture 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 of filling materials contained therein, and have made representations with respect to their pillows designated "Sanitary Sleepwell Pillows," as follows:

ALL NEW MATERIAL consisting of down.

5. Through the use of the aforesaid statements, respondents have represented that the filling material in said pillows is composed entirely of new down.

6. Two pillows designated "Sanitary Sleepwell Pillows" 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 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.....	78.0	76.7	77.35
Feathers.....	18.8	21.1	19.95
Feather fibers.....	2.4	1.4	1.9
Pith and scale.....	.8	.8	.8
	<i>Grams</i>	<i>Grams</i>	
Amount analyzed.....	3.403	3.217	
By the respondents' expert:			
Down and down fiber.....	<i>Percent</i> 90.00	<i>Percent</i> 84.0	87.0

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

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

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

(a) *The American Source*

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

(b) *The European Source*

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

(c) *The Oriental Source*

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

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

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

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

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

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

(5) The same difficulties arise in analyzing the contents of a single pillow. Except by pure accident, no two samples will have the same content; so there is no sure or positive method of measuring the contents of feather pillows with scientific accuracy, other than by taking all of the content out of the pillow and separating it into its component elements, then weighing each element. Such a process is so completely impractical that, usually, a test is made by opening the pillow-ticking and taking samples from three different portions of the pillow. These samples are thoroughly mixed and a smaller testing sample, of which the analysis is to be made, is taken from this mixture. The expert who testified in support of the complaint selected three samples from the opening by inserting his hand and reaching to different portions of the pillow. 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 mixture 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 culling 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

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

Limitations and Restrictions

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

* * * * *

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

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

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

Conclusions:

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

II. Respondents' pillows designated "Sanitary Sleepwell" are the only pillows involved in this proceeding. They are represented as containing all new down. The complaint charges that this is false and misleading in that the pillows contain substantial quantities of filling material other than down. Contents of two of these pillows

were analyzed by the Commission's expert and by respondent's expert. Respondents' expert showed the average down and down fiber content to be 87.0%. The Commission's expert showed the down content as 77.55%, which would be increased to 79.25% if the fiber content be added, as may be done with propriety. The overall average of four analyses shows a down and fiber content of 83.125%. Taking into consideration the numerous variables involved and the lack of absolute accuracy in any of these tests, this percentage is found not to be substantially outside the reasonable tolerance applicable to pillows of this type, and if the down content is within the allowable tolerance, the other filling materials cannot be found to be excessive. This is especially true since these other materials are of the types normally found in down pillows. Upon the basis of these facts, the conclusion is reached that the allegations of the complaint have not been adequately established by reliable, probative and substantial evidence, and that the complaint therefore 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:

This is one of a group of ten cases, all tried and considered together, involving the use on labels of allegedly false and deceptive representations with respect to the filling material contained in feather and down pillows. The hearing examiner having filed his initial decision dismissing the complaint, counsel in support of the complaint appealed, and the case was heard on the appeal brief, the respondents' opposing brief 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 Burton-Dixie Corporation, et al., Docket No. 6134, in which case the Commission has written an opinion setting forth in some detail its views on the issues involved. In view of the similarity of the cases, the opinion in that case is equally applicable here and disposes of all of the issues raised. For the reasons there stated, the hearing examiner's conclusions that the allegations of the complaint in this proceeding have not been sustained and that the complaint herein should be dismissed are rejected. The Commission is of the opinion, on the other hand, and finds, that the respondents, through the use of labels describing their pillows as "ALL NEW MATERIAL consisting of down," have misrepresented the down content of said pillows. The Commission fur-

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ther finds that the use of such misrepresentation has the tendency and capacity to mislead and deceive dealers and the purchasing public into the erroneous and mistaken belief that the representation is true and to induce the purchase of such pillows because of such erroneous and mistaken belief. It follows that the respondents' practices in this respect constitute unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act, as alleged in the complaint, and that the public interest requires the issuance of an appropriate order to cease and desist.

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 Docket No. 6134, such findings are affirmed. The conclusions and order dismissing the complaint as contained in said 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 proceeding; and the matter having been heard on briefs and oral argument, and the Commission having rendered its decision affirming in part the findings of fact contained in the initial decision, but reversing the conclusions and order contained therein:

It is ordered, That the respondents, Sanitary Feather & Down Co., Inc., a corporation, and Martin Braff, Joe Braff, Philip Kestenbaum, and Stanford W. Braff, individually and as officers of said corporation, and their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of feather and down products, do forthwith cease and desist from misrepresenting in any manner, or by any means, directly or by implication, the identity of the kind or type of filling material contained in any such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type.

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