

Complaint

66 F.T.C.

appropriate in all respects to dispose of this proceeding and that the appeal of counsel supporting the complaint should be denied.

It is ordered, That the appeal of counsel supporting the complaint be, and it hereby is, denied.

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

IN THE MATTER OF

SCOTT MITCHELL HOUSE, INC., ET AL.

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

Docket 8591. Complaint, Aug. 22, 1963—Decision, Sept. 24, 1964

Order dismissing for failure of proof, complaint charging Yonkers, N.Y., distributors of various articles of merchandise with representing falsely, in promotional materials including newspaper and magazine advertising, that light bulbs and grinding mills were unconditionally guaranteed for stated periods, that the "Magi-Carver" electric knife had a substantially superior performance to the conventional carving knife, and that the Robinia Tree was suitable for shade and ornamental purposes.

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 Scott Mitchell House, Inc., a corporation, and Juanita Linet, individually and as an officer of said corporation, and David Wittels, individually and as General Manager of said corporation, hereinafter referred to as respondents, have 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 Scott Mitchell House, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 415 South Broadway, in the city of Yonkers, State of New York.

Respondent Juanita Linet is an officer of the corporate respondent and Respondent David Wittels is general manager of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices here-

inafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various articles of merchandise such as electric light bulbs, grinding mills, knives, trees and other articles of merchandise to the public by mail.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their aforesaid merchandise, respondents have made numerous statements and representations in promotional materials including advertisements inserted in newspapers of general circulation and magazines respecting the guarantee, performance and quality of said merchandise.

Typical, but not all inclusive of said statements and representations, are the following:

5 yr. Guarantee on Regal Lite Bulbs

Blender-Liquifier and Grinding Mill * * * fully guaranteed for 1 year

Amazing "Magi-Carver" Electric Knife. Takes the chore out of slicing and carving

Now! A Flowering Shade Tree that Grows Roof-High in Just One Single Year

But this year, thanks to Robinia, instead of slaving half a life time playing nursemaid to a tree * * * you are actually going to grow a beautiful, soaring tree. incredible, as it may seem, in just one year! And remember * * * Robinia's almost unbelievable growing power has been demonstrated in Botanical Gardens * * * on State Parkways * * * by professional landscapers on the grounds of million-dollar estates. Is it any wonder it has been hailed in banner headlines from coast to coast.

PAR. 5. Through the use of the aforesaid statements and representations and others of similar import and meaning not specifically set out herein, respondents have represented, directly or by implication, that:

(a) Said light bulbs and grinding mills are unconditionally guaranteed for the stated period;

(b) That the "Magi-Carver" knife by virtue of its electrical operation has a performance substantially superior to the conventional carving knife;

(c) That the Robinia tree has characteristics which makes it suitable for shade and ornamental purposes.

PAR. 6. In truth and in fact:

(a) Said light bulbs and grinding mills are not unconditionally guaranteed for the stated period. The "guarantees" referred to are subject to numerous conditions and limitations not disclosed in the advertisements.

(b) The "Magi-Carver" knife by virtue of its electrical operation does not have a performance substantially superior to the conventional carving knife.

(c) The Robinia tree does not have characteristics which make it suitable for shade and ornamental purposes.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the conduct of their business, and at all times mentioned herein, respondents have 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 respondents.

PAR. 8. The use by respondents 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 respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. James A. Ryan and *Mr. Charles W. O'Connell* for the Commission.

Mr. Sidney Schreiber of New York, N.Y., for the respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

MAY 1, 1964

The Federal Trade Commission, by complaint dated August 22, 1963, has charged that the respondents, Scott Mitchell House, Inc.,

Juanita Linet and David Wittels have engaged in false, misleading and deceptive advertising in the conduct of a mail-order business operated by them (Federal Trade Commission Act, Section 5, 15 U.S.C.A. Par. 45). While admitting generally that they have engaged in advertising "substantially as set forth" in the complaint, the respondents deny those allegations which are to the effect that the advertising was false, misleading and deceptive. The subject matter of the advertising and the allegations with respect thereto, as will appear in greater detail below, involve guarantees on electric light bulbs and a blender-liquefier-grinding mill, a representation as to the performance of a battery-operated carving knife, and a representation as to the shade and ornamental characteristics of a locust tree. The tree is technically known as the *Robinia, pseudacacia*.

The respondents are Scott Mitchell House, Inc., a New York corporation conducting a mail-order business from 415 South Broadway, Yonkers, New York, Juanita Linet, its president and a member of its board of directors, and David Wittels, its general manager. Mrs. Linet is a housewife. She has retained the offices mentioned in name only, having abdicated all her functions to her husband, Abraham Linet, and to Wittels. Such abdication, the examiner would rule should it become necessary in this case, is no reason to relieve her from charges of false and deceptive advertising if, in fact, an order became appropriate. Respondent's attorney agrees (Tr. p. 147). Wittels, by reason of his acceptance of full responsibility for the advertising practices of the company, also would be subject to an order, if entered in this proceeding (Tr. p. 259). In fact, this was not in issue. Nor is there any issue as to interstate commerce and competition in commerce, the allegations as to those also having been admitted.

The False Guarantee Charge

The advertising claimed to be deceptive is portrayed in the complaint as follows:

"5 yr. Guarantee on Regal Lite Bulbs"

"Blender-Liquefier and Grinding Mill * * * fully guaranteed for 1 year"

Each of these quotations is from separate box advertisements, each containing much additional text, arranged with other boxes under a bannerhead clearly and unmistakably showing Scott Mitchell House, Inc., as the offeror and advertiser.

It is charged "* * * [S]aid light bulbs and grinding mills are (represented as) unconditionally guaranteed for the stated period * * *" when, in truth and in fact, "* * * said light bulbs and grinding mills are not unconditionally guaranteed for the stated period. The 'guar-

antees' referred to are subject to numerous conditions and limitations not disclosed in the advertisements." The complaint does not make clear, and no bill of particulars was filed for the purpose of setting out, what, if any, conditions and limitations were not disclosed in the advertisements. *Cf.* Administrative Procedure Act, Section 5(a), 60 Stat. 239, 5 U.S.C. 1004(a). It appears, however, from Commission counsel's proposed findings, that he contends that a requirement that the grinding mills be returned before the guarantee would be honored was not disclosed in the advertisement, that the purchaser was required to pay postage in returning the product and that the advertisements failed to reveal the identity of the guarantor.

In making these contentions, he relies on the Commission's Guides Against Deceptive Advertising of Guarantees. They provide that an advertisement should show "What, if anything, anyone claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, such as return of the product and payment of service or labor charges; * * * and, The identity of the guarantor should be clearly revealed in all advertising, * * *." The Guides are not substantive law. They put the public and advertisers on notice as to "the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the word and phrases therein set out." *Gimbel Brothers, Inc.*, Docket No. 7834 [61 F.T.C. 1051, 1073], Slip opinion, pp. 15, 16, July 26, 1962.

That the identity of the guarantor was not revealed in the advertising is not charged in the complaint. This is hardly "a condition" or "limitation" unless someone other than the advertiser is the guarantor. Even if failure to disclose identity of guarantor had been charged, the examiner is of the opinion that Scott Mitchell's obligation is clear. The reason given in the Guides for the requirement that the identity of the guarantor be disclosed is, "* * * Confusion of purchasers often occurs when it is not clear whether the manufacturer or the retailer is the guarantor." The confusion is the "run-around" resulting when a claimant under the guarantee goes to his vendor for performance and is told that the manufacturer and not the vendor is the guarantor. In these advertisements, Scott Mitchell House, Inc., the respondent in this proceeding, is the guarantor. It is the offeror and seller and there is nothing in either advertisement or in actual practice which suggests that someone else is the guarantor. It agrees that if the bulb does not last five full years, the buyer will "get a brand new bulb with the same guarantee." It says that the blender-liquefier is "Fully guaranteed for 1 year." It says, also, as to the 10-day test period, if the buyer is "not

completely satisfied that this is the finest appliance (he's) ever owned (he may) return it for a complete money-back refund." There is nothing confusing about either of these advertisements with respect to the identity of the guarantor, which is clearly disclosed at the top of the "spread." The testimony is to the same effect (Tr. pp. 268-269, 271-273).

Heavenly Creations, Inc., a recent case, Docket No. 8448, February 25, 1964 [64 F.T.C. 978], involved an advertisement which did, in fact, create a confusion as to who might have been represented as the guarantor. Immediately following the words of guarantee, the product advertised was described as "Made in U.S.A. by the International Silver Co." The Commission, in modifying the initial decision, pointed out that "the deception charged in the complaint and found by the examiner involved, not failure to disclose the guarantor's identity, but falsely stating the guarantor's identity." (Page 4, Commission's Opinion. Emphasis mine) [64 F.T.C. 1008]. While there is reference to the bulbs as having been "made of Corning glass" and the blender-liquefier-grinding mill as a Moulinex article "manufactured by one of France's largest appliance makers * * *," these references are not in any way related to the guarantees and it is obvious that any claims under the guarantee are to be made to the vendor. Moreover, the complaint, as already noted, did not charge either a failure to disclose the guarantor's identity or a deception with respect thereto.

As to whether the terms of the guarantee were not fully disclosed in the advertisement in that, as contended by Commission counsel, the purchaser was required to return the product or pay a service charge or a labor charge or do anything before the guarantor would fulfill his obligation, the examiner cannot agree that the respondents engaged in deception in any of these respects.

The bulb advertisement said nothing about a return and imposed no conditions. The only testimony related to this charge is that of respondent Wittels. He said there was no other guarantee but that set forth in the advertisement, that the bulb did not have to be returned by the purchaser in order to get satisfaction, that the new bulb is sent to the customer postpaid and without charge, and all that the customer has to do is to notify Scott Mitchell that the bulb has burnt out (Tr. pp. 267-269).

The remaining guarantee charge involves the blender-liquefier-grinding mill. The advertisement sets forth (1) that this appliance is fully guaranteed for one year and (2) that if the purchaser is not satisfied, he may return it for a complete money-back refund after trying it for 10 days. In pressing this charge, Commission counsel

