

Complaint

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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-

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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, Kamsler, 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.

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Mr. Foster of Lansburgh's would testify and the examiner finds, in the absence of evidence to the contrary, that the 69.95 chairs were sold by Lansburgh's at 69.95 until September 6, 1958. Mr. Foster would further testify and the examiner finds, in the absence of evidence to the contrary, that the 59.95 chairs were sold by Lansburgh's at 59.95 until January 23, 1959, except one chair which it sold on December 22, 1958, at 42.77. The reclining chairs, therefore, were not deceptively advertised.

B. On April 1, 1959:

9 x 12 rug formerly 59.95—38.00.

The advertisement also stated: "Sale—Lansburgh's buys out entire stock of manufacturer's discontinued patterns in long-wearing twisted loop pile." Counsel admit based upon RX 1-A, B and C that these rugs purchased at \$37 were marked to sell at \$59.95. Counsel supporting the complaint has failed to prove that the comparative price of \$59.95 which was used in the advertisement was false, misleading, and deceptive.

C. On January 25, 1959:

120 revolving car washers by Osrow orig. 6.98 now 3.99.

On February 20, 1959:

6.98 revolving car washing brushes by Osrow 3.99.

Mr. Rollins, Associate Buyer of Housewares, would testify, and there is no evidence to the contrary, that the articles were to show a reduction in price from \$6.98 to \$3.99, and those in the later ads were on the floor at the same time marked as reduced from \$4.44 to \$3.99. The evidence involving Lansburgh's prior prices for the revolving car washers (Stip. p. 3) does not support a finding that the \$6.98 comparative price used in the advertisement was false, misleading and deceptive. The evidence is too incomplete and inconclusive to support such finding.

D. On March 8, 1959:

6.95 new Chatham Scales 4.88.

CX-5-B indicates that the manufacturer's suggested retail price was \$7.95 and that Lansburgh's used the figure of \$6.95. The Stipulation does not contain facts from which the examiner may conclude whether Lansburgh's had or had not offered for sale or sold the scales at \$6.95 in the usual, regular course of business prior to the time of the advertisement. The examiner, therefore, is unable to make a finding because of the inadequacy of the proof. The burden of proving that Lansburgh's had not sold the scales at \$6.95 is upon counsel supporting the complaint.

E. On January 25, 1959:

21 Munsey Toaster-Ovens orig. 6.98 now 4.59

CX-6-C, which is an invoice from Munsey Products, Inc., indicates that the same toaster was sold by Lansburgh's at \$6.95. This is confirmed in CX-6-E. The challenged advertisement was, therefore, not false, misleading and deceptive.

F. On March 4, 1959:

New Adjustable Ironing Board reg. 6.99—4.99.

CX-7-D, an invoice dated October 13, 1958, for 200 of the ironing tables, indicates that the retail price of the ironing boards had been \$6.99. Since this is the only proof in the record, the examiner finds that counsel supporting the complaint has not sustained the burden of proving that the advertisement was false, misleading and deceptive.

G. On February 20, 1959:

6.95 Skotch Portable Barbeque Grill . . . 1.99.

Mr. Rollins, Associate Buyer of Lansburgh's Housewares Department, which handles this item, would testify that, and, in the absence of contradictory testimony, the examiner finds, Lansburgh's purchased these items locally and sold them in the store for \$6.95. The merchandise purchased from Kastner was identical to the merchandise sold by Lansburgh's at \$6.95. Counsel supporting the complaint has failed to sustain the burden of proving that the grills were falsely and deceptively advertised.

H. On January 25, 1959:

Four French Provincial Buffets, Fruitwood, orig. 99.95, now 64.95.

CX-9-B shows that this item was sold at Lansburgh's at \$99.95. Two sales, one on December 1, 1958, and one on December 23, 1958, were at \$99.95. Sales had been made in 1957 at \$99.95. There is no evidence of deceptive advertising of the French Provincial Buffets.

I. On April 5, 1959:

Wear-ever Hallite Casseroles reg. 8.75—6.12, 8 inch.

The 8-inch casserole was retailed by Lansburgh's at \$8.75 (CX-10-C, D, E, and F). Respondent's witness would testify that Wear-ever semiannually has special sales that they offer to their dealers on selected items. These items are sold to the dealers at a special price for a limited time only. After the sale the prices revert to the original figure. Lansburgh's correctly advertised the former price at which the casseroles were regularly sold prior to the special sale (Stip. p. 7).

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J. On March 11, 1959:

5.98 Enamel Toilet Seat—3.99.

Two separate styles of toilet seats were sold by this store. The style referred to in the advertisement was Model 121 (Stip. p. 8). Style 121 had been sold by Lansburgh's at a retail price of \$5.98. Style 510 had been sold by them at retail for \$3.99. The challenged advertisement has not been proven to be false, misleading and deceptive.

LIT BROTHERS ADVERTISEMENTS:

K. On February 1, 1959:

DuPont Mylar Auto Seat Covers orig. 32.95 Save 20.95 Monday \$12.00.

On May 12, 1959:

Save 19.96 M DuPont Mylar Auto Covers orig. 32.95 12.99.

The recitals in the Stipulation (pp. 9, 10 and 11) justify a finding, which the examiner hereby makes, that counsel supporting the complaint has failed to prove by reliable, substantial and probative evidence that these seat covers had not previously been offered for sale or sold at retail by Lit Brothers on their floor for \$32.95. The use of this comparative price in the advertisements of February 1 and May 12, 1959, was not false, misleading nor deceptive.

L. On October 17, 1958:

VISNOVA Mfr's List \$299 Anniversary price 149.95.

On February 10, 1959:

25 VISNOVA Sewing Machines orig. \$209—\$79.95.

It was misleading for Lit Brothers to use "Mfr's List \$299" in the advertisement unless it had offered for sale or sold the machines in its stores for \$299 or unless the sewing machines had been generally sold in its regular trade area in the recent regular course of business for \$299. According to the handwriting across CX-14-B and C, which are not contradicted, these machines were in the store originally at \$299. They did not sell so were marked down to \$209. They still did not "move" so were marked down to \$79.95. They were finally reduced and sold at \$49.95. The recitals on pages 13 and 14 of the Stipulation do not warrant a finding that counsel supporting the complaint has sustained the burden of proof imposed upon him.

M. On February 10, 1959:

10 Trilmont Electric Heaters orig. 29.95—14.99.

This item was sold a year before the ad appeared at \$32.95 and the manufacturer's list price was \$29.95. Eleven Trilmont heaters which were in stock on the 10th of February, 1959, priced at \$19.97 were

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reduced to \$14.99, and three Trilmont Heaters which were in stock on February 10, 1959, priced at \$19.99 were also reduced to \$14.99. CX-15-D is a price change form indicating that on March 19, 1959, 15 heaters priced at \$14.99 were reduced to \$10.

The November, 1956, advertisement of Strawbridge & Clothier in the Wilmington Morning News and the October 28, 1956, advertisement of Stern's in the Evening Bulletin, are not shown in the stipulation to relate to the time period and trade area presented by the Lit advertisement so as to be relevant to the issues. The recitals in the Stipulation (pp. 13, 14, and 15) do not establish the facts which counsel supporting the complaint must prove in order to sustain the burden imposed upon him. The evidence is inconclusive.

N. On February 18, 1959:

Stainless steel tableware Service for 8, Orig. 19.98 10.99.

On the basis of the facts in the Stipulation, the hearing examiner finds that with exception of pattern the identical merchandise had been sold by Lit's in its recent regular course of business in the trade area involved at the price of \$19.98. The challenged advertisement has not been proven to have been false, misleading, and deceptive within the intent and meaning of the Federal Trade Commission Act.

O. On March 31, 1959:

Melmac 45pc Dinner set for 8, Half price 14.97 orig. 29.95.

Mrs. Haas of Lit Brothers would testify, and in the absence of rebutting testimony, the hearing examiner finds that the same dinner set was sold during 1958 at \$29.95. Mrs. Haas' testimony would be substantiated by that of Mr. Egendorf. Use of the words "orig. 29.95" in the advertisement for the Melmac dinner set was not false, misleading and deceptive.

P. On February 27, 1959:

Amana Air Conditioner Orig. 249.95 \$118.00.

Attached to CX-18-A to D, inclusive, is a note: "Actually sold at Lit Brothers for \$249.95. Mark-down was taken on just five left. This was a clearance." (Stip. p. 17) In the absence of contradictory evidence, the examiner finds that Amana Air Conditioners originally were offered for sale or did sell for \$249.95. The advertisement stating that fact was not false, misleading and deceptive within the intent and meaning of the Federal Trade Commission Act.

Q. On March 8, 1959:

Half price! Famous 29.95 Salon-type Vibra-Slim Massager only 14.97 * * *.

The evidence in the Stipulation supports a finding, and the hearing examiner finds, that the massager had been selling at Lit's for \$29.95

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and that the advertisement was not false, misleading and deceptive (Stip. pp. 18-19).

R. On March 22, 1959:

Save \$4 on this Perfection
Deluxe automatic heating pad!
Formerly 8.95,
now only
4.95.

This heating pad had been sold in the store for \$8.95 by S. Hollander, Inc., of Chicago, Illinois, a licensee of Lit's. Respondent has been unable to find any sales checks evidencing sales at \$8.95; however, the burden of proving that the heating pad had not been sold or offered for sale at \$8.95 was on counsel supporting the complaint, and he has failed to sustain that burden. Mrs. Haas, of Lit Brothers' staff, the buyer of Hollander's, and Mr. Egendorf of Lit Brothers, would testify that the item was on Lit Brothers' floor at the comparative price stated in the advertisement. The evidence is too inconclusive to justify a finding that the advertisement was false, misleading and deceptive.

S. On March 29, 1959:

1000 Ice tea spoons orig. 2.00 50¢.

This spoon sold in Lit's stock at \$2; it was fair-traded by Holmes & Edwards. This was a discontinued pattern and was not being sold by Lit Brothers at the time of the ad, but had been sold previously at \$2. This was a special purchase for the purpose of disposing of a discontinued pattern. Counsel supporting the complaint has failed to sustain the burden imposed upon him with reference to the advertisement for these spoons according to all the facts stated in the Stipulation (p. 20).

T. On March 29, 1959:

2000 aluminum skillets
orig. 2.98
1.55

These sold on the floor at \$2.98 during January and February 1959 (Stip. p. 20). The advertisement for the skillets was not false, misleading or deceptive.

U. On May 19, 1959:

Westinghouse Streamliner
Air Conditioner
Last Year 329.95
158.88

Mrs. Haas of Lit's would testify and there is no evidence to the contrary that the Westinghouse air conditioner had sold "last year" for \$329.95. In the absence of rebutting evidence, the hearing examiner finds that the air conditioner had been offered for sale or sold in Lit Brothers for \$329.95 (Stip. pp. 21-22), and the above advertisement is found not to have been false, misleading or deceptive.

10. All of the 23 items advertised (fndg 9A-9U incl.) are non-seasonal items as that term is understood in the retail department store business.

DISCUSSION

The complaint alleges in Paragraph Six:

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 respondents 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.

Only ten Lansburgh's advertisements out of 6,000, and thirteen Lit Brothers' advertisements out of 10,000 published have been challenged in these proceedings. In no instance has counsel supporting the complaint established even as to the 23 challenged advertisements by reliable, probative and substantial evidence that the comparative prices stated in such twenty-three advertisements were in fact false, misleading and deceptive within the intent and meaning of the Federal Trade Commission Act.

An "automatic" mark-down policy and practice has been followed by some very successful retail department stores for the purposes, among others, of turning over their stocks frequently, insuring fresh merchandise on the floor, and to move slow moving items such as the Visnova Sewing Machines (fdg 9L). Some successful department stores seek more frequent turnover of their stock than do others. Obviously rate of turnover is one essential ingredient in successful retail department store operations.

The increase in the number of "discount houses" has also complicated the retail merchandising picture, and created new problems in connection with policing the advertising practices of such discount houses.

In this case, however, none of these elements has been inserted in the record, nor brought up for evaluation. The evidence in this record does not support a finding that as to the ten Lansburgh advertisements out of 6,000 and the thirteen Lit Brothers advertisements out of 10,000 the comparative prices used were "fictitious and in excess of amounts at which respondent had sold the advertised mer-

chandise at retail in the recent regular course of its business," as charged in the complaint. In most of the 23 advertisements, the stipulated record proved just the opposite, and in a few other instances the facts are too inconclusive to support any finding of fact other than that counsel supporting the complaint has failed to sustain the burden of proof imposed upon him.

The word "recent" in the expression "recent, regular course of business" should not be too inflexibly defined. RX-10 is a letter dated November 14, 1958, from the Chairman of the Federal Trade Commission to the Better Business Bureau of New York City approving insofar as they do not conflict with the policies and practices of the Federal Trade Commission certain standards for Retail Advertising promulgated by the Better Business Bureau of New York City, Inc. Neither the letter nor the standards constitute binding authority but it appears appropriate to state that respondent's advertising in this case conforms to the spirit of said Standards for Retail Advertising of Price Reduction, Comparison and Savings Claims. This is reproduced in substance on page 22 of the Prehearing Stipulation:

I. Saving or Reduction in Your Own Price

1. *immediately preceding price* if based on your own usual price immediately before reduction, terms such as these may be used: * * * "regularly," "usually," "formerly" * * *

2. *Intermediate reductions.* if intermediate markdowns during "recent course of business" "your first price during period may be described as "original." "Recent course of business" is defined by BBB as the current selling season for seasonal merchandise such as apparel, sporting goods, etc., and not more than 12 months for non-seasonal merchandise such as furniture, jewelry, appliances, etc."

The advertisements here involved were for (a) reclining chairs, (b) rugs, (c) car washers, (d) scales, (e) toaster-ovens, (f) ironing boards, (g) barbeque grills, (h) buffets-furniture, (i) Wear-Ever Casseroles, (j) enamel toilet seats, (k) automobile seat covers, (l) sewing machines, (m) electric heaters, (n) stainless steel tableware, (o) Melmac dinner ware, (p) air conditioners, (q) Massager, (r) heating pads, (s) teaspoons, (t) aluminum skillets, and (u) air conditioners. Interestingly enough, these are all in the non-seasonal category.

Based upon the application of pertinent rulings to the facts, the examiner makes the following:

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this complaint and this complaint is in the public interest.

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

3. Use of the words "formerly" and "originally" (and abbreviations thereof) in retail store advertisements in conjunction with and juxtaposition to a comparative price connotes to the prospective purchaser that the advertised item formerly was offered for sale by the store in its trade area in the recent regular course of its business at the comparative price stated. A twelve-month period preceding the challenged advertisements may constitute the "recent" regular course of business.

4. In order to establish that such comparative prices are false, misleading and deceptive under the Federal Trade Commission Act, it is incumbent upon counsel supporting the complaint to prove by reliable, probative and substantial evidence that the merchandise being offered was neither sold nor offered for sale at the comparative price stated in the advertisement in the recent regular course of business of respondent in the trade area involved. In this proceeding counsel supporting the complaint has not sustained this burden.

The deficiencies of the evidence in this record have been stated, as the examiner has made findings with respect to each of the 23 challenged advertisements. Such evidence does not prove that Lansburgh's and Lit Brothers' advertisements were, in fact, false, misleading and deceptive within the intent and meaning of the Federal Trade Commission Act.

Counsel supporting the complaint has failed to sustain the burden of proof imposed upon him by law, the Federal Trade Commission Act, the Administrative Procedure Act, and the Rules for Adjudicative Proceedings of the Federal Trade Commission. The complaint and this proceeding ought to be and

It is ordered, That the complaint herein be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

The complaint herein charges respondent, City Stores Company, with violation of the Federal Trade Commission Act by virtue of the comparative price representations made in the advertisements of two of its divisions which it operates as department stores, namely, Lansburgh's of Washington, D.C., and Lit Brothers of Philadelphia, Pa.

Specifically, the complaint alleges that respondent's advertisements setting forth certain amounts preceded by descriptions such as "Orig." or "Formerly" or by no prefix at all in comparison with a lower sales price represented the higher amounts, contrary to fact, as respondent's

usual and customary prices in its recent regular course of business, and, further, that the differences between the higher amount and the sales price did not, as represented, constitute savings from respondent's usual and customary prices for the advertised merchandise.

The matter is now before us on the appeal of counsel supporting the complaint from the initial decision dismissing the complaint for failure of proof. Counsel supporting the complaint argues that the record documents two methods employed by respondent in utilizing fictitious pricing, viz., the use of comparative prices not applicable to the identical merchandise offered for sale and, second, respondent's reliance on comparative prices in effect in a period too remote to constitute the respondent's recent regular course of business.

The record herein consists entirely of a forty-page transcript, certain exhibits, and a stipulation by counsel for both sides explaining the exhibits. Support for the allegations of the complaint must be found, if at all, in the aforesaid stipulation. On a review of the record, we hold that the hearing examiner correctly ruled that counsel supporting the complaint has not sustained the burden of proof in this matter. At best the facts of record here do no more than support a surmise that certain of the allegedly fictitious prices may not have been respondent's usual and customary prices in the recent regular course of business. The facts presented by this record do not constitute that reliable, probative and substantial evidence required to support an order.

The stipulated facts are inconclusive on the central point at issue here, namely, whether the allegedly fictitious prices were in excess of respondent's usual and customary prices in the recent regular course of business. The evidence herein with respect to the retail prices charged by respondent for the merchandise in question is inadequate for an evaluation of the veracity of respondent's pricing claims, since the facts stipulated are by and large unclear as to whether respondent regularly adhered or failed to adhere to any particular retail price, including the allegedly fictitious prices, in an ascertainable period prior to the alleged misrepresentations.¹

¹ E.g., counsel supporting the complaint challenged respondent's advertisement of a rug manufacturer's discontinued stock in the April 1, 1959, Washington, D.C., Evening Star, which represented Callaway rugs as "formerly \$59.95"—on sale at Lansburgh's for \$38.

The stipulated facts record respondent's purchase of the rugs from Callaway Mills under invoice dated February 26, 1959, and the manufacturer's wholesale price for the advertised rugs. Counsel concluded the stipulation on this point with the irrelevant statement that invoices dated September 1958 showed rugs "purchased [from another source than Callaway] at \$37 were marked to sell at \$59.95".

Even assuming that the February 26, 1959, invoice recorded an intended retail price of \$39.95 for the shipment in question, counsel supporting the complaint has not satisfied the burden of proof. The record does not disclose the actual prices paid by customers for the

We are compelled to disagree, therefore, with certain of the hearing examiner's findings holding, in effect, that the truthfulness of the comparative pricing claims in particular advertisements is proven by this record,² as well as with the examiner's conclusion that in case of most of the challenged advertisements that the record tends positively to rebut the allegations of the complaint.

Nor do we agree that a consideration of the "Standards for Retail Advertising of Price Reduction, Comparison and Savings Claims" promulgated by the Better Business Bureau of New York City is appropriate in our disposition of this matter as the initial decision implies. The criteria to be applied in a Commission proceeding for definition of the term "recent, regular course of business", of course, is a question to be resolved by the Commission and may not be governed by the determination of an outside body.

In light of our views already expressed in this opinion and for additional reasons set forth below, we are obliged to modify the initial decision. Specifically, paragraph 9 of the Findings of Fact, the examiner's analysis of the evidence relating to specific instances of respondent's pricing representations, will be deleted and our own finding substituted therefor, since we do not agree with the examiner that the record supports the truthfulness of respondent's pricing claims in the case of certain advertisements. That portion of the initial decision, entitled "Discussion", will be stricken primarily because of the reliance therein on the criteria promulgated by the Better Business Bureau of New York City for determining the recent regular course of business in the case of seasonal and nonseasonal merchandise. In this connection, paragraph 10 of the Findings of Fact to the effect that the advertised items in issue here are nonseasonal items will be deleted as not germane to our decision. Furthermore, the examiner's comments in

rugs received in this shipment and, further, it is completely silent on the question of whether Lansburgh's had previously received and sold these Callaway rugs in the case of other shipments. On the basis of this evidence no affirmative finding can be made that the allegedly fictitious prices were, in fact, in excess of respondent's usual and customary retail price for this product in its recent regular course of business.

² E.g., in the case of Lit Brothers' advertisement in the Philadelphia Evening Bulletin of May 19, 1959, of a Westinghouse Air Conditioner as "Last Year 329.95—158.88", the hearing examiner found on the basis of the stipulated facts that "... the air conditioner had been offered or sold in Lit Brothers for 329.95 . . . and the above advertisement is found not to have been false, misleading, or deceptive." [Emphasis supplied.]

The stipulation, however, states no more than that one of Lit's employees would testify that she had been told by the buyer that the item "had sold around town last year at \$329.95" and that at the time of the Commission's investigation no one, including Westinghouse, could verify this statement. The stipulated facts are inconclusive on the point at issue here and insufficient to sustain the burden of proof incumbent on counsel supporting the complaint. On the other hand, this evidence clearly does not support an affirmative finding that respondent's comparative pricing in this instance was not false, misleading or deceptive.

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the "Discussion" on automatic markdown policy and the increase in number of discount houses are irrelevant to a resolution of the issues presented by this record and as already stated, we reject the examiner's conclusion in this part of the initial decision that the stipulated record proves the truthfulness of most of the challenged pricing representations.

Certain of the initial decision's "Conclusions" will also be deleted. In this portion of the initial decision, statements that the words "formerly" and "originally" in comparative pricing claims connote that the advertised items had been offered for sale by the store in the recent regular course of its business are incomplete, since they ignore the necessary inference that representations of this nature imply that the comparative price in question was the advertiser's usual and customary price in his recent and regular course of business. Further, for the reasons already indicated, the conclusion that a twelve-month period preceding the date of the challenged advertisements may constitute the recent regular course of business is not warranted by this record.

The appeal of counsel supporting the complaint is denied and the initial decision, as modified in the accompanying order, is adopted as the decision of the Commission.

FINAL ORDER

This matter having come before the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision, upon briefs and oral argument in support thereof and in opposition thereto; and the Commission, after consideration of the entire record, having rendered its decision denying the appeal and directing modification of the initial decision:

It is ordered, That the initial decision be modified by striking paragraph 9 from the Findings of Fact and substituting therefor the following:

9. The record herein consisting primarily of a stipulation of facts covering respondent's representations of comparative prices challenged by the complaint does not support a finding that respondent has engaged in the practice of representing as its customary prices amounts which are in excess of its customary and usual prices in the recent regular course of business.

It is further ordered, That the initial decision be modified by striking therefrom paragraph 10 of the Findings of Fact, that section entitled "Discussion" beginning on page 633 with the words "The complaint alleges in Paragraph Six" and ending on page 634 with the words "these are all in the nonseasonal category", and the first three

paragraphs of page 635 of the initial decision beginning with the words "Use of the words 'formerly' " and ending with the words "and meaning of the Federal Trade Commission Act."

It is further ordered, That the hearing examiner's initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.
