

Complaint

60 F.T.C.

IN THE MATTER OF
CITY STORES COMPANY

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

Docket 7871. Complaint, Apr. 19, 1960—Decision, Mar. 27, 1962

Order dismissing complaint charging a corporation with headquarters in New York City with making deceptive use of comparative prices in advertisements of two divisions it operated as department stores, i.e., Lansburgh's of Washington, D.C., and Lit Brothers of Philadelphia, Pa.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that City Stores Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent City Stores Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 100 West Tenth Street, in the city of Wilmington, State of Delaware.

Said corporate respondent operates, as Divisions, a large number of department stores located in various states of the United States and in the District of Columbia, among them being Lansburgh Division of City Stores Company, located in Washington, D.C., and Lit Brothers, located in Philadelphia, Pa. Said Divisions operate branch stores in states adjacent to their aforesaid main stores.

PAR. 2. Respondent, through its said Divisions, is now, and for some time last past has been, engaged in advertising, offering for sale, sale and distribution of general department store merchandise to the public.

PAR. 3. Lansburgh Division of City Stores Company and Lit Brothers operate central warehouses in the District of Columbia and in Philadelphia, respectively. Merchandise shipped across state lines is received at said warehouses and is thereafter shipped across state lines to the branch stores of said Divisions. Said Divisions have their central business offices at their main stores and carry on an extensive commercial intercourse in commerce between said main stores

and their branch stores and with their credit customers located in other states.

Lansburgh Division sells merchandise in its store in the District of Columbia and it and Lit Brothers ship merchandise to purchasers located in states other than the state in which the sale is made.

Respondent, through its said Divisions, is engaged in a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent, through its said Divisions, advertises its merchandise in numerous newspapers which have an extensive circulation across state lines and has engaged in the practice of using fictitious prices in said advertisements. Among and typical of such practices, but not limited thereto, are the following statements:

Advertisements of Lansburgh Division of City Stores Company:

12 Modern Reclining Chairs with Vibrators, assorted

Orig. 59.95 to 69.95—Now 29.99

Sale

famous Calloway 9' x 12' rugs formerly 59.95—\$38.

matching 6' x 9' size, formerly 34.95—24.95

120 revolving car washers by Orsow

Orig. 6.98 now 3.99

6.95 new Chatham scale by Detecto * * * 4.88

21 Munsey toaster oven—Orig. 6.98—now 4.59

Advertisements of Lit Brothers:

25 Visnova sewing machines, orig. \$209

Brand new portable with carry-case 79.95

10 Trilmont electric heaters, orig. 29.95—14.99

Imagine, 50 pcs. stainless steel tableware

Service for 8, orig. 19.98—10.99

Amana air conditioner—Orig. 249.95—\$118.

Save \$4.00 on this Perfection Deluxe automatic heating pad! Formerly 8.95, now only 4.95

PAR. 5. Respondent, through the use of the amounts in connection with the words "Orig." and "Formerly", and through prices set forth without a descriptive prefix, have represented that said amounts were the prices at which the merchandise advertised had been usually and customarily sold by it at retail in the recent regular course of business and that the differences in said amounts and the lesser sale prices represented savings from respondent's usual and customary retail prices of said merchandise.

PAR. 6. Said statements and representations were false, misleading and deceptive. In truth and in fact, the amounts used in connection with the words "Orig." and "Formerly", and prices set forth without a prefix, were fictitious and in excess of amounts at which respond-

ent had sold the advertised merchandise at retail in the recent regular course of its business and, therefore, the differences between said amounts and the lesser sale prices, did not represent savings from respondent's usual and customary price of said merchandise.

PAR. 7. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition in commerce with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondent's merchandise by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondent from its competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now 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.

Mr. Harry E. Middleton, Jr., for the Commission.

Mr. Samuel D. Goodis and *Mr. Stanford S. Hunn* for *Folz, Bard, Kamster, Goodis & Greenefield*, of Philadelphia, Pa., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

I. PRELIMINARY STATEMENT

This proceeding is being dismissed because counsel supporting the complaint has failed to sustain by reliable, probative and substantial evidence the burden of proof imposed upon him by § 7(c) of the Administrative Procedure Act,¹ and §§ 3.14 and 3.21(b) of the Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission.²

¹ "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. . . . But . . . no . . . order be issued except . . . in accordance with the reliable, probative, and substantial evidence."

² § 3.14: ". . . counsel supporting the complaint shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with reference thereto."

§ 3.21(b): ". . . initial decisions . . . shall be based upon a consideration of the whole record and supported by reliable, probative and substantial evidence."

The issue presented for decision in this proceeding is comparatively simple: Did respondent's department stores, Lit Brothers of Philadelphia, Pa., and Lansburgh's of Washington, D.C., violate the Federal Trade Commission Act by the deceptive use of comparative prices in advertisements offering their merchandise for sale?

In this record, counsel supporting the complaint has failed to prove such deception by a preponderance of reliable, substantial and probative evidence.

The fact that respondents have stipulated the challenged advertisements into the record does not make out a prima facie case in support of the complaint. Commission counsel has the burden, which he has not met, of *proving* wherein said advertisements are false, misleading or deceptive. He must prove considerably more than that the ads were actually published. He must prove that the comparative prices characterized in the ads as "usually," "regularly," "formerly," and "originally" were in fact *not* prices at which the advertised articles were offered for sale or sold by the seller in the usual, recent, regular course of business in the trade area involved.

Use of the words "regularly" or "originally" (or abbreviations thereof), in juxtaposition to, and in conjunction with, comparative prices in advertisements constitutes a representation by the seller to prospective buyers that such regular or original prices were the seller's usual and customary price in his recent regular course of business for identical merchandise in the same trade area.³

To support a cease and desist order by the Federal Trade Commission in this type of proceeding, there is no need to show injury to the purchasing public.⁴

... capacity to deceive and not actual deception is the criterion by which practices are tested under the Federal Trade Commission Act.⁵

The public does not weigh each word in an advertisement or representation. It is important to ascertain the impression that is likely to be created upon the prospective purchaser.⁶ It is in the public interest to prevent the sale of commodities by the use of false and misleading statements and representations.⁷ Advertisements are not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase but rather by their effect upon the average member of the public who more likely will be influenced by

³ Bond Stores, Inc., Docket No. 6789, Commission's Opinion of January 7, 1960; Arnold-Constable Corporation, Docket No. 7657.

⁴ *Jacob Siegel v. FTC*, 150 F. 2d 751, 755.

⁵ *Goodman v. FTC*, 244 F. 2d 584, 604 (C.A. 9th 1957).

⁶ *Kalwajtys v. FTC*, 237 F. 2d 654, 656 (*cert. denied* 352 U.S. 1025).

⁷ *Parke, Austin & Lipscomb v. FTC*, 142 F. 2d 437.

the impression gleaned from a first-glance at the most legible words.⁸

This complaint was issued April 19, 1960, against respondent City Stores Company, a Delaware corporation, charging it with the deceptive use of comparative prices in advertising promulgated by two of the department stores which it operates, i.e., Lit Brothers, Inc., of Philadelphia, Pa., and Lansburgh's of Washington, D.C. Issue was joined in the answer. Several prehearing conferences and hearings were either suspended or canceled to permit counsel to work out a stipulation of facts. A "Prehearing Stipulation" was filed on July 19, 1961, with accompanying exhibits. These constitute the entire record in this proceeding. Certain statements made at a prehearing conference have also been cited by counsel as proof of certain formal facts which are not decisive as to the issues presented. The "Prehearing Stipulation" is not a stipulation of fact but more in the nature of a stipulated record. Proposed findings, conclusions and suggested order have been filed. The Prehearing Stipulation, *inter alia*, recites:

The exhibits identified herein are stipulated as being authentic and the statements in explanation of the respective exhibits are accepted with the same force and effect as if witnesses had testified under oath.

It is further stipulated that no testimony or exhibits will be introduced in rebuttal of the material herein stipulated, and the evidence and testimony of record and this stipulation constitute the entire record in this case.

Motions heretofore made which have not previously been ruled upon hereby are specifically denied unless otherwise indicated in this decision. Requested findings which are not specifically incorporated herein in *haec verbae* or in substance are rejected and refused. The fact that findings do not incorporate specifically evidence which is in the record must not be construed as indicating that such evidence has not been fully considered. It indicates merely that the evidence which has been incorporated in the findings contains all of the relevant, reliable, probative and preponderant facts essential to a proper adjudication of the issues.

The hearing examiner makes the following:

FINDINGS OF FACT

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding, and the proceeding is in the public interest. The complaint filed herein states a good cause of action under the Federal Trade Commission Act.
2. Respondent City Stores Company is a corporation organized, existing and doing business under and by virtue of the laws of the

⁸ *Ward Laboratories, Inc., et al. v. FTC*, 276 F. 2d 952 (C.A. 2d 1960).

State of Delaware, with its principal office at 132 West 31st Street, New York, N.Y.

3. Respondent operates as Divisions a large number of retail department stores located in various states of the United States and in the District of Columbia, among them being Lansburgh's, Washington, D.C., and Lit Brothers, of Philadelphia, Pa. The Lansburgh's and Lit Brothers Divisions operate branch stores in states adjacent to their aforesaid main stores.

4. Respondent is engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

5. Lansburgh's and Lit Brothers are separate Divisions of respondent and act independently of respondent with full local autonomy as to their advertising, the prices advertised therein, and the comparative pricing employed therein.

6. During the period involved in these proceedings Lansburgh's advertised over 6,000 items with comparative prices and Lit Brothers advertised over 10,000 items with comparative prices.

7. The advertisements of Lansburgh's and of Lit Brothers for the items stated appeared on the dates and in the words set forth hereinafter. Lansburgh's advertised in the Washington Post and Times-Herald, a morning newspaper, and the Washington Evening Star, an afternoon newspaper, both having general interstate circulation in the District of Columbia, Virginia, and Maryland. Lit Brothers advertised in the Philadelphia Evening Bulletin and the Philadelphia Inquirer, both newspapers of general circulation in the Philadelphia area. It is not essential to this decision to specify hereafter the particular newspaper in which the particular advertisement appeared since only the date and the wording of the advertisement are material to the decision.

8. Lansburgh's and Lit Brothers advertised the item hereinafter described in newspapers of general circulation on the dates indicated. A finding whether such item had previously been sold in the usual, recent, regular course of business in the trading area involved at the comparative price stated in the advertisement must be predicated solely upon the record made in the Prehearing Stipulation and accompanying exhibits.

9. The dates and the items advertised by Lansburgh's and Lit Brothers were:

LANSBURGH'S ADVERTISEMENTS:

A. On January 25, 1959:

12 modern reclining chairs with vibrators, assorted, orig. 59.95 to 69.95 now 29.99.

