

Decision

IN THE MATTER OF
BARCLAY HOME PRODUCTS, INC., ET AL.

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

Docket 6275. Complaint, Dec. 28, 1954—Decision, Feb. 27, 1956

Order requiring a manufacturer in Cohoes, N. Y., to cease misbranding pillows through affixing to them labels stating that the filling was "All New Material Consisting of Down" and "* * * White Goose Down—50%; White Goose Feathers—50%," respectively, when the content of the pillows was less than the percentages so stated by more than the tolerance allowed by the trade practice rules for the industry.

Mr. Ames W. Williams and *Mr. Charles S. Cox* for the Commission.

Mr. Ralph E. Becker, of Washington, D. C., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charged the respondent corporation and its 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 certain other cases¹ "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." The filing of proposed findings of fact, conclusions and order was waived by counsel. On the basis of the entire record, this proceeding is found to be in the interest of the public, and the following findings of fact are made:

¹ The other related 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.; and
Docket 6137, Northern Feather Works, Inc., et al.

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1. Respondent Barclay Home Products, 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 North Mohawk Street, Cohoes, New York. Respondents Alexander and Louis Buchman are the officers of said corporate respondent. Their address is the same as that of the corporate respondent. These individuals formulate and direct 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 products, 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 in the State of New York to purchasers thereof located in 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 competition in commerce with others engaged in the manufacture, sale and distribution of down and feather products, including pillows.

4. In the course and conduct of their business, respondents have caused labels to be affixed to their pillows purporting to state and set out the kinds or types and proportions thereof of filling material contained therein. Typical of the statements appearing on the labels of two pillows designated "Greylark" is the following:

All New Materials Consisting of Down;

and on the labels of two pillows designated "Lucerne":

All New Material Consisting of

White Goose Down -----50%

White Goose Feathers -----50%

5. Through the use of the aforesaid statements appearing on the labels affixed to said pillows, respondents represent that the filling material in the pillows designated "Greylark" is composed of all down, and that the filling material in the pillows designated "Lucerne" is composed of 50% white goose down and 50% white goose feathers.

6. Two pillows designated "Greylark" and two designated "Lucerne," which were manufactured by respondents, were procured by a representative of the Commission at the same time from the same retail dealer, and were introduced in evidence. The contents

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of these four pillows were analyzed by an expert Mr. J. Davis Donovan, for the Commission. Respondents removed samples of filling material from each of these four pillows, and sent two of such samples, one taken from a "Greylark" pillow and one from a "Lucerne" pillow, to each of two experts, U. S. Testing Company, Inc., and Charles D. Pomerantz, for analysis. The analyses made by the Commission's expert showed as follows:

Pillows designated "Greylark"

	Pillow 1 (by weight)	Pillow 2 (by weight)
	<i>Percent</i>	<i>Percent</i>
Down.....	82.2	83.0
Feathers.....	15.0	13.7
Feather fiber.....	1.4	2.6
Pith and scale.....	1.4	.7

Respondents' experts made analyses of the contents of the two "Greylark" pillows, which showed the following:

	Pillow 1	Pillow 2
	<i>Percent</i>	<i>Percent</i>
Down and down fiber (fiber not separated).....	91.9	90.2
Feathers.....	8.1	9.8

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

	Pillow 3	Pillow 4
	<i>Percent</i>	<i>Percent</i>
By the Commission's expert:		
Down.....	36.2	36.4
Goose feathers.....	52.0	55.4
Damaged feathers.....	6.8	3.9
Chicken feathers.....	.5	.6
Fiber.....	3.2	1.8
Pith and scale.....	1.3	1.9
By respondents' experts:		
Feathers.....	50.9	56.0
Down and down fiber.....	49.1	44.0

7. There are three sources of raw feather supplies upon which respondents are, or have been, drawing. These 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 mis-

labeling 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.

(1) 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.

(2) 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 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.

(3) 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:

(a) *down*—waterfowl undercoating—clusters of light, fluffy filaments attached to one quill point but without any quill shaft;

(b) *down fiber*—down plumes or filaments separated from quill points, without any quill;

(c) *waterfowl feathers*—goose, duck, or a mixture of both;

(d) *natural feathers*—bird or fowl, having quill shafts and barbs;

(e) *quill feathers*—wing or tail feathers, or any mixture of both;

(f) *crushed feathers*—feathers, including quills, crushed or curled by machine;

(g) *feather fiber*—feather barbs separated from quill shaft;

(h) *damaged feathers*—other than crushed, chopped, or stripped, which are broken, damaged by insects, or otherwise materially injured.

(4) 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.

(5) A manufacturer may fill from 1,200 to 1,400 *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 hundred pillows.

(6) 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.

8. 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. These rules are interpretations of the laws administered by this Commission and express Commission policy with respect to the practices involved in this proceeding.

(1) 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 or 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 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" [underscoring supplied].

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

(2) 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 representations, 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.

(3) 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.

9. The expert who analyzed the samples of pillow-filling material for the Commission and testified in support of the allegations of the complaint followed the procedures prescribed in the Trade Practice Rules for the Feather and Down Products Industry, whereas

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the two experts who performed respondents' analyses did not follow these procedures, and failed to separate the samples of pillow contents tested by them into all the component parts. Their test results cannot be accepted as accurate, and the test results of the expert who testified in support of the complaint, therefore, must be accepted as representative of the contents of the pillows tested.

10. The average of his analyses of the contents of the two "Grey-lark" pillows shows down content of 82.6%. Under the Trade Practice Rules, it should be not less than 85%; hence the labeling of these pillows as "All New Material Consisting of Down" must be found to be false, misleading and deceptive. The average of the contents of the two pillows designated "Lucerne" shows down content of 36.3% and goose-feather content of 53.7%. Even taking into account the 15% tolerance, the down content of these two pillows is less, and the goose-feather content is more, than that stated on the labels, and, accordingly, the labeling of the "Lucerne" pillows must likewise be found to be false, misleading and deceptive.

CONCLUSIONS

The use by respondents of the aforesaid false, misleading and deceptive representations 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 as to the composition of the filling material of said pillows, and to induce the purchase of substantial quantities of their pillows because of such mistaken and erroneous belief.

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

It is ordered, That the respondents, Barclay Home Products, Inc., a corporation, and Alexander Buchman and Louis Buchman, 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.

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ON APPEAL FROM INITIAL DECISION

Per Curiam:

This case is similar to a number of other cases, all tried and considered together,¹ involving the use on labels of allegedly false and deceptive representations with respect to the filling material contained in feather and down pillows.

Except as to the results of the analyses of the different pillows used as exhibits, as to which the record in each of the cases is specific and definite, this case is not unlike the cases of Burton-Dixie Corporation, et al., D. 6134, and Bernard H. Sumergrade and Harry Sumergrade, copartners trading as N. Sumergrade & Sons, D. 6135, in which the Commission has written opinions setting forth in some detail its views on the issues involved. The similarity between the Burton-Dixie Corporation and Sumergrade cases and the instant matter renders the opinions in those cases equally applicable here, and for the reasons there stated the Commission is of the view that the hearing examiner correctly concluded that the respondents have misrepresented the contents of certain of their pillows in violation of the Federal Trade Commission Act and that the order to cease and desist contained in the initial decision is appropriate.

Accordingly, the respondents' appeal is denied and the initial decision is affirmed.

Commissioner Secrest did not participate in the decision of this matter.

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.

Commissioner Secrest not participating.

¹ In deciding this matter the Commission to the extent permitted by stipulation of counsel, entered on the record on April 14, 1955, considered the relevant portions of the records in the following related proceedings which are identified by principal respondents as:

- D. 6132 National Feather & Down Company,
- D. 6133 The L. Buchman Co., Incorporated,
- D. 6134 Burton-Dixie Corporation, et al.,
- D. 6135 N. Sumergrade & Sons,
- D. 6137 Northern Feather Works, Inc.

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IN THE MATTER OF

C. G. OPTICAL COMPANY ET AL.

Docket 6260. Complaint, Nov. 5, 1954—Decision, Mar. 1, 1956

Order reopening proceeding, vacating decision, and remanding case to hearing examiner.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Frank McManus for the Commission.

Frank E. & Arthur Gettleman and *Mr. Benjamin D. Ritholz*, of Chicago, Ill., for respondents.

This matter having been heard upon the respondents' motion for an order directing the receipt and filing of their report purporting to show compliance with the order to cease and desist entered herein pursuant to an agreement for consent order executed by the parties on March 24, 1955;¹ or, in the alternative for an order vacating the decision accepting said agreement and granting a new trial; and

The respondents having alleged a misunderstanding on their part as to the scope of the order agreed to, it being their understanding that the requirements of said order related only to statements made on inserts packaged with their eye testing device and not to their advertising generally; and

It appearing to the Commission that while the order on its face admits of no ambiguity, clearly applying to all forms of advertising disseminated by the United States mail or by any means in commerce, the discussion on the record does indicate a possible basis for the respondents' misunderstanding; and

The Commission being of the opinion that in the circumstances the public interest will best be served by vacating the decision and directing that the case be tried:

It is ordered, That the respondents' request for an order directing the receipt and filing of their report of compliance be, and it hereby is, denied.

It is further ordered, That this proceeding be reopened and that the initial decision of the hearing examiner, filed April 12, 1955, and the Decision of the Commission and Order to File Report of Compliance, issued May 22, 1955, be, and they hereby are, vacated and set aside.

It is further ordered, That the case be, and it hereby is, remanded to the hearing examiner for further proceedings in regular course.

Commissioner Kern not participating.

¹ 51 F.T.C. 1209.