

Syllabus

IN THE MATTER OF

FRANK MCKINNON, TRADING AS EASTERN ART COMPANY AND UNITED ART ASSOCIATION

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2912. Complaint, Aug. 28, 1936—Decision, Apr. 8, 1937

Where an individual engaged, under two separate trade names, in the offer and sale of tinted or colored photographic enlargements of family and other photographs, and of frames therefor, through the medium of salesmen or agents, working in squads, groups, or teams, and whom it supplied with identification cards and with equipment including samples or specimens of its so-called "paintings," and with printed order or contract forms, and with sales talks and with certificates or coupons for salesmen's use in the lucky "draw" ruse employed by him, and who called upon the prospective customers and, in accordance with their instructions, falsely represented that said individual was conducting a contest for national advertisers, and that winning pictures in such contest, and particularly those of babies, would appear on Cream of Wheat, Ovaltine, Ralston, and other packages or containers, and that parents of child would obtain royalties for use of the picture and a grand prize, and that paintings to be entered in such contest might result in the offer of a movie contract to the customer, and who made further false and misleading representations to the effect that said individual was conducting an art school at which pictures made for customers would be exhibited, etc., and made other representations in enlisting interest of prospective customers over and in addition to those below set forth, and in direct substantial competition with others similarly engaged in sale between and among the various States of tinted or colored photographic enlargements and frames therefor, and with those engaged in the similar sale of genuine, free-hand, original, oil, and water color paintings, and including among said former competitors those who truthfully represent and honestly vend their products, and, among the latter, those who truthfully represent their genuine portraits as paintings—

- (a) Described said enlargements as "paintings" and as "fine oil paintings" and as "hand paintings," and as a work of art and not photographic enlargements, in soliciting sale thereof as above set forth, and as "portrait paintings" on the order or contract forms with said individual's trade name thereon, notwithstanding fact that so-called "paintings" were not portrait paintings, oil paintings, etc., or original paintings or works of art, but were merely cheap photographic enlargements of photographs which had been tinted or colored through use of pastel or crayon water color or other powdered pigments sprayed thereon with air brush and compressed air;
- (b) Represented to the prospective customer contacted by one of his said sales agents or representatives that a drawing contest would be held to decide a few lucky persons to receive free paintings in their homes, and that customer would be allowed two draws or trials, and informed the

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participating customer, upon invariable receipt of a winning check or coupon purportedly entitling him, as theretofore announced, to a genuine oil painting, painting or portrait free, or to a substantial discount on the price thereof, and, following the subsequent negotiations and contract for such a painting, free or at substantial discount, and after the closing of the deal, casually and incidentally, that there was a nominal charge of \$3.98 to be paid as representing actual cost of materials used in making the paintings, facts being said alleged "draw" or "drawing" was a mere sham device employed for the sole purpose of inducing prospective purchaser to believe erroneously, that if he drew a lucky coupon or certificate he would thereby have the distinct advantage of obtaining a painting free, or at a price below that ordinarily charged, and all customers, unknown to each other, were approached in the same manner through use of said scheme and device and were similarly beguiled into the false belief that they had been favored by chance and that their cases were exceptional in such respects, when such was not the fact;

- (c) Represented, as aforesaid, that said sum of \$3.98 covered actual cost of materials used in making painting, and that said individual desired to open a branch studio in the home town of the customer and a limited number would be selected as exhibitors to receive paintings free of charge, paying only such incidental item to cover cost of materials as aforesaid, or that customers would receive a fine oil painting for said sum, as covering alleged cost of materials only, or that, in view of a special sale, a hand painted miniature, representing the mere cost of materials, would be painted for \$3.98, and in his order blanks set forth that that customer was entitled to "portrait painting," as above set forth, and of specified size, at a "cost of production" price of \$3.98, facts being sum mentioned therein did not represent such actual cost, but constituted an initial substantial profit to him on the character and type of work done by him, and he was not painting miniatures in oil or otherwise for aforesaid sum in connection with any special sale or otherwise, was not offering any customer any special price or genuine price reduction in case of any "painting" or frame therefor, or operating any art school or giving work to unemployed artists in painting pictures of babies for prize contests, or opening any branch studio in town or community in question, or exhibiting customers' paintings for benefit of artists, or conducting any contest, etc., and no child's mother was to receive a grand prize or the child's parents any royalties, as variously claimed and represented in salesmen's contact sales talks, as above indicated;
- (d) Represented that pictures and frames had selling prices and values which were fictitious and greatly in excess of the prices at which similar products were usually sold and intended to be sold, and in excess of the values of such or similar products, through such statements as that the customer would receive a fine oil painting on canvas, worth \$35 or \$40, for \$3.98, alleged cost of materials only, as above set forth, and that prominent people paid as much as \$1,000 for portraits painted by hand in fadeless colors such as those made by him, facts being said so-called "paintings," etc., were, as above set forth, merely cheap photographic enlargements or photographs tinted or colored as hereinabove explained, were not worth and did not have the value of \$35 or \$40, or any other sum approaching such amount, but constituted cheap inferior products costing around

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\$1.25 each, and were not pictures of the type ever bought by prominent people for \$1,000; and

- (e) Failed to disclose, in soliciting and taking the order, and after selection by agent of a family photograph to be used, as stated, merely to check details in the so-called "oil painting" to be furnished free to the customer, and except for the so-called incidental item of \$3.98 to cover cost of materials, that the painting would be made on a peculiar shaped convex surface, hexagonal in form, as subsequently disclosed to customer by a second, and different, agent who called to exhibit a sketch, outline or proof of such oil painting and endeavored to collect in advance said so-called incidental sum of \$3.98, and who represented that it would be necessary for the full protection of the picture to have a frame with convex unbreakable glass, such as could be obtained only from aforesaid individual, and which was priced to consumer at various exorbitant figures, and sale of which cheap and inferior frame was further pressed by a third salesman who called to deliver finished product, in event of second salesman's failure to consummate same;

With tendency and capacity to cause members of the purchasing public to form mistaken and erroneous beliefs that said colored or tinted photographic enlargements were genuine oil or water color paintings, drawings, and portraits in the ordinary accepted meaning, and that said pictures had a value of \$35 to \$40, or other similar sum, and were the type sold for \$1,000, or some such figure, as hereinbefore set forth, and that purchaser would receive a picture free or at a substantially reduced price on account of being a winner in a drawing contest, and with result that many of the members of the public, acting in such erroneous beliefs, induced by various misrepresentations, purchased said colored photographic enlargements and frames therefor, and with further capacity and tendency to divert to said individual trade of competitors engaged in selling in interstate commerce colored photographs and photographic enlargements and frames therefor, truthfully advertised and represented; to the substantial injury of competition in commerce:

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Mr. Marshall Morgan for the Commission.

Hartigan, Mullen & Roberts, of Providence, R. I., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Frank McKinnon, an individual trading under the names, Eastern Art Company and United Art Association, has been and is using unfair methods of competition in commerce as defined in said act, and it appearing to said 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:

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PARAGRAPH 1. Respondent, Frank McKinnon, is an individual, residing at Providence, State of Rhode Island, and doing business at No. 710 Eddy Street in said city, under the trade names, Eastern Art Company and United Art Association.

Respondent is the sole owner and operator of the business conducted by him through the medium of the aforementioned trade name companies and directs the activities and controls the business policies and practices of each.

Respondent, Frank McKinnon, trading as Eastern Art Company and as United Art Association, as aforesaid, is now, and for more than two years last past, has been engaged in the business of offering for sale and the sale of tinted or colored photographic enlargements of family and other photographs, and of frames therefor. Respondent sells his products through the medium of salesmen or representatives appointed by him as agents in his behalf, to customers located in States other than the State of Rhode Island. In consummating such sales and in distributing such products, respondent Frank McKinnon causes the pictures and frames so sold by him to be transported and delivered from his place of business in Providence in the State of Rhode Island, through and into various other States of the United States to the respective purchasers thereof at their respective points of location. In the course and conduct of his said business, respondent Frank McKinnon has been, and is now, engaged in direct and substantial competition with various corporations, partnerships, and individuals, likewise engaged in the sale, between and among the various States of the United States, of tinted or colored photographic enlargements and of frames therefor, and, likewise, with corporations, partnerships, and individuals engaged in the sale among the various States of the United States of genuine, free hand original paintings, including oil paintings and water color paintings, as will be more fully hereinafter shown.

PAR. 2. A crayon is a pencil-shaped piece of colored clay, chalk or charcoal used for drawing upon paper. A crayon drawing is the act or art of drawing with crayons.

A drawing is a representation produced by the art of drawing; a work of art produced by pen, pencil or crayon.

The pastel, in art, is a colored crayon made of pigments ground with chalk and compounded with water into a sort of paste. A drawing made with a colored chalk or crayon is called a pastel, as is also the art of drawing with colored crayons.

Paint is defined as a substance used in painting composed of a dry coloring material intimately mixed with a liquid vehicle. A paint-

ing is a likeness, image, or scene depicted with paints without the aid of photography.

A water color is a painting with pigments for which water, and not oil, is used as a solvent.

A portrait, in its ordinarily accepted meaning, is a picture of a person drawn from life, especially a picture or representation of a face; a likeness, particularly in oil.

An oil painting is a painting done by hand with brushes in plastic oil colors on canvas, or other material, without the aid of photography.

PAR. 3. In the course and conduct of his said business, respondent Frank McKinnon, trading as Eastern Art Company and as United Art Association, causes agents and representatives employed by him to visit the homes of prospective customers in the cities, towns, and rural communities of the various States of the United States. Under said respondent's selling plan he organizes the said agents and representatives into squads, groups or teams, each covering or working a particular territory under a crew manager appointed by respondent. Neither of the two trade name companies operates in the same territory, at the same time, and when agents of the Eastern Art Company are working in Connecticut or Massachusetts, agents of the United Art Association are working elsewhere. No separate book-keeping systems are maintained for the business handled through the medium of the aforesaid trade name companies, nor does an agent know before taking over a given territory which of the two companies he will represent therein. Crew managers in charge of selling teams keep in constant touch with the daily activities of the respective salesmen or representatives of respondent. One sales representative of respondent calls upon, or contacts, a prospective customer and makes a contract with said prospect for a "Portrait Painting" or oil painting at a price of \$3.98, alleged to represent merely the cost of production, said sum of \$3.98 to be paid when "proof" of said "painting" is shown later at said customer's residence or address. In connection with the initial order the first salesman obtains from the customer a family photograph to serve as a model for the "painting." A second and different salesman submits an outline or proof of the "painting" in due course, and endeavors at that time to collect for the incomplected "painting" and to induce the customer to agree to buy a frame therefor. A third and final representative delivers the finished "painting," collects any sum remaining due thereon and collects also for the frame if the customer has agreed to buy one.

Sales talks containing approved methods of approach and convincing proposals or arguments to be used in contacting prospective pur-

chasers of "paintings," and necessary order blanks or forms, are furnished by respondent for the use of and distribution among his sales representatives; also certificates or coupons to be used in connection with the "draw" as hereinafter related.

PAR. 4. Respondent, Frank McKinnon, trading under the names Eastern Art Company and United Art Association, as aforesaid, makes and produces and sells his "paintings" in the following manner:

A negative is made of a family photograph furnished to the agent or sales representative by the customer. This negative is then used to make a photographic enlargement of the original photograph. This photographic enlargement is then tinted or colored by spraying crayon or pastel water color or oil thereon by the use of a mechanical appliance from which liquid paint is forced by compressed air and known as an air brush. Respondent makes these enlarged tinted or colored photographs at an average cost of \$1.25. Frames range in cost from 85¢ to \$1.05, a few special patterns going as high as \$2.25. Glass and a back for the picture or painting represent a cost of about 24¢. Picture frames are sold for as much as an agent can obtain for them at any particular home visited, respondent's largest item of profit being realized in the sale of frames. Colored enlargements are made in an unusual convex hexagonal shape necessitating a type of glass and frame which respondent represents, can only be obtained by the purchaser from him.

Respondent maintains and operates a separate collection department in connection with his aforesaid business to which specific fees or sums are credited in connection with the collection of sums alleged to be due from delinquent customers.

Respondent, Frank McKinnon, trading respectively, as aforesaid, as Eastern Art Company and United Art Association, causes orders or contracts for pictures or "paintngs" to be taken by his agents or representatives on printed forms provided by respondent bearing the name and address of one of the trade name companies across the top thereof and in such order it is "certified" that the customer is entitled to "one Venetian Convex Portrait Painting" 10 x 16 inches in size at a "cost of production" price of \$3.98 unframed, payment to be made upon presentation of proof at customer's residence. Said order blank or certificate is duly signed by respondent's agent in his representative capacity on a line provided therefor. Receipts similar in tenor are signed for the trade name company by the agent making a sale.

Purchasers of pictures are given to understand that they are contracting or dealing with a duly constituted agent of one or the

other of respondent's trade name companies and each agent or salesman is furnished by respondent with an identification card or card of credentials to be presented or exhibited by him when interviewing prospective purchasers. Equipment, including sample cases containing samples of specimens of fine oil paintings, is also furnished solicitors or agents by said respondent for use in soliciting orders in his behalf.

PAR. 5. Salesmen, agents, or representatives soliciting orders for and on behalf of respondent are given full and complete instructions by respondent as to the representations to be made by them upon approaching or contacting prospective purchasers of pictures or "paintings." Alluring samples of respondent's work, painted in oil paint, hand drawn and hand painted portraits to be duplicated for the prospect, are exhibited to him. Respondent's agents and representatives, with a view to inducing prospective customers to sign contracts for pictures, or "paintings," make, and are instructed to make and do make the following, among other representations:

1. That respondent is conducting a contest for national advertisers; that pictures, particularly those of babies, will be entered in such contest, the winning pictures to appear on Cream of Wheat, Ovaltine, Ralston and other packages or containers, and that the parents of the child will obtain royalties for the use of the picture, and a grand prize;

2. That respondent desires to open a branch studio in the home town of a customer; that a limited number of customers will be selected as exhibitors, these to receive paintings free of charge, paying only the incidental item of \$3.98, representing the cost of materials;

3. That respondent is conducting an art school, that pictures made for customers will be exhibited to art students and for their benefit, and that respondent is assisting unemployed art students;

4. That the customer will receive a fine oil painting on canvas worth \$35 to \$40, for \$3.98, the alleged cost of materials only;

5. That prominent people pay as much as \$1,000 for portraits "painted by hand in fadeless colors" such as those made by respondent;

6. That respondent's paintings are "hand drawn, hand painted," "a work of art" and are not photographic enlargements, the photograph being used merely to obtain details for the painting;

7. That a hand painted miniature, in view of a special sale being conducted by respondent, will be painted for \$3.98, representing the mere cost of materials;

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8. That pictures of babies will be painted by unemployed artists and entered in a prize contest;

9. That a paper or document obligating the customer to pay for a painting is merely a receipt for a small photograph;

10. That paintings to be entered in a contest of national advertisers may result in the offer of a movie contract to the customer.

In further connection with his said selling methods respondent, Frank McKinnon, represents that a drawing contest will be held for the purpose of deciding who shall be one of a few lucky persons in a particular city or town to have respondent place free paintings in their homes. The agent in connection with said drawing produces a sealed box or package containing a number of slips of paper attached to a wire. It is represented that most of said slips are blank but that a few are trade checks or coupons; that a customer is allowed two draws or trials; that if he draws a blank he does not win, but if fortunate enough to draw a winning check or coupon, he will be entitled to receive a genuine oil painting free, or to receive a substantial discount on the price of a genuine oil painting. The prospective customer draws, and finally, and invariably, draws a lucky coupon, allegedly giving him an oil painting free. The customer is thereupon congratulated by the agent upon his good luck. Believing the representations of the agent to the effect that he has been lucky and has obtained a distinct financial advantage the customer is thereby induced to continue negotiations with said agent and to make a contract with the said agent for a fine "oil painting" free. The customer is casually and incidentally informed when the agent is departing that there is just a nominal charge of \$3.98 to be paid in connection with the transaction, representing the actual cost of the materials to be used in making the "painting."

Said alleged "draw" or "drawing" was, and is, a mere sham device employed by respondent for the sole purpose of inducing the prospective purchaser to believe that if he draws a lucky "coupon" or certificate, he will thereby have the distinct advantage of obtaining a portrait free, or at a price below that ordinarily charged customers, when in truth and in fact other customers unknown to each other are approached in the same manner through the use of said drawing scheme and device, and likewise have been beguiled into believing that they are exceptional ones favored by fortune and chance, when such is not the fact.

The interest of the prospective customer finally having been elicited through the use of one or more of the herein described selling devices, the said agent of respondent then asks the privilege of inspecting family photographs. After careful inspection a photo-

graph announced by the agent to be satisfactory, is selected by him. This photograph, with which the agent departs when the contract is closed, is to be used, it is stated, merely for the purpose of checking details in the oil painting to be furnished free to said customer, except for the incidental item of \$3.98 to cover cost of materials.

In due course a second and different agent of said respondent calls to exhibit a sketch, outline, or proof of the oil painting to be finished for the customer; to inquire about coloring details; to collect, or to endeavor to collect, in advance of the completion and delivery of the painting, for the "incidental" cost of the materials to be used in painting the picture or "portrait," amounting to \$3.98 as aforesaid; and to persuade the customer to contract for a frame for the painting. Respondent's said agent, in this relation, exhibits to the customer a model, outline, or proof of the painting made on a peculiar-shaped convex surface, hexagonal in shape. Respondent's said agent then represents that it will be necessary for the picture, in order to be fully protected, to have a frame with convex unbreakable glass and that such frame and glass can be obtained only from the said respondent. Said frame and glass are priced to the customer at various exorbitant figures, and in the event the second visiting agent fails to sell a frame and glass, a third salesman, who calls to deliver the finished painting, makes a further effort to induce the customer to add the price of a frame and glass to his contract.

PAR. 6. The pictures or photographs which are borrowed from prospective purchasers by the agents and representatives of respondent for the purpose of having "paintings" made therefrom, were, and are in most instances, pictures of members of the customer's family or near relatives, and many such pictures cannot possibly be duplicated. Such photographs loaned and furnished to respondent by his customers, possess and have possessed great sentimental value. In numerous instances the member of the family or near relative represented by the photograph, has been dead many years. In making contracts with his customers the respondent inserts therein a clause to the effect that no cancellations will be accepted. In case of a controversy involving alleged misrepresentation as to the character or quality of the work done, or for other reasons, justified in the mind of the purchaser, the respondent, Frank McKinnon, in the event any sum or balance is claimed to be due him from the purchaser, did and does insist upon holding the purchaser to the letter and terms of the contract, and, as a means of enforcing compliance with the terms of the contract in every instance, respondent did and does refuse to return the valued family photograph until the money claimed

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to be due him has been paid to him. Respondent in many instances has retained original photographs and colored enlargements made therefrom and has retained possession of enlargements fully paid for, at original contract price, if subsequently frames therefor were refused by the customer for any reason. Under such type of duress, many customers who are and have been dissatisfied with the character or quality of the paintings made for them by respondent, and who assert, and have asserted, misrepresentation in connection therewith, have been forced to go through with the contract in order to obtain the return of a treasured family photograph.

PAR. 7. In truth and in fact the various statements and representations made by respondent through his agents and representatives, in selling and offering for sale his pictures in cities, towns, and communities of the respective States of the United States, were and are false, deceptive and misleading in the following, among other particulars:

(a) The paintings so represented and sold on behalf of respondent, Frank McKinnon, trading as Eastern Art Company and United Art Association, are not and never have been, "portrait paintings," "oil paintings," or "hand drawn, hand painted," or "hand paintings," or "water color paintings," or "original paintings," or "works of art," or any work of art produced through the art of drawing or drawn from life, but on the contrary, are and have been, merely cheap photographic enlargements of photographs, tinted or colored by the use of pastel or crayon, water color or other powdered pigments sprayed upon the enlargement, in solution, through the use of an air brush and compressed air;

(b) Pictures or "paintings" such as those represented and sold by respondent are not worth, and have never been worth, or had the value of \$40 or \$35, or any other value approximating these amounts; pictures of this type have never been bought by prominent people for \$1,000, nor do respondent's pictures possess, nor have they ever possessed or had the quality, characteristics, or value of oil paintings or other types of genuine paintings attributed to them by representatives of the said respondent, but on the contrary comprise a cheap, inferior product costing around \$1.25 each;

(c) The sales prices represented for respondent's pictures by his sales representatives, were and are fictitious and greatly in excess of the prices at which such tinted or colored photographic enlargements were ever sold or were ever intended or contemplated to be sold;

(d) Respondent does not operate any art school and does not give work to unemployed artists and does not exhibit customer's paintings

for the benefit of artists, and the United Art Association is not an art association;

(e) Respondent has not conducted, and is not conducting, any contest for or in connection with national advertisers in which the winning picture has been, or will be selected and used for advertising purposes, nor is any child's mother in connection with such alleged contest to receive a grand prize, or the child's parents to receive any royalty from any national advertiser alleged to be using the picture.

(f) Respondent has not painted, and does not paint, miniatures in oil or otherwise for \$3.98 in connection with any special sale being conducted, or otherwise;

(g) The sum of \$3.98 does not represent, and has never represented, the actual cost of materials used by respondent in making a "painting," but on the contrary represents and constitutes an initial, substantial profit to respondent on the type and character of work done by him;

(h) Pictures or "paintings" made by respondent for customers are different from and greatly inferior in quality, workmanship and character to alleged samples thereof exhibited by respondent's agents in endeavoring to and obtaining contracts for such pictures or "paintings";

(i) Customers do not understand and have not agreed in connection with contracts that treasured family photographs are to be retained by respondent until payment of any sum alleged by respondent to be due him;

(j) Customers have not understood and do not understand from respondent that receipts for photographs supplied by them are actually contracts for pictures or "paintings" to be made by respondent;

(k) Frames delivered by respondent in connection with the sale of the said pictures or "paintings" are not the same as, but are inferior to, alleged samples of frames exhibited by agents while obtaining contracts therefor, and the prices asked for said frames are exorbitant and far above the value thereof;

(l) Respondent has not introduced, and is not introducing, any new or special type of pictures or "paintings"; is not offering, and has not offered to any customer any special or genuine reduction in price in the case of any "painting" or frame therefor; has not opened, nor intended opening any branch studios in any city, town, or community; does not select, and has not selected, a few special exhibitors of his products in any city, town, or community, and the prices quoted by respondent's said agents to customers and prospective customers are not special or reduced prices in any instance, but on the contrary are

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either prices ordinarily quoted, or prices grossly in excess of the real and actual value of respondent's products as sold by him in commerce.

PAR. 8. There are among the competitors of respondent, Frank McKinnon, trading as aforesaid under the names, Eastern Art Company and United Art Association, as described in paragraph 1 hereof, corporations, partnerships, firms, and persons who are engaged in the sale of tinted or colored enlargements of photographs and of frames therefor, who do not employ and maintain the practices as set forth in paragraphs 3 to 7 of this complaint, but who truthfully represent their products and honestly vend the same, and there are also, among the competitors of respondent, Frank McKinnon, corporations, partnerships, firms, and persons engaged in the business of painting genuine portraits, who truthfully represent their products as being "paintings."

PAR. 9. The use by respondent, Frank McKinnon, trading as Eastern Art Company and United Art Association, of the said practices as set forth in paragraphs 2 to 7 of this complaint, tends to and does unfairly divert trade from competitors and thereby substantial injury has been done, and is being done, by respondent to competition in interstate commerce. By the use of the within described false and misleading representations, respondent has deceived, and is deceiving, the public concerning the quality and value of the products sold by him as aforesaid and in the various other particulars as hereinbefore described and related, and has thereby induced, and is inducing, the public to purchase said products under the erroneous belief that the same are, and were, high-grade quality "paintings" and picture frames of exceptional merit and value.

PAR. 10. The above-alleged acts and practices employed by respondent as aforesaid are all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in interstate commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on August 28, 1936, issued, and on August 31, 1936, served, its complaint in this proceeding upon respondent, Frank McKinnon, an individual trading under the names Eastern Art

Company, and United Art Association, charging him with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding came on for final hearing before the Commission on the said complaint and the answer thereto; and the Commission having duly considered the same and being now fully advised in the premises, finds that this proceeding is in the interest of the public, and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Frank McKinnon, is an individual residing at Providence, State of Rhode Island, and doing business at No. 710 Eddy Street in said city, under the trade names, Eastern Art Company and United Art Association. Respondent is the sole owner and operator of the business conducted by him through the medium of the aforementioned trade name companies and directs the activities and controls the business policies and practices of each.

Respondent, Frank McKinnon, trading as Eastern Art Company and as United Art Association, as aforesaid, and hereinafter referred to as respondent, is now, and for more than two years last past has been, engaged in the business of offering for sale and the sale of tinted or colored photographic enlargements of family and other photographs, and of frames therefor. Respondent sells his products through the medium of salesmen or representatives appointed by him as agents. In consummating such sales and in distributing such products, respondent Frank McKinnon causes the pictures and frames so sold by him to be transported and delivered from his place of business in Providence in the State of Rhode Island, through and into various other States of the United States to the respective purchasers thereof at their respective points of location. In the course and conduct of his said business, respondent Frank McKinnon has been, and is now, engaged in direct and substantial competition with various corporations, partnerships, and individuals, likewise engaged in the sale, between and among the various States of the United States, of tinted or colored photographic enlargements and of frames therefor, and with corporations, partnerships, and individuals engaged in the

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sale among the various States of the United States of genuine, free hand original paintings, including oil paintings and water color paintings.

PAR. 2. A crayon is a pencil-shaped piece of colored clay, chalk or charcoal used for drawing upon paper. A crayon drawing is the act or art of drawing with crayons. A drawing is a representation produced by the art of drawing; a work of art produced by pen, pencil, or crayon. The pastel, in art, is a colored crayon made of pigments ground with chalk and compounded with water into a sort of paste. A drawing made with a colored chalk or crayon is called a pastel, as is also the art of drawing with colored crayons.

A painting is a likeness, image, or scene depicted with paints without the aid of photography. A water color is a painting with pigments for which water, and not oil, is used as a solvent. A portrait, in its ordinarily accepted meaning, is a picture of a person drawn from life, especially a picture or representation of a face; a likeness, particularly in oil. An oil painting is a painting done by hand with brushes in plastic oil colors on canvas, or other material, without the aid of photography.

PAR. 3. In the course and conduct of his said business, respondent causes agents and representatives employed by him to visit the homes of prospective customers in the cities, towns and rural communities of the various States of the United States. Under said respondent's selling plan he organizes the said agents and representatives into squads, groups or teams, each covering or working a particular territory under a crew manager appointed by respondent. Neither of the two trade name companies operates in the same territory, at the same time. No separate bookkeeping systems are maintained for the business handled through the medium of the aforesaid trade name companies. Crew managers in charge of selling teams keep in constant touch with the daily activities of the respective salesmen or representatives of respondent. Purchasers of pictures are given to understand that they are contracting or dealing with a duly constituted agent of one or the other of respondent's trade name companies and each agent or salesman is furnished by respondent with an identification card or card of credentials to be presented or exhibited by him when interviewing prospective purchasers. Equipment, including sample cases containing samples of specimens of "paintings," is also furnished solicitors or agents by said respondent for use in soliciting orders in his behalf.

Respondent causes orders or contracts for pictures or paintings to be taken on printed forms provided by him bearing the name and address of one of the trade name companies across the top thereof

and in such order it is "certified" that the customer is entitled to "one Venetian Convex Portrait Painting" 10 x 16 inches in size at a "cost of production" price of \$3.98, unframed, payment to be made upon presentation of proof at customer's residence. Said order blank or certificate is duly signed by respondent's agent in his representative capacity on a line provided therefor. Receipts similar in tenor are signed for the trade name company by the agent making a sale.

Sales talks containing approved methods of approach and convincing proposals or arguments to be used in contacting prospective purchasers of paintings, and necessary order blanks or forms, are furnished by respondent for the use of and distribution among his sales representatives; also certificates or coupons to be used in connection with the "draw" as hereinafter related.

PAR. 4. Respondent makes and produces and sells his "paintings" in the following manner:

A negative is made of a family photograph furnished to the agent or sales representative by the customer. This negative is then used to make a photographic enlargement of the original photograph. This photographic enlargement is then tinted or colored by spraying crayon or pastel water color or oil thereon by the use of a mechanical appliance known as an air brush, from which liquid paint is forced by compressed air. Respondent makes these enlarged tinted or colored photographs at an average cost of \$1.25. Frames range in cost from 85¢ to \$1.05, a few special patterns going as high as \$2.25. Glass and a back for the picture or painting represent a cost of about 24¢. Picture frames are sold for as much as an agent can obtain for them at any particular home visited, respondent's largest item of profit being realized in the sale of frames. Said colored enlargements are made in an unusual convex hexagonal shape necessitating a type of glass and frame which respondent fails or refuses to disclose at the time of the purchase of the picture, can be obtained only from him.

PAR. 5. In pursuance of the sales methods employed by and on behalf of and under the direction of respondent, a sales agent or representative calls upon or contacts a prospective customer, usually at the home of the latter. Said sales agent represents that a drawing contest will be held for the purpose of deciding who shall be one of a few lucky persons in a particular city or town to have respondent place free paintings in their homes. The agent then produces a box or package containing a number of slips of paper. It is represented that most of said slips are blank but that a few are trade checks or coupons; that a customer is allowed two draws or trials;

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that if he draws a blank he does not win, but if fortunate enough to draw a winning check or coupon, he will be entitled to receive a genuine oil painting, painting or portrait free, or to receive a substantial discount on the price of a genuine oil painting or valuable painting. The prospective customer draws, and finally, and invariably, draws a lucky coupon, allegedly giving him a painting free, or at a substantial discount. Believing the representations of the agent to the effect that he has been lucky and has obtained a distinct financial advantage the customer is thereby induced to continue negotiations with said agent and to make a contract with the said agent for a fine oil painting or portrait painting free, or at a substantial discount. The customer is casually and incidentally informed, when the deal is closed, that there is just a nominal charge of \$3.98 to be paid in connection with the transaction, representing the actual cost of the materials to be used in making the painting.

Said alleged "draw" or "drawing" was, and is, a mere sham device employed by respondent for the sole purpose of inducing the prospective purchaser to believe that if he draws a lucky coupon or certificate, he will thereby have the distinct advantage of obtaining a painting free, or at a price below that ordinarily charged. In truth and in fact all customers, unknown to each other, are approached in the same manner through the use of said drawing scheme and device, and likewise have been and are beguiled into believing that they are exceptional ones favored by chance, when such is not the fact. Respondent's agents and representatives, with a view to inducing prospective customers to sign contracts for oil, portrait or other valuable types of painting, make, and are instructed to make and do make the following, among other representations:

(1) That respondent is conducting a contest for national advertisers; that pictures, particularly those of babies, will be entered in such contest, the winning pictures to appear on Cream of Wheat, Ovaltine, Ralston, and other packages or containers, and that the parents of the child will obtain royalties for the use of the picture, and a grand prize; (2) That respondent desires to open a branch studio in the home town of a customer; that a limited number of customers will be selected as exhibitors, these to receive paintings free of charge, paying only the incidental item of \$3.98, representing the cost of materials; (3) That respondent is conducting an art school, that pictures made for customers will be exhibited to art students and for their benefit, and that respondent is assisting unemployed art students; (4) That the customer will receive a fine oil painting on canvas worth \$35 to \$40 for \$3.98, the alleged cost of materials only; (5) That prominent people pay as much as \$1,000

for portraits painted by hand in fadeless colors such as those made by respondent; (6) That respondent's paintings are hand drawn, hand painted, a work of art, and are not photographic enlargements; (7) That a hand-painted miniature, in view of a special sale being conducted by respondent, will be painted for \$3.98, representing the mere cost of materials; (8) That pictures of babies will be painted by unemployed artists and entered in a prize contest; (9) That paintings to be entered in a contest of national advertisers may result in the offer of a movie contract to the customer.

The interest of the prospective customer finally having been elicited through the use of one or more of the herein described selling devices, the said agent of respondent then asks the privilege of inspecting family photographs. After careful inspection a photograph announced by the agent to be satisfactory, is selected by him. This photograph, with which the agent departs when the contract is closed, is to be used, it is stated, merely for the purpose of checking details in the oil painting to be furnished free to said customer, except for the incidental item of \$3.98 to cover cost of materials.

In due course a second and different agent of said respondent calls to exhibit a sketch, outline, or proof of the oil painting to be finished for the customer; to inquire about coloring details; to collect, or to endeavor to collect, in advance of the completion and delivery of the painting, for the purported incidental cost of the materials to be used in painting the picture or portrait, amounting to \$3.98 as aforesaid; and to persuade the customer to contract for a frame for the painting. Respondent's said agent exhibits to the customer a model, outline, or proof of the painting made on a peculiar-shaped convex surface, hexagonal in shape. Said agent then represents that it will be necessary for the picture, in order to be fully protected, to have a frame with convex unbreakable glass and that such frame and glass can be obtained only from the said respondent. Said frame and glass are priced to the customer at various exorbitant figures, and in the event the second visiting agent fails to sell a frame and glass, a third salesman, who calls to deliver the finished painting, makes a further effort to induce the customer to add the price of a frame and glass to his contract.

PAR. 6. The various statements and representations made by respondent directly and through his agents and representatives, in selling and offering for sale pictures in cities, towns, and communities of the respective States of the United States, were and are false, deceptive and misleading in the following, among other particulars:

The "paintings" so represented and sold by the respondent are not, and never have been, portrait paintings, oil paintings, or hand drawn, hand painted, or hand paintings, or water color paintings, or original paintings, or works of art, or any work of art produced through the art of drawing or drawn from life. They are, and have been, merely cheap photographic enlargements of photographs, tinted or colored by the use of pastel or crayon, water color or other powdered pigments sprayed upon the enlargement, in solution, through the use of an air brush and compressed air. Pictures or purported paintings such as those sold by respondent are not worth, and never have been worth, or had the value of \$40 or \$35, or any other value approximating these amounts. Pictures of this type have never been bought by prominent people for \$1,000. Respondent's pictures do not possess, and they have never possessed or had the quality, characteristics or value of oil paintings or other types of genuine paintings attributed to them by representatives of the said respondent. They comprise a cheap, inferior product costing around \$1.25 each. The sales prices represented for respondent's pictures by his sales representatives, were and are fictitious and greatly in excess of the prices at which such tinted or colored photographic enlargements, as such, were ever sold or were ever intended or contemplated to be sold. Respondent does not operate any art school and does not give work to unemployed artists and does not exhibit customer's paintings for the benefit of artists. Respondent has not conducted, and is not conducting, any contest for or in connection with national advertisers in which the winning picture has been, or will be selected and used for advertising purposes, nor is any child's mother in connection with such alleged contest to receive a grand prize, or the child's parents to receive any royalty from any national advertiser alleged to be using the picture. Respondent has not painted, and does not paint, miniatures in oil or otherwise for \$3.98 in connection with any special sale being conducted, or otherwise. The sum of \$3.98 does not represent, and has never represented, the actual cost of materials used by respondent in making a "painting," but on the contrary represents and constitutes an initial, substantial profit to respondent on the type and character of work done by him. Pictures or "paintings" made by respondent for customers are different from and greatly inferior in quality, workmanship, and character to alleged samples thereof exhibited by respondent's agents in endeavoring to and obtaining contracts for such pictures or "paintings." Frames delivered by respondent in connection with the sale of the said pictures or "paintings" are of cheap, inferior quality and the prices asked for said frames are exorbitant and far

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above the value thereof. Respondent has not introduced, and is not introducing, any new or special type of pictures or "paintings." Respondent is not offering, and has not offered to any customer any special price or genuine reduction in price in the case of any "painting" or frame therefor. Respondent has not opened, nor intended opening, any branch studios in any city, town or community, and does not select, and has not selected, a few special exhibitors of his products in any city, town, or community. The prices quoted by respondent's said agents to customers and prospective customers are not special or reduced prices in any instance, but on the contrary are either prices ordinarily quoted, or prices grossly in excess of the real and actual value of respondent's products as sold by him in commerce.

PAR. 7. There are among the competitors of respondent, as described hereinbefore, corporations, partnerships, firms, and persons who are engaged in the sale of tinted or colored enlargements of photographs and of frames therefor, who do not employ and use practices similar to those set out herein, but who truthfully represent their products and honestly vend the same. There are also, among the competitors of respondent, Frank McKinnon, other corporations, partnerships, firms, and persons engaged in the business of painting genuine portraits, who truthfully represent their products as being paintings.

PAR. 8. The use of the aforesaid false and misleading representations and practices on the part of the respondent and his agents in the sale and offering for sale of purported paintings has had, and now has, the tendency and capacity to cause members of the purchasing public to form the mistaken and erroneous beliefs that respondent's said colored or tinted photographic enlargements are paintings produced by one of the methods described in paragraph 2, hereof; that said pictures have a value of \$35 to \$40 or some similar sum; that pictures of the same type have sold for \$1,000 or some similar sum; that said pictures have the same quality, value and characteristics as paintings produced by the methods described in paragraph 2 hereof; and that the various other representations made by the respondent and his agents as detailed in paragraph 5 hereof, including the representation that the purchaser will receive the picture free or at a substantially reduced price on account of being a winner in a drawing contest, are true. Acting in such erroneous beliefs, induced by the various misrepresentations herein detailed, many of said members of the public have purchased the colored photographic enlargements, and frames therefor, sold by the respondent. The aforesaid representations and practices on the part of respond-

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ent have and have had the capacity and tendency to divert to respondent the trade of competitors engaged in selling in interstate commerce colored photographs and photographic enlargements and frames therefor, which latter product are truthfully advertised and represented, and thereby substantial injury has been done, and is being done, by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of the respondent, Frank McKinnon, an individual trading under the names Eastern Art Company and United Art Association are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, within the intent and meaning of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer filed herein on October 9, 1936, by respondent admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, and the Commission having made its findings as to the fact and its conclusion that said respondent has violated the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is ordered, That the said respondent, Frank McKinnon, individually, and trading under the names Eastern Art Company and United Art Association, or under any other trade name, or through any corporate or other device, his servants, employees, or agents, individual or corporate, in connection with the offering for sale, sale, and distribution of colored or tinted photographic enlargements having a photographic base for a likeness, and of frames therefor, in interstate commerce or in the District of Columbia, do forthwith cease and desist from representing:

1. That such pictures are "oil paintings," "portrait paintings," "water color paintings," "original paintings," "hand paintings," "paintings," or "hand drawn"; and are produced by hand without the aid of photography;

2. That the sum of \$3.98, or any other sum, represents only the actual cost of the materials used by respondent in making one of his pictures through his accustomed process, when said sum represents other than the actual cost of production;

3. That customers by means of the so-called draw, or drawing, or voting contest, by drawing a "lucky" blank, coupon or certificate, or on account of any other device or pretext such as prize contests or introductory advertising offers, have thereby obtained a distinct financial advantage, as a result of which they will be entitled to receive free one of two "paintings," or will receive a substantial discount or reduction in price in the case of an order for one "painting";

4. That pictures and frames have selling prices or values which were and are fictitious and greatly in excess of the prices at which such or similar products are usually sold and were intended to be sold, and greatly in excess of the values of such or similar products.

5. In any manner, or through any means or device, or through failure to disclose the size and shape of the pictures sold at the time the order is taken, that the pictures furnished by him are of such size and shape, that frames therefor can be procured from any source, when in fact said pictures have such peculiar size and shape that frames therefor can be obtained only from respondent.

It is further ordered, That the respondent shall, within 60 days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF
PHILIP WELSH, TRADING AS THE WELSH FOUNDATION

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
 OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2485. Complaint, July 1, 1935—Decision, Apr. 9, 1937

Where an individual engaged in the publication, sale and distribution in interstate commerce of books and booklets known as and sold under the name "The 7 Essentials of Health," to wit; as designated and dealt with by him in the seven booklets, in which he detailed his theories and ideas as to correct mode of living, with respect to the subject matter of the different pamphlets, fresh air, natural foods, water, sunshine, exercise, and occupation, rest and mental attitude; and in substantial competition with others engaged in sale and distribution in commerce among the various States of books, booklets, pamphlets, magazines, and other publications dealing with problems of health and hygiene and other related subjects, and who do not in any manner misrepresent the benefits to be obtained from following the mode of living or rules of health and hygiene or treatments therein set forth; in advertising his said publication in magazines circulated throughout the States, and through circulars, dodgers, leaflets, pamphlets, form letters, and other printed matter distributed among prospective purchasers by mail and through other means—

- (a) Represented that the following and using of the theories, ideas, rules, directions, and instructions announced and stated in his said publication would prevent and cure all bodily ailments and diseases and cure or be beneficial in the treatment of a large number of specified ailments, diseases, and conditions, including, among many others, anemia, arthritis, high blood pressure, kidney trouble, low blood pressure, rheumatism, sexual disorders, and women's ailments, and that following instructions in said publication would "make the blood so pure and the entire digestive tract and colon so clean that disease CANNOT maintain hold in the body * * *," and result in the body itself becoming immune thereto, and would enable one to "get at and strengthen all the internal organs, revitalize them and bring them back to normal function," and to learn a simple, inexpensive, practical, and entirely natural way to attain unusual health; and
- (b) Represented that all sickness is caused by overlooking one of the essentials named in said publication, and that following mode of living outlined therein is simplest and most effective way of dealing with health problems, and that health cannot be restored by cutting out parts of the body, and that adoption of his said teachings, as stated in publication in question, will cause disease and premature death to disappear from the earth;

Facts being that the following and using of the theories, ideas, rules, directions and instructions of said individual, as stated in publication in question, in regard to health, hygiene, mode of living, and related matters therein referred to, will not prevent and cure all bodily ailments and diseases regardless of their cause, origin and nature, or cure or be of any substantial benefit in the treatment of the ailments, diseases, and conditions for which