

Syllabus

IN THE MATTER OF
MIDWEST STUDIOS, INC., IMPERIAL SALES COMPANY,
AND B. E. YOUMANS

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

Docket 3011. Complaint, Dec. 9, 1936—Decision, May 11, 1939

Where a corporation engaged in offering and selling tinted or colored enlargements of photographs, and frames therefor, to members of the public through large number of solicitors and salesmen who worked together in crews under supervision of crew managers and traveled throughout the various States, and who were supplied by it, and carried and presented, credential cards certifying that they were duly accredited representatives of said corporation, authorized to show or demonstrate samples and to take orders, and with samples and with contract forms or order blanks directed and addressed to said corporation, and who acted as its agents and were accepted and dealt with as such by purchasing public;

In selling, through such various agents and representatives, and for the purpose of thus selling said products as aforesaid, and inducing purchasers thereof to sign contracts without understanding or being able to learn the nature, terms and conditions thereof or to obtain complete details regarding the transaction into which they were entering, and with the active cooperation of a second corporation, to which notes for balances due on products sold by former were, for a time, made payable, and stock of which was owned by the individual who was the president thereof, as of said former corporation, and large stockholder therein, and in control of the operation and management of both, and with other actively cooperated also in matters herein set forth through standardized sales talks furnished its said representatives, and with the knowledge, acquiescence and active cooperation of said corporations and said individual, and knowing false and misleading character thereof, and through its order blanks or contracts, and, as thus engaged in competition with those who sell colored enlargements of photographs and frames therefor in commerce among the various States and in the District of Columbia, and do not employ and maintain the practices below enumerated, but truthfully represent and honestly vend their products, and those engaged in painting and selling paintings in commerce as aforesaid, and who truthfully represent as paintings their said products—

- (a) Exhibited to prospective purchasers various samples of attractively colored specimens of work of aforesaid corporation, glass enclosed, and informed prospective customer that the company, in order to advertise their paintings, was anxious to select a few customers who would display them in a prominent place in their homes, and represented that such offer constituted a special or introductory one to a selected few members of the community, available only for a short period of time, and represented and referred, in such connection, to their pictures as "paintings," "fine paintings," "free hand-painted portrait valued at \$20," "oil painting worth \$20," etc., and, in the contract form referred to product as a "\$20 high grade painting, * * * future price \$20 and up," and informed customers that the com-

pleted painting furnished by the corporation would be the same as the sample exhibited, facts being sale was not limited in any way, its said products never sold for any such price and were not paintings, it did not produce any oil paintings of photographs loaned to it, and was conducting no special advertising campaign, but was simply carrying on its regular sales plan employed in case of all customers, and pictures supplied were not in accordance with samples shown or representations made relative thereto;

- (b) Made use, in aforesaid connection and in furtherance of sales plan in question, and to convince prospective purchaser that such enlargements were being obtained only by a selected few and for a nominal or incidental expense as a special offer or as a free picture given as an advertising offer, of so-called "draw," under which salesman purported to give prospect opportunity to draw lucky number entitling successful prospect to such supposed special consideration in connection with so-called special offer, and under which prospects were informed, after drawing, that they had secured the lucky number or had drawn "lucky," and were entitled to advantages of so-called special advertising offer, and to "a \$20 picture free," or a "High-grade painting worth \$20 for \$1.95," and informed prospective customer, following such lucky draw and borrowing of some treasured family photograph for use in connection with making of so-called "painting," that nominal item of expense, or \$1.95," was necessary to cover cost of "handling," "wrapping," or other item, and required payment of said amount, facts being so-called "painting" or picture was not free, but sum of \$1.95 charged, as aforesaid, was usual or customary price thereof and more than covered cost to corporation of picture in question, and did not represent, as above set forth, actual cost of wrapping, etc., and said alleged "draw" was a fraudulent scheme conceived to mislead prospects into belief that they would secure a picture free or at a greatly reduced price and receive same to exclusion of other people in the same locality;
- (c) Concealed carefully, in initial contact, from customer essential fact that customer was expected to and must eventually buy a frame for the painting from corporation in question, and did not intimate on such contact that real purpose and intent of entire proceeding was to sell customer frame, costing about \$1.50 each at the factory, at prices ranging from \$8.90 to \$17, and that company's profit was made on sale of such products and covered any loss otherwise sustained, but informed customer, through appearance of the follow-up employee or so-called "field artist," as referred to in order blank and sales talk, with picture in octagon shape and convex in surface, that owing to peculiar shape of frames it would be difficult or not possible for customer to obtain frame elsewhere, and that frame selected by customer would be unsatisfactory and unacceptable to the company, and that customer would not receive his picture unless frame therefor was purchased from corporation; and
- (d) Refused, further, to return photograph, which, in many instances, possessed great sentimental value and was unique, until the "transaction" was "completed," or customer had accepted picture and frame and paid therefor in full, and required customer, in cases in which transaction had not been thus completed, to sign note containing provision setting forth that such signature was voluntary "as evidence of balance due on portrait and frame"

purchased from corporation, to be mailed to such signer "together with photo upon payment of this note in full," and made it its policy to retain customers' photographs until final payment had been made on frame in many cases where notes had been executed for balances due, and thus attempted to show balance due on picture which had already been paid for in full;

With result that members of the purchasing public were beguiled, through said alleged "draw," into believing that they were the exceptional few whom fortune had favored, and thus induced to sign contracts for completion and delivery of pictures in question, and, through use of sales plan above described and employed, and involving separate solicitation and calls by the original or contact salesman and second visit by such falsely designated "field artist," of misleading and forcing purchaser into buying something which he did not originally intend to buy, through special design of frame in which picture was delivered, and of thus placing in the hands of their sales representatives and so-called "field artists" means whereby they could and did sell picture frames for exorbitant amounts and force purchase of such products upon unsuspecting customers, and with effect that customers were thus compelled to buy such products from said corporation in order to receive their pictures or "paintings" and to obtain return of family photograph theretofore loaned to such corporation's agent by customer without information of any sort as to real nature of transaction in question; and

With further effect and result that purchasers were deceived, through such false and misleading representations, into buying aforesaid products of such corporation as and for those possessing the characteristics and qualities claimed for them, and of also placing thereby in the hands of said sales managers, sales agents and "field artists" means of deceiving their customers, and of unfairly diverting to them thereby trade of competitors engaged in selling, in commerce among the States and in the District of Columbia, products of the same kind and nature, truthfully advertised and represented by them:

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

Before *Mr. Henry M. White* and *Mr. Robert S. Hall*, trial examiners.

Mr. Marshall Morgan, *Mr. Reuben J. Martin* and *Mr. George Foulkes* for the Commission.

Mr. Dan J. Kenney and *Mr. B. E. Youmans*, of Portland, Oreg., and *Fry & Fry*, of Chicago, Ill., for respondents.

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 Midwest Studios, Inc., a corporation, Imperial Sales Co., a corporation, and B. E. Youmans, an individual, each hereinafter referred to as re-

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spondent, have been and are using unfair methods in competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents, Midwest Studios, Inc., and Imperial Sales Co., are corporations organized, existing, and doing business under and by virtue of the laws of the State of Oregon, each with its place of business located on the second floor of the Government Building at 408 Southwest Second Street, Portland, Oreg. While each of these respondents is a separate entity each has the same president.

Respondent B. E. Youmans is president of the Midwest Studios, Inc., and president and treasurer of Imperial Sales Co. Respondent Youmans owns a controlling interest in each of said companies and directs the activities and controls the affairs and policies of each, including the conduct of sales campaigns, character of sales representations made, and all business interviews and correspondence incident thereto.

Respondent, Midwest Studios, Inc., is now and for more than 2 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, Midwest Studios, Inc., sells its products through the medium of salesmen or sales representatives appointed by it as agents in its behalf, to customers located in States other than the State of Oregon. In consummating such sales and in distributing such products, respondent, Midwest Studios, Inc., causes the pictures and frames so sold by it to be transported and delivered from its place of business in Portland in the State of Oregon, through and into various other States of the United States to respective purchasers thereof at their respective points of location. In the course and conduct of its said business respondent Midwest Studios, Inc., 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 of photographs and of frames therefor and, likewise with those corporations, partnerships, and individuals engaged in the sale among the various States of the United States of genuine original paintings, including oil paintings and water color paintings.

For many years prior to January 1, 1935, respondent Imperial Sales Co. was engaged in the sale of colored photographic enlarge-

ments at Portland, Oreg. Since said date said respondent has served as an agency and medium for respondent Midwest Studios, Inc., in collecting balances due from purchasers of pictures and frames sold by respondent, Midwest Studios, Inc., through its agents and representatives, to customers throughout the various States of the United States other than the State of Oregon, as will be more fully herein-after 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.

A 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 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 and with brushes in plastic oil colors on canvas, or other material, without the aid of photography.

PAR. 3. In the course and conduct of its said business, respondent, Midwest Studios, Inc., causes agents and representatives employed by it to visit the homes of prospective customers in cities, towns, and rural communities of the various States of the United States. Under said respondent's selling plan, it organizes its said agents and representatives into squads or teams, each designated by a certain name and working a particular territory. Among such squads or teams so organized by and under the supervision and authority of respondent, Midwest Studios, Inc., for the purpose of selling tinted photographic enlargements made by it, are, and were, squads, crews, or teams designated by such titles as: Aces, Chinooks, Rangers, Rustlers, Cyclones, Beavers, Travelers, Champions, Pioneers, Buckaroos, Tigers, Terriers, and Texas Steers. Teams or crews are and have been placed in immediate charge of crew managers or foremen, who keep in constant touch with the daily activities of the respective salesmen or representatives of respondent company. Respondent, Midwest Stu-

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dios, Inc., keeps and has kept close watch over the activities of its agents or representatives selling pictures and frames for it, and assists and promotes such work actively and continuously. Weekly bulletins, reviewing and discussing sales work, and containing high-powered sales talks, are prepared by the editorial department of respondent, Midwest Studios, Inc., and distributed by it among the salesmen, agents and representatives engaged in the sale of the products of respondent, Midwest Studios, Inc. In said bulletins are set forth lists of leading salesmen and leading teams or salesmen, covering weekly, quarterly or other periods. Leading salesmen are complimented in the bulletin for the records made by them, and others are encouraged to redouble their efforts. Sales talks containing approved methods of approach and salesmanship, and convincing arguments to be used in contacting prospective purchasers of pictures and frames, are likewise prepared and furnished by respondent, Midwest Studios, Inc., for distribution and use among its sales representatives and agents. Purchasers of respondent's products are given to understand that they are contracting or dealing with a duly constituted agent of the Midwest Studios, Inc., of Portland, Oreg. Each agent or salesman is furnished by said company with an identification card or card of credentials to be presented or exhibited by him when interviewing prospective purchasers.

Sales representatives and agents carry and exhibit alluring samples of free-hand paintings, some done in oil, some in water color, showing the color of the hair, eyes, complexion and clothing. A sales representative of respondent Midwest Studios, Inc. calls upon, or contacts a prospective customer and represents that a drawing contest will be held for the purpose of deciding who shall be one of the few lucky persons in a particular city or town to have respondent place free paintings in their homes in connection with a "special advertising offer." The agent or salesman, in connection with said drawing, produces a number of slips or envelopes. It is represented that most of said slips are blank but that a few are trade checks, or certificates, 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, certificate or coupon, he will be entitled to receive a genuine \$20 oil or water color painting free, or to receive a substantial discount on the price of a fine painting. The prospective customer draws and finally and invariably draws a lucky coupon, reading: "This entitles holder to our special advertising offer. *Midwest Studios, Inc.*" 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 ad-

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vantage and has put himself in the position of obtaining something of value "free," the customer thereupon proceeds to sign a contract whereby, upon the payment of the sum of \$1.95, respondent, Midwest Studios, Inc., agrees to make—"One of our \$20.00 High Grade Paintings in a most pleasing size in the newest Octagon Design same as painting shown." The agent explains that the item of \$1.95 represents merely postage charges or expenses of the agent. Said contract explains that—"This extraordinary offer" is made "for advertising purposes only to introduce paintings of a higher grade by a talented artist." Continuing the thought of the "advertising purpose only" the contract's next provision reads:

Therefore to assure us of a lasting advertisement this offer is conditional to the extent that the paintings be framed within a reasonable length of time.

Continuing further, the contract provides that before finishing the painting, a "Field Artist" will call upon the prospect with "a sketch of your photograph" and get "full particulars for finishing" and that at that time art craft frames of the newest design will be submitted for your selection." It is further provided that in the event a frame is not selected, the sketch will be left with the customer until a suitable frame is selected elsewhere, and then the painting will be finished at no additional cost.

PAR. 4. Respondent's sales agents and representatives, when calling upon prospective customers with a "proof" or "sketch" of a painting to be made for them, endeavor in each instance to sell to said customer a frame or frames for said paintings, and when such sales are made and the frame is not paid for in full, said sales agent or representative, after taking an order for the frame in the name of Midwest Studios, Inc., causes the customer to sign a note for any sum due on said frames, in favor of Imperial Sales Co., Government Building, Portland, said note carrying a provision for the payment of interest at 10 percent. Thereby, in case of controversy for any reason with the purchaser of a painting, where the purchaser has given a note to the Imperial Sales Co., for any unpaid balance due on a frame, respondent, Midwest Studios, Inc. is enabled to avoid further responsibility in connection with its contract for the painting by referring the purchaser of the frame to the Imperial Sales Co., which company had nothing to do with, and plays no part in the production and sale of the painting. This plan, scheme, or arrangement enables the Midwest Studios, Inc., original seller of the "painting," through another corporation owned by it, to remove itself from the situation.

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In truth and in fact the Midwest Studios, Inc., and Imperial Sales Co., while technically separate corporate entities, are and have been, one and the same in fact, each being owned, organized, and operating out of the same address in Portland, Oreg., by B. E. Youmans, the moving spirit in the business of the Midwest Studios, Inc., and the purchaser of a picture frame, in cases where a note has been given for an unpaid balance thereon, has thus found himself cut off with dealing with the original company with which he had contracted for his "painting," and has been remitted instead to a controversy with a collection agency holding a note against him bearing 10 percent interest.

PAR. 5. The so-called "sketch" referred to in the aforesaid contract, and delivered to and left with the customer by respondent's so-called "Field Artist," is not in any sense a "sketch," but is merely, and so far, an untinted, uncolored, lightly printed photographic enlargement in black and white of the original family photograph that had been furnished to respondent's sales representative, and the contract for the "painting" is not, and has not been made with any customer for advertising purposes, but solely as a lead or step looking to the sale by respondent to the customer of a "suitable" frame for said "painting." In the event the customer should refuse to agree to buy one of respondent's frames, priced to him at exorbitant prices, the unfinished "painting," or "sketch" is left with the customer, the field artist departs, and the customer is remitted to his own resources to find a "suitable" frame for the "sketch," or "painting" to be. The customer learns to his astonishment that owing to the peculiar convex, octagonal shape of the "painting," a "suitable" frame for the same cannot be bought or located by him at any store or place known to or ascertainable by the customer in a reasonable or any other period of time, and that he must either buy a frame from respondent at respondent's price, or do without both a finished "painting" and frame therefor.

Respondent meanwhile retains the money paid in advance by the customer for the "\$20.00 High Grade Painting" and retains the customer's family photograph, often of a deceased member of the customer's family.

The customer, in this situation, has paid for a "High Grade Painting" but is unable to obtain delivery thereof unless and until a frame is approved as "suitable" by a representative of Midwest Studios, Inc.

PAR. 6. The pictures or photographs which are borrowed from prospective customers by the agents and representatives of respondent Midwest Studios, Inc. for the purpose of having "paintings"

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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 so loaned and furnished to respondent by its 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 for many years. In making contracts with its customers, respondent inserts therein, a clause to the effect that no countermands are accepted. In case of a controversy involving alleged misrepresentations as to the character of the goods, or work done, or for other reasons, justified in the mind of the purchaser, the respondent, Midwest Studios, Inc., in the event any sum or balance is claimed to be due it 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 respondent did and does refuse to return the valued family photograph until the money claimed to be due it has been paid.

Respondent, in many instances, has retained original photographs and colored enlargements made therefrom, and has retained possession of enlargements fully paid for at the original contract price therefor, if subsequently frames for the same were not purchased by the customer from respondent Midwest Studios, Inc., 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, misrepresentations 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 Midwest Studios, Inc. through its agents and representatives, in selling its products and in offering them for sale 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 alleged oil paintings, water color paintings, and paintings, represented and sold by respondent Midwest Studios, Inc. as "\$20.00 High Grade Paintings" are not and never have been "oil paintings," "water color paintings," hand-painted paintings, or paintings at all, 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, thereafter tinted or colored by the use of pastel or crayon, water color or other powdered pigments sprayed upon the photographic enlargement, in solution, largely through the use of an air brush and compressed air.

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(b) The said "paintings" as represented and sold are not worth, and never have been worth, or had the value of \$20.00, or any other value approximating these amounts; nor have such products ever possessed or had the quality, characteristics or value of oil paintings, water colors, or other types of genuine paintings attributed to them by representatives of said respondent, but on the contrary comprise a cheap, inferior product, costing around \$1.25 each.

(c) The sales prices represented for said "paintings" by 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) The sum of \$1.95 does not represent, and has never represented the cost of postage or the agent's expenses incurred in connection with the delivery of a "painting," but on the contrary represents the average price at which such type and quality of work is sold.

(e) 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 agents endeavoring to obtain and obtaining contracts for such pictures or "paintings."

(f) 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.

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

(h) Glasses for said picture frames are not unbreakable in character, but on the contrary are and may be readily broken.

(i) So-called "lucky slips" drawn by customers from agents upon the representation that the customer is thus obtaining a ticket, coupon or certificate entitling him to obtain a \$20.00 High Grade Painting" free, falsely and deceptively induce the customer to believe that he has thereby obtained a distinct advantage, and influence him to enter into a contract for a "painting" and a frame therefor, when as a matter of fact all prospects found to have any available money were and are permitted to make a "lucky draw" and obtain such alleged "free painting" certificates and respondent, Midwest Studios, Inc., acting through its salesmen and representatives, further deceives the purchasing public by concealing the fact that the purchase of a suitable frame is made a condition in connection with the sale of respondent's "paintings" and that the customer will be forced in the end to buy a frame from respondent at respondent's own price.

PAR. 8. There are, among the competitors of respondent, Midwest Studios, Inc., as described in paragraph 1 hereof, corporations, partnerships, firms and persons who are not engaged in the sale of tinted or colored photographic enlargements of photographs and of frames therefor, who do not employ the methods and practices set forth in paragraphs 3 to 6 of this complaint, but who truthfully represent their products and honestly vend the same, and there are also, among the competitors of respondent, Midwest Studios, Inc., corporations, partnerships, firms, and persons engaged in the business of producing and selling genuine paintings, who truthfully represent the same as "paintings."

PAR 9. The use by respondents, Midwest Studios, Inc., Imperial Sales Co., and B. E. Youmans, of said practices as set forth in paragraphs 3 to 6 inclusive of this complaint, unfairly diverts trade from competitors and thereby substantial injury has been done, and is being done, by respondents to substantial competition in interstate commerce. By the use of the within described false and misleading representations, said respondents have deceived, and are deceiving, the public concerning the quality and value of their products sold as hereinbefore described, and have thereby induced, and are inducing, the public to purchase such products under the erroneous belief that the same are, and were, high grade quality paintings, and picture frames of exceptional merit and value respectively.

PAR. 10. The above alleged acts and practices employed by said respondents as aforesaid are all to the prejudice of the public and the respondents' competitors and constitute unfair methods of competition in interstate 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."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 9, 1936, issued and thereafter served its complaint in this proceeding upon respondents, Midwest Studios, Inc., and Imperial Sales Co., corporations, and B. E. Youmans, an individual, charging them 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 respondents' answer thereto, testimony and other evidence in support of the allegations of the said complaint were introduced by Marshall Morgan, Reuben J. Martin and George Foulkes, attorneys for the Commission, and in opposition to the allegations of the complaint by Dan J. Kenny, B. E. Youmans and Albert H. Fry, attorneys for the respondents, before Henry M. White and Robert S. Hall, examiners for the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of counsel aforesaid; 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 these its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents, Midwest Studios, Inc., and Imperial Sales Co., are corporations organized, existing, and doing business under and by virtue of the laws of the State of Oregon, each with its place of business located in the Governor Building, 408 Southwest Avenue, in the city of Portland, Oreg.

Respondent Midwest Studios, Inc., is engaged in the business of producing and offering for sale and selling tinted or colored enlargements of photographs and frames therefor. Prior to March 1936, notes for balances due on products sold by Midwest Studios, Inc., were made payable to respondent Imperial Sales Co. Since March 1, 1936, notes have been made payable to Imperial Finance Co., a trade name owned by and registered in the name of Midwest Studios, Inc., the Imperial Finance Co. taking over the function formerly exercised by the respondent Imperial Sales Co., that of handling instalment notes for the Midwest Studios, Inc.

Respondent Youmans is president of each corporation, owns all the stock of Imperial Sales Co. and is a large stockholder in Midwest Studios, Inc. He is in charge of the latter company's office force and finances, has contact with the field forces, has authority to make concessions on contracts and to authorize refunds. Complaints are referred to him. He personally has control of the operation and the details of the management of the business of the two corporations. Balances due on pictures and frames sold by Midwest Studios, Inc. have been made payable to and have been collected by Imperial Sales Co., entirely owned by respondent Youmans. This installment business, in the year 1936, amounted to \$86,735.42.

PAR. 2. In the course and conduct of its business of offering for sale and selling tinted or colored enlargements of photographs and frames therefor, the respondent Midwest Studios, Inc., has caused such products, when sold, to be transported from its place of business in Portland, Oreg., to purchasers thereof located in various States of the United States other than the State of Oregon. In the course and conduct of such business, respondent Midwest Studios, Inc. is in competition with other corporations and with partnerships, firms, and individuals likewise engaged in offering for sale and selling in commerce among and between the various States of the United States and in the District of Columbia, colored, enlargements of photographs, pictures, and frames, and other similar products.

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Findings

PAR. 3. The pictures and frames of respondent Midwest Studios, Inc., also referred to herein as Midwest, are sold to members of the public by crews of solicitors and salesmen traveling throughout the various States of the United States, each crew working together under the supervision of a crew manager. There are from 125 to 150 salesmen. The sales people are divided into two general classes, "front men" with samples, who make the original contacts with customers, and follow-up men or "field artists," who call later to obtain color instructions for pictures and to sell frames therefor. Each salesman is supplied by Midwest with, and carries and presents, a card of certificates certifying him to be a duly accredited representative of Midwest Studios, Inc., Portland, Oreg., authorized to show or demonstrate samples and to take orders for future delivery. Samples of respondent's work are carried by its salesmen. Salesmen are also furnished by Midwest with contract forms or order blanks, each order being directed and addressed to Midwest Studios, Inc. Prior to February 1936, the contract form for orders as employed by Midwest Studios, Inc. contained the following language and provisions:

"Midwest Studios, Inc.,
408 S. W. Second Ave.,
Portland, Oregon.

----- 1935.

Authorized capital \$25,000.

By paying our representative \$1.95 we will make for the undersigned one of our \$20 HIGH GRADE PAINTINGS in the most pleasing size in the NEWEST OCTAGON DESIGN, same as painting shown.

This extraordinary offer is for advertising purposes only to introduce paintings of a higher grade, hand-finished by talented artists; therefore to assure us of a lasting advertisement this offer is conditional to the extent that the paintings be framed within a reasonable length of time.

Before finishing, our field artist will call on you with a sketch of your photograph and get full particulars for finishing; at that time art-craft frames of the newest design will be submitted for your selection. In the event a frame is not selected, the sketch will be left with you until a suitable frame is selected elsewhere; then the painting will be finished at no additional cost.

COUNTERMANDS NOT ACCEPTED. VERBAL AGREEMENTS NOT RECOGNIZED.

This offer cannot be extended, future price \$20 and up. All work strictly guaranteed

Customer -----
Address -----

Representative.

The language of the above form of contract was amended about February 1936, to the extent of changing the word "painting" to "portrait" wherever the former word had occurred.

Order blanks covering the sale of frames were, and are, also employed by respondent Midwest Studios, Inc., space being reserved at the bottom thereof for the signature of the customer in each instance, the sales representative taking the order for respondent company also signing opposite the customer or purchaser variously as "advertising manager," and "field artist."

These forms of contracts were employed by salesmen for Midwest Studios, Inc., in taking orders to be executed by it. Based upon the testimony of customers of Midwest Studios, Inc., and upon the general representations of said respondent made both directly and through agents, salesmen and representatives, and also by reason of the use of the credential cards, contracts and order blanks, above described or referred to, the Commission finds that the respondent, Midwest Studios, Inc., as well as its salesmen and other representatives soliciting orders for pictures and frames therefor, have customarily represented to such customers and have induced them to understand that they are dealing direct with the respondent, Midwest Studios, Inc., and are purchasing pictures and frames direct from Midwest Studios, Inc. The Commission finds that solicitors, salesmen, managers, "field artists" and other representatives selling Midwest colored enlargements of photographs and frames therefor to members of the purchasing public are agents for Midwest and are accepted as such and dealt with as such by the purchasing public.

PAR. 4. For the purpose of selling respondent Midwest's colored enlargements of photographs and frames therefor, and inducing purchasers thereof to sign contracts without understanding or being able to learn the nature, terms and conditions thereof or to obtain complete details regarding the transaction into which they are entering, salesmen and other representatives of respondent, Midwest Studios, Inc., with the active cooperation of the respondents Imperial Sales Company and B. E. Youmans, by the use of standardized sales talks furnished by respondents, made and have made, under circumstances and in situations hereinafter related, representations as follows:

(a) Salesmen and other representatives of the respondent Midwest Studios, Inc., while traveling in crews and visiting homes in cities and towns in various States of the United States, exhibit to prospective purchasers various samples of attractively colored specimens of the work of Midwest Studios, Inc., enclosed in glass. The prospective customer's attention is called to these specimens and the customer is informed that the company in order to advertise their paintings, is anxious to select a few customers who will display them in a prominent place in their homes. This proposition is represented as being

a special or introductory offer to a selected few members of the community, available only for a short period of time.

(b) Respondent's salesmen in showing samples call particular attention to the quality of Midwest Studios' work. Pictures are and have been represented and referred to by respondent Midwest Studios and by its various salesmen and representatives as "paintings," "fine paintings," "free hand-painted portrait valued at \$20," "oil painting worth \$20," and as various types of paintings selling at or worth from \$15 to \$25, and in respondent's contract the product agreed to be supplied is a \$20 high grade painting. * * * future price \$20 and up." Respondent's product has been continuously called a "painting" and a substantial portion of customers called upon interpret the product as an "oil painting." Customers are informed that the completed "painting" furnished by Midwest Studios, Inc. will be the same as the sample exhibited.

(c) In connection with and in furtherance of respondent's said sales plan, and for the purpose of convincing the prospective purchaser that said colored photographic enlargement is being obtained only by a selected few, and for only a nominal or incidental expense as a "special offer" or as a "free picture given as an advertising offer," the prospective customer is then introduced to the "draw." Midwest Studios salesmen, upon entering the home of the customer, represent that the company is anxious to select a few customers to advertise their paintings and is willing to give her the opportunity to draw a lucky number. Customers who "draw" and are informed that they have drawn "lucky" are presented by the sales agent with a coupon reading "Special. This entitles the holder to our special advertising offer: Midwest Studios, Inc." Customers are informed that by reason of having drawn the "lucky envelope," they are entitled to picture or painting variously described as follows: "A \$20 picture for nothing," "a \$20 picture free, absolutely free," "a free hand-painted portrait valued at \$20," "a \$20 picture painted by an eastern artist," "a high-grade painting worth \$20," a "High-grade painting worth \$20 for \$1.95," "a real oil painting," "A very beautiful painting worth \$20 to \$25 any way," and "a \$20 picture like the one in the agent's case."

(d) Having induced the prospective customer to "draw lucky" so as to obtain a "free picture" and to sign a contract or order to that effect, respondent's salesman then borrows from the customer a treasured family photograph to be used in making a "sketch," outline or foundation for the "free painting." Finally after a treasured family photograph belonging to the customer is in the possession of

respondent's sales representative, the customer is advised that there is a small or nominal item of expense involved, generally \$1.95 (formerly \$1.45) to cover the cost of "handling," "wrapping," parcel post or "the painter's time," which said sum the customer is required to pay at the outset on the "free painting."

The customer is finally informed by the first sales representative that in a few days a field artist will call with a "sketch" of the painting to obtain color instructions from the customer.

(e) The first sales representative to contact the customer speaks only of paintings or portraits. Salesmen carefully conceal from the customer the essential fact that he or she is expected to and must eventually buy a frame for the painting from the respondent Midwest Studios, Inc. There is no intimation from respondent's first contact salesman that the real purpose and intent of the entire proceeding is to sell the customer a frame; that the respondent company's profit is made on the sale of frames and covers any loss sustained by the company on the picture or painting. The matter of frames not being mentioned by the salesman obtaining the contract for the picture, the customer is not advised, and he has no way of knowing that owing to the peculiar shape of respondent company's frames they cannot be bought elsewhere.

(f) As a rule the photographs borrowed from customers by respondent's salesmen are photographs of members of the customer's family, or a near relative, and in some instances they cannot be duplicated. In many instances, the photograph in question is the only picture the family has of a particular person. These pictures in many instances possess great sentimental value.

(g) The second salesman, or so-called "field artist," introduces the customer to the matter of purchasing a frame. It is from the "field artist" that the customer begins to learn, and eventually does learn, what respondent's sales proposition really means. The second salesman or follow-up man, designated in respondent's order blank and in sales talks as "field artist," appears at the home of the customer with a preliminary sketch or unfinished photographic enlargement of the photograph theretofore loaned by the customer to respondent Midwest Studios' first or contact representative. This sketch is octagon shaped, convex in surface, 10 by 16 inches in size, and is done in sepia or brown tone. The "field artist," in addition to the sketch, brings along samples or pictures of frames. The dual job of the second salesman or "field artist" is to obtain coloring instructions for the "painting" and to sell the customer a frame for the "painting" that is to be made from the "sketch."

The average selling price of respondent Midwest Studios' frames is around \$7.50. Frames are sold respectively, however, for \$8.90, \$9.90, \$11, \$11.95, \$12, \$13.95, \$15, and \$17. Frames cost about \$1.50 each at the factory.

(h) The real situation as to the sale of frames by respondent, theretofore undisclosed by reason of the silence of respondent's salesmen on the subject of frames, is brought to light immediately upon the refusal of a customer to buy a frame or to carry the transaction through to a conclusion by paying any balance due on a frame and picture theretofore ordered. Upon refusing to purchase frames, customers are thereupon variously informed by respondent's "field artists" or follow-up salesmen that owing to the peculiar octagon shape of frames it will be difficult or it will not be possible for the customer to obtain a frame elsewhere; that frames selected by the customer will be unsatisfactory and unacceptable to the company, and that the customer will not receive his picture unless a frame therefor is purchased from Midwest.

(i) The first sales agent, in obtaining the loan of a treasured family photograph and explaining that it will be needed for making the "sketch" for the painting or portrait, does not disclose or even intimate that the customer will not be able, when the sketch is produced, to obtain then the return of the photograph that has been loaned the sales agent. The color instructions are obtained from the customer, not from the photograph, and customers understand that having paid all that was requested in the case of the painting or picture, the picture is their property.

It is established by the evidence that in various instances where customers refused to buy frames, respondent company would neither surrender to them the sketch or painting or the family photograph which had been loaned by the customer. Various customers have been informed that the photograph will not be returned until a frame is bought. The policy and practice of respondent company is and has been to retain the family photograph of the customer "until the transaction is completed" and the transaction is "not completed until the customer has either accepted the picture and frame and pays for it in accordance with the contract or the customer and the studio have entered into a satisfactory disposition of the case * * *." If the customer pays in full for the portrait and frame, the original photograph will be returned with these. If the customer fails or refuses to pay eventually, the photograph is returned when the time comes when the respondent company does not deem it advisable to press the matter further. In pursuance

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of the company's policy, customers' photographs are retained until final payment is made on the frame in cases where notes have been executed for balances due. In such cases the customer is required to sign a note containing the following provision:

I have voluntarily signed this note as evidence of balance due on portrait and frame purchased from Midwest Studios, Inc., which you are to mail to me, together with photo upon payment of this note in full as above specified.

By this means the respondent attempts and has attempted to show a balance due on a picture which has already been paid for in full.

PAR. 5. Based upon the testimony of customers of Midwest Studios, Inc., upon the testimony of the officers, salesmen and other representatives of said company, and upon the failure and refusal of said officers, salesmen, and representatives to disclose to customers essential facts and situations bearing upon and influencing the course of said customers' dealings and contractual relations with said Midwest Studios, Inc., the Commission finds that:

Midwest Studios, Inc., does not and never has limited the sale of said pictures to a few selected customers in any given territory.

The picture or similar work does not now and never has sold for the price of \$20 to \$25.

Respondent Midwest Studios' \$20 painting or picture offered as "free" for advertising purposes after the customer has drawn "lucky," is not free, but in fact the sum of \$1.95 charged therefor is the usual customary price for which respondent sells said so-called paintings or pictures. The actual cost to Midwest of the picture sold by it is possibly a dollar and the sum of \$1.95, collected from the customer at the beginning of each transaction is in fact an initial purchase price payment on a picture and is not and does not represent the actual cost of "wrapping," "handling" a picture, or "parcel post" or "the painter's time," as represented.

Respondent, Midwest Studios, Inc., is not and has not been engaged in any special advertising campaign. Pictures are not actually offered as, or in connection with, any special introductory offer, and the method by which respondent company, through its salesmen, undertakes to place and does place its pictures, portraits, or paintings in the homes of customers in various States of the United States was, and is, the regular sales plan employed by the company in the case of all customers.

Respondent, Midwest Studios, Inc., does not now and never has produced oil paintings of photographs loaned to it.

Based upon the testimony of photographers who enlarge and color photographs, artists who design and paint pictures, and curators

who conduct exhibitions of art, the Commission finds that pictures sold and distributed by respondent, Midwest Studios, Inc., are not "paintings." Said pictures in no way conform to the established belief of the public as to what constitutes a painting nor do said pictures constitute paintings. The pictures sold and distributed by the respondent, Midwest Studios, Inc., are in fact colored photographs produced by making a photographic negative of a photograph loaned or furnished by the customer, an enlarged photograph then being made from the negative or specially prepared photographic paper, this being built up by the use of pastel and water color, principally applied by a mechanical device known as an air brush.

The Commission finds that a painting as understood by photographers who color photographs, artists who paint pictures, and the general public, is an original representation by the painter of a design, image, or object on a surface by means of paint, either pastel, water color or oil; a free-hand image by the artist painted directly on the surface without the intervention of any mechanical means such as a camera. This is the conception which the general public has of the term "painting" and is what they expect to get when a painting is purchased.

The alleged "draw" is a fraudulent scheme conceived for the sole purpose and with the result of inducing prospective purchasers to believe that if they draw "lucky" numbers they will have the advantage of securing pictures free, or at a greatly reduced price, and that they will further receive said pictures to the exclusion of certain other people in the same locality. In fact, however, every prospect is approached in the same way and all pay the same price. By means of this scheme, members of the purchasing public are beguiled into believing that they are the exceptional few whom fortune has favored.

The Commission finds that the said "draw" as employed by the Midwest Studios, Inc., does not give said purchaser a picture free or at a reduced price and does not give any customer any advantage or preference over any other customer. The Commission further finds that as a result of the representations of respondent's salesmen in relation to the "draw" customers considering that they have been lucky and have won or obtained a distinct advantage over other customers in the same locality are thereby induced to sign contracts for the completion and delivery of respondent's pictures.

The sales plan designed and employed by the respondents, which provides for the original or contact salesman selling or placing only the picture and a second or separate party known as a "field artist" delivering a "sketch" of the picture and selling the frame, is solely for the purpose, and has the effect of, misleading and forcing the

purchaser into buying something which he did not originally intend buying, namely, a frame. The special design of frame in which the picture is delivered cannot be duplicated successfully except by the Midwest Studios, Inc. As a result, the purchaser is forced to deal with the respondent, Midwest Studios, Inc., in the purchase of said frame. By this method of dealing in frames, the respondents have placed, and are placing, in the hands of their sales representatives and "field artists" a means whereby said representatives and "field artists" can, and do, sell said picture frames for exorbitant amounts, and can force the purchase of frames upon unsuspecting customers.

The alleged "field artist," mentioned in respondent Midwest's "painting" contract and in sales talks, who comes to get color instruction and to sell a frame, is not an artist but merely another salesman posing under that title. The expression "field artist" is merely a nickname applied to them. They do no actual art work.

PAR. 6. Based upon the testimony of customers of Midwest Studios, Inc., upon the testimony of the officers, salesmen and other representatives of said company, and upon documents employed by respondent company in connection with sales work, the Commission finds that if a customer accepts a "free painting," has paid \$1.95 thereon as an item of incidental expense after having drawn "lucky," has loaned Midwest's representative a treasured family photograph, and then refuses to buy a frame from respondent, his plight is as follows: Respondent company will refuse to complete the "painting"; the customer, assuming it might be delivered to him, has up to that moment only a brown-toned unfinished print or "sketch," not suitable for framing, the contract is not subject to cancellation and, in order to get the "free painting" which the customer thought he would get upon drawing "lucky" and paying \$1.95 as an item of expense, and the return of the valued family photograph, the customer finds he must buy a frame from respondent Midwest Studios, Inc. The Commission finds that the record does not disclose any instance where one of Midwest's salesmen informed any customer where he or she might purchase a frame other than through respondent Midwest Studios, Inc., and that the record does disclose that customers were compelled to buy frames from respondent company in order to receive their pictures or paintings and to obtain the return of the family photograph they had theretofore loaned to the company's sales agent.

PAR. 7. The Commission further finds that if the customer has agreed to accept a free painting, has drawn "lucky," has paid the expense item of \$1.95, has loaned Midwest's sales representative a

valued family photograph and has bought a frame on the installment plan, but has not finished paying for the frame, the respondent company, Midwest Studios, Inc., retains the sketch, the finished "painting," the valued family photograph and the frame until all sums claimed to be due to the company are paid to it in full.

The Commission further finds in this relation that customers have not agreed, and have not been given to understand by respondent's sales agents, that in lending a family photograph to respondent's sales agents for use in making a preliminary sketch, respondent, Midwest Studios, Inc., thereby obtained in effect and could undertake to assert a lien upon such photograph entitling respondent company to retain custody and possession of said photograph until any and all sums due, or claimed to be due, by the customer to Midwest Studios, Inc., were paid.

PAR. 8. The Commission further finds, based upon the testimony of customers, that many were dissatisfied and deceived as a result of the representations of salesmen of Midwest Studios, Inc., were dissatisfied with the work done for them by the respondent company, and that pictures were not in accordance with samples previously shown or representations made relative thereto. This was the case with respect to pictures and frames alike. Customers who had been promised oil paintings did not receive oil paintings. Many customers complained about the quality and character of respondent's work. Many customers did not understand that the picture was to be in a peculiar octagonal shape and convex and some refused to accept the picture when the same was sent c. o. d. with no opportunity permitted to inspect the work before paying for it.

PAR. 9. The Commission further finds that all of the representations by the salesmen and representatives of the respondent, Midwest Studios, Inc., were made with the knowledge, acquiescence and active cooperation of the respondents and respondents' salesmen and representatives for the purpose and with the result of selling Midwest Studios, colored enlargements or photographs and frames therefor. The respondents and said salesmen and representatives knew these representations to be false and misleading. The respondents further aided and abetted in the furtherance of said fraudulent sales plan and representations by furnishing said salesmen and representatives with standardized sales talks containing the false and misleading representations hereinbefore set out for their guidance.

PAR. 10. There are among the competitors of respondent, Midwest Studios, Inc., and respondent, Imperial Sales Co., corporations, partnerships, firms, and persons who are engaged in the sale of colored enlargements of photographs and frames therefor in commerce be-

tween and among the various States of the United States and in the District of Columbia, who do not employ and maintain the practices hereinbefore enumerated and described, but who truthfully represent and honestly vend their products, and there are also among the competitors of said respondents, corporations, partnerships, firms, and persons engaged in the business of painting portraits and selling paintings in commerce between and among the various States of the United States and in the District of Columbia, who truthfully represent their products as being paintings.

PAR. 11. The use by respondents of the hereinabove enumerated false and misleading representations in connection with the offering for sale and sale of colored photographic enlargements and of frames therefor has had and now has the capacity and tendency to deceive, and has deceived, purchasers into buying respondent Midwest Studios, Inc.'s products as and for those possessing the characteristics and qualities claimed for them. Respondents, through such methods have placed, and are placing, in the hands of their sales managers, sales agents and "field artists," the means of deceiving customers.

The aforesaid acts and practices of the respondents have the capacity and tendency to, and do, divert unfairly to respondents the trade of competitors engaged in selling in commerce among and between the various States of the United States and in the District of Columbia products of the same kind and nature as those of respondents, which products are truthfully advertised and represented.

CONCLUSION

The aforesaid acts and practices of respondents are all to the prejudice and injury of the public and of the respondents' competitors and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondents thereto, testimony and other evidence in support of the allegations of said complaint and in opposition thereto, taken before Henry M. White and Robert S. Hall, examiners of the Commission theretofore duly designated by it, briefs filed herein, and oral arguments by Marshall Morgan, counsel for the Commission, and by Albert H. Fry, counsel for the respondents, and the Commission having made its findings as to the facts and its conclusion that said

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Order

respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the said respondent, Midwest Studios, Inc., a corporation, and Imperial Sales Co., a corporation, their officers, representatives, agents, and employees, and B. E. Youmans, an individual, his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale and sale and distribution of colored or tinted photographs or colored enlargements thereof having a photographic base, and of frames therefor, in commerce as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or in any manner, that colored or tinted pictures, photographs, or photographic enlargements are hand-painted or are paintings.

2. Using the terms "free hand painted portrait," "oil painting," or the word "painting," either alone or in conjunction with any other terms or words or in any way to designate, describe or refer to colored or tinted pictures, photographs or photographic enlargements or other pictures produced from a photographic base or impression.

3. Misrepresenting that any specified sum is the actual cost of "handling" a picture, "wrapping," or "parcel post," or the "painter's time," or otherwise misrepresenting the actual cost of either materials or delivery.

4. Representing that a picture similar to sample displayed will be delivered unless the picture so delivered is of the same kind, quality, design, and workmanship.

5. Representing that respondents are conducting any special or advertising campaign in any particular place or locality for the purpose of obtaining special exhibitors, or otherwise, unless such campaign or such special offer is in fact then being conducted or made in such locality for such purpose.

6. Representing that said pictures are being, or will be, sold only to a limited number of customers, or otherwise misrepresenting any material fact concerning the terms and conditions of sale, or the extent to which the sale of such pictures is limited.

7. Misrepresenting through the use of a "draw," or drawing contest, or through the use of "lucky" blanks, slips, coupons, or certificates, or through the use of any other device, plan or scheme, or through any introductory or advertising offer, or otherwise, that any customer thereby would obtain a financial advantage or would be entitled to receive any picture free or would receive a substantial discount or reduction in the price of any picture or pictures.

8. Concealing from or failing to disclose to customers upon initial contact that the finished picture when delivered will be so shaped and designed that it can only be used in a specially designed, odd style of frame which can be obtained from Midwest Studios only.

9. Representing to customers in any manner that suitable frames for pictures may be purchased elsewhere unless such odd design of frame can in fact be readily purchased in the customary marts of trade.

10. Representing as the customary or regular prices or values of frames prices and values which are in excess of the prices at which frames are regularly and customarily sold in the normal and usual course of business.

11. Obtaining promissory notes which recite that there is an outstanding "balance due on portrait," or otherwise misrepresenting that any sum or balance is due on a picture, when in fact the purchaser has previously paid the full prescribed contract price for said picture.

12. Retaining the original photograph loaned to respondent for use in making its picture, or retaining the pictures made by it therefrom, after full payment has been made therefor, unless all of the terms and conditions upon which said original photograph or said picture made by respondent is to be retained in connection with the purchase and payment for a frame, or for any other purpose, are fully and adequately revealed to the purchaser at the time the original photograph is obtained from such purchaser.

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

Syllabus

IN THE MATTER OF

CORNELIUS P. VAN SCHAAK, JR., TRADING AS THE
INK COMPANY OF AMERICA AND PIONEER ADVERTISING COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3261. Complaint, Nov. 6, 1937—Decision, May 15, 1939*

Where an individual engaged in offer and sale of sales promotion cards and certificates, fountain pen and pencil sets, and ink and pencil leads, to retailers and other consumers in various States and in the District of Columbia, and, as thus engaged, in (1) entering into written contracts with retail merchants contacted by his agents, which provided for purchase by merchant, at 10 cents apiece, of pen and pencil certificates, to be distributed to merchant's customers upon purchase by customer of \$5 worth of merchant's goods, as registered upon purchase cards supplied by said individual to merchant, and entitling customer to have same redeemed for pen and pencil set, as therein described, upon forwarding same to said individual with 80 cents for ink and pencil leads, and in (2) furnishing such merchants with various display posters and advertisements to be employed by them in distribution and use of such cards—

- (a) Represented, in the course and operation of his said business, and to induce said merchants to purchase his said pen and pencil certificates and use plan above set forth, that the Ink Co. of America was carrying on a national campaign designed to advertise its "Ticoa" ink and pencil leads, and that such campaign was being conducted by the Pioneer Advertising Co. as a separate organization, so as to permit retail merchants to give away nationally advertised pen and pencil sets free;

Facts being said individual was not engaged in carrying on such a campaign to advertise products of said first-named company, use of said names or trade names constituted a subterfuge by said individual to carry his plan into effect to lead merchants to believe that they were separate and distinct organizations, and he was not interested in sale of such "Ticoa" ink and "Ticoa" pencil leads for use in the fountain pen and pencil sets distributed by him, but was principally and primarily interested in sale of such promotional cards and certificates, to obtain the profits resulting therefrom, and he did not enable retail merchants to give away nationally advertised pen and pencil sets free, but cost thereof was included in price paid by merchants' customers for ink and pencil leads which they were required to purchase when redeeming certificates in question, and before receiving set involved;

- (b) Represented that pen and pencil sets furnished to customers were nationally advertised products and had retail value and usual selling price of \$3.50, and set forth statements to such effect on certificates in question, and that such certificate entitled holder to a matched pen and pencil set absolutely free when sent, as hereinabove set forth, with 80 cents for the four bottles of "Ticoa" ink and four tubes of "Ticoa" leads;