

a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist as so modified.

IN THE MATTER OF
BOND STORES, INC.

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

Docket 6789. Complaint, May 3, 1957—Decision, Jan. 7, 1960

Order requiring the corporate owner and operator of 95 retail clothing stores throughout the United States to cease representing falsely in advertising in newspapers and by radio and television—by such statements as "Bond's Suit Sale \$38.90, \$50, \$55, \$60 values. During Bond's Big Celebration Sale—you can save up to twenty-one dollars on a beautiful TRU FIT SUIT!"—that during the advertised sale it had reduced its prices to the stated "sale" prices, that the higher prices followed by the word "values" were its regular prices, and that purchase at the "sale" price resulted in a saving of the difference between the two.

Before *Mr. Loren H. Laughlin*, hearing examiner.

Mr. Edward F. Downs for the Commission.

Kaye, Scholer, Fierman, Hays & Handler and *Mr. Bernard Grossman*, of New York City, for respondent.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission on May 3, 1957, issued its complaint charging respondent, Bond Stores, Inc., with violation of the Federal Trade Commission Act through dissemination of false, misleading and deceptive representations as to prices of clothing advertised for sale. After the filing of answer by respondent, hearings were held in due course before a duly designated hearing examiner of the Commission and testimony and other evidence in support of, and in opposition to, the allegations of the complaint were received into the record. In an initial decision filed April 14, 1959, the hearing examiner held that there is no public interest in the proceeding; that respondent's practices did not constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act; and that the proceeding is barred by law as well as being unjust and unfair to respondent. Accordingly, he ordered that the complaint be dismissed.

The Commission has considered the appeal filed from the initial

decision by counsel supporting the complaint, briefs submitted by counsel on both sides, their oral argument before the full Commission, and the entire record, and has determined that the appeal should be granted and that the initial decision should be vacated and set aside. The Commission further finds that this proceeding is in the public interest and now makes this its findings as to the facts, conclusions drawn therefrom and order to cease and desist, which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Bond Stores, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland with its office and principal place of business at 380 Fifth Avenue, New York, N.Y.

2. Respondent owns and operates 95 retail clothing stores located throughout the United States and in the District of Columbia. It also owns and operates factories in New York and New Jersey for the manufacture of some of the clothing shipped to and sold in its stores. It also purchases some clothing from other manufacturers for sale in its stores. Purchased merchandise may be shipped by the manufacturer direct to respondent's retail stores or to its warehouse in New York for distribution. In many instances, respondent's retail outlets to which clothing is shipped are located in states other than those where it is manufactured by respondent or by its suppliers.

Respondent's retail stores are engaged in the sale of clothing and the shipment and delivery thereof in commerce, as "commerce" is defined in the Federal Trade Commission Act, to purchasers located in states other than that in which such shipments have their origin.

Respondent maintains and has maintained a course of trade in said clothing among and between the various states of the United States and in the District of Columbia. Its volume of business is and has been substantial, total retail sales in the fiscal year ending July 31, 1957, having amounted to \$87,000,000.

3. The prices of all merchandise, sold in all of respondent's retail stores, are determined in New York, and respondent transfers merchandise from store to store and from state to state. When merchandise is sold in any store a ticket is removed therefrom and sent to New York where a unit control is maintained of every garment in stock, and, from these returned tickets, respondent in New York determines the inventory of each store, then ships such merchandise as it deems necessary to balance out the inventory of each store.

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Respondent's goods are transferred from store to store as business conditions dictate, and there is no evidence that title to any such goods ever passes from respondent corporation itself until a sale is made to a retail purchaser in the state where the store he buys from is located.

4. Respondent is now and has been in substantial competition with other corporations, and with partnerships and individuals engaged in the sale of wearing apparel in commerce among and between the various states of the United States and in the District of Columbia.

5. Respondent advertises in newspapers in cities where its stores are located, which advertising is prepared in New York and sent to the various stores for release to the newspapers in their respective trade areas. Some of these newspapers send their bills for said advertising to the local store from where it is forwarded to New York while other newspapers send their bills direct to New York. But all advertising is paid for by respondent in New York. The New York newspapers in which respondent advertises have a circulation outside of the State of New York. Respondent also advertises over radio and television.

6. Respondent has made certain statements and representations in metropolitan newspapers and commercial radio announcements. Among and typical, but not all inclusive, of the statements and representations so made are the following: "Once a year * * * for Bond's Anniversary only great savings on our own famous 'Tru Fit' collection. Bond's Suit Sale 38.90. \$50.00. \$55. \$60. values. During Bond's Big Celebration Sale * * * you can save up to twenty-one dollars on a beautiful TRU FIT SUIT!—They're fifty and sixty dollar values—but *during this sale* only. Bond's has 'em celebration-priced at just THIRTY EIGHT NINETY!"; "MILLION-DOLLAR SAVINGS! That's Bond's Big Anniversary Present to all Bond Customers!—Brand-new, freshly-tailored TWO TROUSER Suits—anniversary priced at a terrific FORTY-NINE NINETY! They're actually sixty and sixty-five dollar values, so YOU save ten to fifteen dollars in cold cash!"; and "BOND'S greatest ANNIVERSARY SALE in 46 years Entire Fall Stock of FINER 'Style Manor' 2-trouser suits at our lowest prices ever! \$60 and \$65 values 49.90."

7. A number of consumer witnesses testified that their understanding of the price representations in respondent's advertising was to the effect that prices had been reduced by the difference between the stated "value" price and the "sale" price; that savings in specific amounts would be realized which could be computed only by comparing the value and sales prices; that Bond had cut its prices

from those represented by stated values; that Bond had previously sold clothing at the advertised value price; and that they regarded both the stated value prices and sales prices as being Bond prices and as not having any reference to the prices of other competitive stores.

8. Upon the basis of the foregoing testimony and its own interpretation of the whole context of respondent's advertisements, the Commission finds that respondent, through the use of the aforesaid statements appearing in advertisements as set out and quoted, and by other advertisements of similar import, has represented, directly or by implication, that during an advertised "sale" it had reduced its prices to the stated "sale" prices, that the higher prices followed by the word "values" in such advertisements were respondent's regular and customary prices for the clothing so advertised and that a purchase at the advertised "sale" price resulted in a saving to the purchaser of the difference between the so-called "sale" price and the higher stated prices, designated in such advertisements as "values."

9. The representations in said advertisements, as hereinabove set forth, were false, misleading and deceptive. In truth and in fact, the higher prices appearing in such advertisements followed by the word "values" were not the regular or customary prices for the clothing so advertised but were in excess of the regular and customary prices charged by respondent for such clothing. It follows that a purchase of such clothing at the so-called "sale" price did not result in a saving to the purchaser amounting to the difference between the so-called "sale" price and the stated higher prices designated in such advertisements as "values."

10. The use by respondent of the foregoing false, misleading and deceptive statements and representations, and others similar thereto, has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of a substantial quantity of respondent's clothing because of such mistaken belief. As a result thereof, trade has been unfairly diverted to respondent from its competitors and injury has thereby been done to competition in commerce.

CONCLUSIONS

The Commission has jurisdiction of the subject matter and of the person of the respondent corporation. The aforesaid acts and practices of respondent, as herein found, were all to the prejudice and

injury of the public and of respondent's competitors and constituted unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered. That respondent, Bond Stores, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of wearing apparel in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication that any amount is the regular retail price of respondent's merchandise when such amount is in excess of the price at which said merchandise was regularly sold at retail by respondent in the recent normal course of its business.

B. Misrepresenting in any manner the amount of savings available to purchasers of respondent's merchandise, or the amount by which the price of said merchandise is reduced from the price at which said merchandise was regularly and customarily sold by respondent in the recent normal course of its business.

It is further ordered. That respondent, Bond Stores, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

Respondent, Bond Stores, Inc., is charged in this proceeding with misrepresenting the regular or customary prices of clothing advertised for sale by it; with misrepresenting the amount it had reduced prices for certain sales; as well as with misrepresenting the amount of savings accruing to customers through purchases at the advertised sale prices. After hearings in due course, the hearing examiner entered an initial decision which would dismiss the complaint. Counsel supporting the complaint has appealed from that action. Briefs in support of and in opposition to the appeal of counsel supporting the complaint have been submitted and oral argument heard by the full Commission. The matter is now before us for final determination upon the merits.

The principal question presented on appeal is whether the exam-

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iner was correct in holding, as he did, that "the evidence in support of the complaint lacks that substantiality upon which the Commission's case of false, misleading and deceptive advertising must be based." Other subsidiary questions are presented and they will be considered seriatim after consideration and disposition of the primary issue.

Typical of the advertisements which are the basis of the complaint, announcing special sales, are those containing such representations as:

Once a year . . . for Bond's Anniversary Only great savings on our own famous "Tru-fit" collection

Bond's Suit Sale

38.90

\$50.00 • \$55 • \$60 values

* * * *

During Bond's Big Celebration Sale—you can save up to twenty-one dollars on a beautiful TRU FIT SUIT!—They're fifty and sixty dollar values—but *during this sale only*. Bond's has 'em celebration—prices at just THIRTY-EIGHT NINETY!

* * * *

MILLION-DOLLAR SAVINGS! That's Bond's Big Anniversary Present to all Bond customers!—Brand-new, freshly-tailored TWO TROUSER Suits—anniversary priced at a terrific FORTY-NINE NINETY! They're actually sixty and sixty-five dollar values, so YOU save ten to fifteen dollars in cold cash!

* * * *

BOND'S greatest ANNIVERSARY SALE in 46 years—Entire Fall Stock of FINER "Style Manor" 2-trouser Suits at our lowest prices ever!

\$60 and \$65 values

49.90

In support of the charge that certain of respondent's advertising has the capacity and tendency to mislead or deceive members of the purchasing public, counsel supporting the complaint adduced the testimony of a number of "consumer" witnesses who, on direct examination, were queried as to their understanding of respondent's representations in the *whole context* of each questioned advertisement (Comm. Ex. 2, 3, 5, 7 and 10). The sole purpose and effect of their testimony, as recognized by the hearing examiner, was to present representative samplings of public understandings and interpretation of the advertisements disseminated by respondent.

All consumer witnesses testified on direct examination that, according to their understanding of the Bond advertisements, clothing was being offered at reduced prices and when asked what the extent of the reductions were they replied that the reductions were from the stated value figures. On cross-examination they were questioned

as to what their understanding was of an Arnold Constable advertisement (Resp. Ex. 1), which read as follows:

Sale! Fine Ties
Imported Pure Silks!
Values 3.50 to 5.00 1.95

These witnesses, it is true, evinced some confusion as to the meaning of the word "value," both on direct and cross-examination and, with regard to the Arnold Constable advertisement, their testimony was characterized by the hearing examiner as "ultimately negating" their direct testimony as to the meaning of the Bond advertisements. Counsel supporting the complaint contends that it was error to permit use of the Arnold Constable advertisement in attempting to rebut the testimony as to the Bond advertisements. We do not feel it necessary to determine that question here. We look only to the advertisements received in evidence, each in its whole context.

Thus viewing each of the Bond advertisements, the Commission is of the opinion that the references contained therein to reduced sale prices and to savings in specific amounts such as, for example, "*** You save ten to fifteen dollars in cold cash"—particularly when the only reference back is to the stated "values"—did, in fact, have the tendency to mislead and deceive attributed to them. It seems obvious to us that the heralded reductions and savings at Bond's sales were related directly to Bond's customary and usual retail prices, artfully characterized as "values," and that the advertised merchandise purportedly had been reduced from those prices to the stated sales prices for the advertised event. Such advertisements are contradictory and ambiguous and at best disclose only partial truths as to "reductions and savings." Those advertisements in the whole context of each, give rise to the reasonable inference that the public would and did assume that the reductions were from the only other prices appearing therein—the stated value prices—and that these latter were the respondent's customary and usual prices.

That such reductions had not been made is not questioned. Respondent in its answer admitted that the "value" prices set forth in its advertisements were in excess of its customary and usual prices for the articles so advertised, and this admission is supported by the testimony of Sylvan N. King, vice president of respondent Bond Stores, Inc., as well as by respondent's Exhibit 2.

Respondent contends, however, and without contradiction, that prices for these sales events actually had been reduced, though not from the stated "value" prices. We note in passing that the testimony of Mr. King and the aforementioned respondent's Exhibit 2 clearly establish that certain of the items of merchandise actually

were reduced ten cents, \$1.05 and \$2.60, respectively, from respondent's customary and usual retail prices.

As previously indicated, we deem it unnecessary to rule upon the contention of counsel supporting the complaint that it was erroneous to permit use of the Arnold Constable advertisement to rebut testimony as to the meaning of respondent's advertisements. Assuming that the Constable advertisement (Resp. Ex. 1) correctly was received in evidence, it is abundantly clear that the use of the term "value" therein does not give rise to the connotations implicit in the use of the same term in the Bond advertisements in their whole context, especially when, as noted above, the latter are replete with references to specific reductions and specific savings from stated "value" prices.

Considerable stress is laid in the initial decision upon the testimony of the "consumer" witnesses. The hearing examiner, upon the basis of his evaluation of their testimony, appears to have discarded in a large measure their affirmative testimony as to their understanding of respondent's advertisements.

We have examined this phase of the case carefully in the light of the whole record. It is our considered judgment that due weight was not accorded this "consumer" evidence. Taking it in its proper perspective in the light of everything else material and relevant of record, and advertising to the whole context of the advertisements, our conclusion as to the misleading character of respondent's representations is the one indicated above.

We turn next to the hearing examiner's finding that there is a lack of public interest in this proceeding. It is not clear from the initial decision whether this finding is based upon a conclusion that the evidence fails to sustain the alleged false, misleading and deceptive character of respondent's advertising or upon the asserted discontinuance of its use. Since we already have determined that respondent's advertisements were misleading and deceptive, it follows that the proceeding in that respect most surely is in the public interest and that an appropriate order should issue to inhibit the questioned practices.

As to the question of effective discontinuance or abandonment of the pricing practices which are the subject of this proceeding, it is noted that the complaint herein issued May 3, 1957. The evidence is that respondent actually did not discontinue publication of the questioned advertisements until some months thereafter. There is not here any showing of the "unusual circumstances which in the interest of justice require" dismissal of the present complaint upon the ground of abandonment. As a matter of fact, respondent still

contends in its argument on the appeal now before us that its practices were not, and are not, in violation of the law. Controlling here are the principles enunciated by the Commission in *Sheffield Merchandise, Inc.*, Docket No. 7727, decided July 7, 1957, and cases therein cited. No case has been made warranting dismissal of the complaint on the ground of discontinuance.

Also presented for determination in this appeal is the question whether the proceeding is barred by law as found by the hearing examiner. To put this issue in its proper perspective we need but refer briefly to the fact that in an earlier case, in 1949, the Commission issued its complaint against Bond Stores, Inc., in Docket 5697. That complaint was dismissed without prejudice upon the execution of a "Stipulation and Agreement," in Section 2(b) of which Bond Stores, Inc., agreed:

(b) Not to state, directly or by implication, that an indicated price is a saving or reduction from a regular price, unless respondent previously sold the merchandise at such regular price, or to refer to a price as a regular price, directly or by implication, unless respondent previously sold the merchandise at such regular price.

The agreement carried the following explanatory statement:

Nothing herein contained shall prevent respondent from advertising or otherwise representing that its merchandise is worth or is of a value in excess of its stated price, provided such worth or value is based upon the price of comparable merchandise sold by other retailers in the same trade territory, nor shall respondent be prevented from referring to the price of a special purchase as a sale price, nor from indicating a saving resulting from such special purchase.

Thereafter, on May 1, 1957, the Commission, having reason to believe that Bond Stores, Inc., was violating the aforesaid Section 2(b), formally notified Bond that said section of the "Stipulation and Agreement" was rescinded. As previously noted, complaint in the instant proceeding followed on May 3, 1957.

The hearing examiner regards the stipulation as an entity and as not being subject to partial rescission. He concludes that through its "unilateral" action abrogating a portion only of the stipulation and agreement in Docket 5697, the Commission acted *ultra vires* and that the present proceeding is barred by law. The examiner recognizes that the Commission may always revoke an informal stipulation and agreement, but is of the opinion that such revocation must be complete and not partial.

The authorities and cases relied upon by the hearing examiner are not germane here. They involved stipulations which became parts of the records in litigated cases, while the stipulation and agreement here was accepted by the Commission in its discretion as an admin-

istrative matter. Even if such agreements are strictly adhered to, they cannot be permitted to tie the hand of the Commission in the exercise of its duty to act in proper cases in the public interest to inhibit unfair and deceptive acts and practices and unfair methods of competition. What we have here is not a stipulation to be enforced by adjudicative action, but a mere informal agreement by respondent not to engage in certain practices in consideration of which the Commission dismissed its complaint without prejudice. Obviously, there was no agreement by the Commission never again to issue a complaint against Bond Stores, Inc., and where, as here, a respondent violates the spirit, if not the letter, of the stipulation, all moral obligation of the Commission to refrain from further action is at an end. The Commission, in such a case, has no alternative but to issue a complaint charging a violation of law, and the question whether or not the stipulation is formally rescinded, either in whole or in part, is of no importance. The examiner's holding that this proceeding is barred by the stipulation or by reason of the Commission's failure to revoke it in toto is disapproved.

The hearing examiner's final ground for dismissal of the complaint is that the present proceeding is unjust and unfair to the respondent. He cites as a precedent the case of *Arnold Constable*, Docket 7106. In that case, letters were written to the respondent by members of the Commission's staff commenting on certain specific advertisements which had been submitted by the respondent. The clear implication of the letters was that the only questions with respect to such advertisements were whether the higher prices mentioned therein were "current market prices" and whether the respondent had adequate records to disclose the facts upon which such prices were based. Subsequently, however, a complaint was issued attacking the same advertisements on the basis that they falsely represented the respondent's own former selling prices. In that situation, the Commission held that while the foregoing did not constitute a defense to any charge of unlawful activity, principles of equity and fair play did militate against further prosecution of that phase of the case. That is not the situation in this case, and the examiner's reliance on *Arnold Constable* was completely misplaced. The complaint herein does not attack representations as to "value" as permitted under the stipulation quoted above. It charges, rather, that respondent has engaged in a practice which it agreed not to engage in, namely, representing directly or by implication that a sales price is a saving or reduction from a regular price when the merchandise has not been previously sold at such "regular" price.

In view of the foregoing considerations, we deem it unnecessary to

rule specifically on the exceptions of counsel supporting the complaint