

IN THE MATTER OF
THE ASSOCIATION OF AMERICAN ARTS, INC., ET AL.

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

Docket 3409. Complaint, May 7, 1938—Decision, Dec. 22, 1939

Where a corporation and two individuals who, together with a third, were the incorporators thereof and directed and controlled its activities, policies, and affairs, engaged in offer and sale of tinted or colored enlargements of family and other photographs and of frames therefor; and two other persons engaged as agents and sales representatives for said two individuals and corporation in the offer and sale of their aforesaid products and in serving, in the case of one of said persons, as assistant manager for said individuals and said corporation;

In carrying on their said business through visiting, directly and through agents and representatives employed by them, homes of prospective customers in cities, towns, and rural communities of the various States, and through sales talks containing approved methods of approach and convincing arguments for use in contacting such prospective purchasers, prepared and furnished by them for distribution among and use by their salesmen, along with sample cases containing attractive specimens of genuine pastel paintings, oil color and water color paintings, identification card or credentials, contract forms and blanks, receipts and similar documents, and certificates or coupons for use in connection with so-called "draw," as below set forth, and under general procedure by which (1) one of their agents or representatives obtained photograph to serve as model for alleged Venetian convex portrait paintings, pastel and other types of so-called "paintings," (2) second and different salesman, in due course, submitted outline or proof of enlarged photograph and then endeavored to collect full price agreed upon for uncompleted alleged "pastel" or "painting," and to induce customer to agree to buy frame therefor, and (3) third and final representative delivered alleged "pastel" or "painting" and collected any sum remaining due and for frame, if customer had agreed to buy one, and under which purchasers were given to understand that they were contracting or dealing with duly constituted agents or representatives of said corporation, individuals, and persons, or of one of their trade name companies; and, as aforesaid engaged, in direct and substantial competition with others likewise engaged in sale of tinted or colored photographs, enlargements, and frames therefor, in commerce among the various States, and with others engaged in similar sale of genuine original pastels and paintings, including oil and water colors—

- (a) Represented, directly and through their said agents and sales representatives, that the finished pictures would be hand painted oil portraits on canvas and that paintings were done on Japanese silk, and made use of such terms as "pastel," "painting," "oil portraits," and "pastel portrait painting" to designate and refer to said photographs or enlargements thereof, or pictures produced on photographic base or impression, facts being so-called "pastels" or "paintings" were not such in any sense of word but,

on contrary, were merely cheap, quickly made, photographic enlargements tinted or colored, and costing about \$1.25 each; and

- (b) Represented that cost of production of one of so-called Venetian convex portrait paintings, unframed, was \$3.98, while similar cost of the smaller pastel portrait painting, so-called, was \$7.90, and that of larger one was \$15.80, and that said prices for unframed paintings were special prices, and that "special" offers were being made to selected customers, to expire on given date, and due to advertising campaign which they were conducting;
- (c) Represented, that particular types of children were being selected for reproduction work in their art school, and that the work was being done by unemployed artists, and, through the trade names made use of by them and otherwise, that they or their businesses were artists or art associations, and that art work would be performed without charge, and that portrait paintings made by them were often purchased by advertising concerns, and that pictures of the children would be used as models in the studio conducted by them, and that they were conducting exhibitions from which cereal manufacturers would select subjects for use in their advertising, and that any compensation received as result of purchases by advertising concerns as aforesaid would be turned over to the children's parents; and
- (d) Represented, in aforesaid general connection, through one of such individuals, that he was an artist and had been commissioned to make such pastels or paintings and that it was necessary and advisable to have his signature as such artist on each picture, and that child's picture, if customer would agree, would be placed on exhibition at the Boston Studio of the supposed American Art Association, under which, and similar, trade names they carried on their business;

Facts being prices named as above set forth did not represent cost nor special prices but, on the contrary, their regular prices, which were highly exorbitant and fictitious in character, methods made use of by them were those employed customarily by them and their agents and sales representatives, in the conduct of their businesses, and said individual was not an artist commissioned, etc., as above set forth, and other statements above set out with respect to supposed nature of their said businesses as organizations of artists, and with respect to exhibition or purchase of children's portraits, etc., were false;

- (e) Represented, in connection with their said selling methods, that a drawing contest would be held to decide who should be one of a few lucky persons in a particular city or town to have placed in their homes by them free paintings, and made use, in such connection, of plan under which customer, allowed two draws or trials to win trade check or coupon, or blank, invariably drew former, to be advised, upon the conclusion of negotiation with the agent for a fine "pastel" or "painting" free at the close thereof, that a so-called nominal charge, assertedly representing merely "actual cost" of materials to be used, needed to be paid;

Facts being such alleged "draw" or "drawing" was mere sham device employed by them to induce prospective customer to believe that if he drew a lucky "coupon" or certificate he would thereby have distinct advantage of obtaining pastel or painting "free" or at price below that ordinarily charged customers, and other customers, unknown to each other, were similarly approached and likewise beguiled into erroneous belief that they were exceptional one favored by fortune and chance;

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- (f) Concealed from persons thus solicited and contacted fact that it would be impossible, due to specially designed, odd style of frame, to secure for alleged pastel or painting frame from any source other than themselves, and assured those inquiring in advance, that there would be no difficulty in such matter, and advised customers upon delivery of the completed picture, to their surprise, that it would be futile for them to have so-called pastels or paintings framed elsewhere, and gave them to understand that the pictures would soil or otherwise deteriorate unless suitably framed, including glass, and thus and thereby sold to customers, along with the alleged pictures, pastels, or paintings, frames at grossly exorbitant prices; and
- (g) Refused to return valued family photograph in case of controversy as to alleged misrepresentation as to character or quality of work or otherwise, and insisted upon holding purchaser to letter and terms of contract and enforcing compliance therewith.

With result that many customers, dissatisfied in aforesaid respects and who asserted misrepresentations, were forced to go through with contract in order to obtain return of treasured family photograph and public was misled and deceived, (1) through use of term "Art Association," as to character of business actually being conducted, and caused to confuse business in question with various organizations which might properly be designated under similar name as such associations, and, (2) through such false and misleading representations made directly or with knowledge, acquiescence and active cooperation of said individuals and persons with intent and result of selling said colored enlargements and frames therefore, was deceived concerning quality and value of their products and in other particulars as above described; and

With further result public was thereby induced to purchase said products in erroneous belief that they were high-grade, quality pastels or paintings and picture frames of exceptional merit and value, and trade was unfairly diverted to them from their competitors hereinabove set forth, including those who do not employ such practices in selling their tinted or colored enlargements and frames, but truthfully represent their products and honestly sell the same, and including those engaged in business of painting genuine pastels and paintings and who truthfully represent their products as such:

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

Mr. Marshall Morgan for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission having reason to believe that The Association of American Arts, Inc., a corporation; Edward Ziman and Harry Burney (otherwise known as H. E. Burney, H. E. Bernstein, and Harry E. Bernstein), individually, and trading as partners under the trade names American Art Association, Paramount Art Studios,

and Royal Art Association; Jack A. Burney (otherwise known as Jack A. Bernie, Jacob Bernstein, and Jack A. Burnstein), individually, and trading as Burney Fairchild Studio and The Fine Art Portrait Co., and as agent for Edward Ziman, Harry Burney, and The Association of American Arts, Inc.; Peter F. Friedman (also known as Peter F. Fairchild), individually, and also trading as The Burney Fairchild Studio and as agent for Edward Ziman, Harry Burney, and The Association of American Arts, Inc.; Alfred Davis, Paul Seidler, Eli Lictofsky, and Hulbert Beauregard, individually, and as agents for Edward Ziman, Harry Burney, and The Association of American Arts, Inc., hereinafter referred to as respondent, have violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, The Association of American Arts, Inc., with its principal office and place of business located at 486 Boylston Street, Boston, Mass., was incorporated under the laws of the State of Massachusetts on July 6, 1937, with the following incorporators: Harry E. Bernstein, Edward Ziman, and Jack A. Bernie, who direct the activities and control the policy and affairs of such respondent company. These three persons, together with Paul Seidler and Eli Lictofsky, became and have served as directors of said corporation.

Respondents, Edward Ziman and Harry Burney are individuals residing at Boston in the State of Massachusetts and doing business at 486 Boylston Street, Boston, Mass., where they also are and have been trading as partners under the trade names American Art Association, Paramount Art Studios, and Royal Art Association.

The American Art Association and the Paramount Art Co., located at 486 Boylston Street, Boston, Mass., were registered at the office of the City Clerk at Boston, Mass., by respondents, Edward Ziman and Harry E. Bernstein, and on April 13, 1936, these respondents registered at the office of the City Clerk at Boston the Royal Art Co., located likewise at 486 Boylston Street, Boston, Mass. Respondents, Edward Ziman and Harry Burney, trading as individuals and likewise as partners, are the owners and the operators of the business conducted by them at the above stated Boston address through the medium of the aforementioned corporation and trade name companies and the agents and sales representatives employed by them, and they direct and have directed the activities and control and have controlled the business policies and practices of said companies.

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The American Art Association, stated to be doing business at 710 Eddy Street, Providence, R. I., was previously registered at the office of the City Clerk of Providence, R. I., on September 17, 1935, by Edward Ziman and Harry Burney, both stated to be of 1626 Commonwealth Avenue, Brighton, Mass. The Paramount Art Co. was registered at the same time at the office of the City Clerk at Providence, R. I., with the same personnel and same Providence address.

Respondents, Paul Seidler, Peter F. Friedman, also known as Peter F. Fairchild, Hulbert Beauregard, Eli Lictofsky, and Alfred Davis, individually, and through the medium of trade name companies, all located and doing business at 486 Boylston Street, Boston, Mass., are and have been agents and sales representatives for the said Edward Ziman, Harry Burney, and The Association of American Arts, Inc., Alfred Davis being also assistant manager for said respondents in connection with the businesses conducted by them at said address, 486 Boylston Street, Boston.

Respondents hereinabove named are now, and for some time last past have been, engaged in the business of offering for sale and selling tinted or colored enlargements of family and other photographs, and of frames therefor. Respondents sell their products directly and through the medium of salesmen or representatives appointed by them as agents in their behalf to customers located in States other than the State of Massachusetts. In consummating such sales and in distributing such products, respondents cause the pictures and frames so sold by them to be transported and delivered from their places of business in Boston in the State of Massachusetts 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 their said business, respondents have been and now are engaged in direct and substantial competition with various corporations, partnerships, and individuals likewise engaged in the sale of tinted or colored photographic enlargements and frames therefor in commerce between and among the various States of the United States, and likewise with corporations, partnerships, and individuals engaged in the sale of genuine original pastels and paintings, including oil paintings and water color paintings in commerce among the various States of the United States 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 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 their said business respondents directly and through agents and representatives employed by them visit the homes of prospective customers in cities, towns, and rural communities of the various States of the United States. Sales talks containing approved methods of approach and convincing arguments to be used in contacting prospective purchasers of pictures and of frames therefor, and contract forms and blanks, receipts, and similar documents, are prepared and furnished by respondents for distribution and use among their salesmen; also certificates or coupons to be used in connection with the "draw," as hereinafter related.

PAR. 4. Respondents make their pictures in the following manner: A negative is made of a family or other type of photograph furnished by the purchaser or consumer to one of respondents' agents or sales representatives. This photograph is and has been obtained by the salesman or sales representative to serve as a model for alleged Venetian convex portrait paintings, pastel, and other types of so-called "paintings." The negative made from the photograph furnished is then used to make a photographic enlargement of the original photograph. A second and different salesman thereafter submits an outline or proof of the enlarged photograph in due course, and endeavors at that time to collect the full price theretofore agreed upon for the incompleting alleged "pastel" or "painting," and also to induce the customer to agree to buy a frame therefor. A third and final representative delivers the finished alleged "pastel" or

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"painting," collects any sum remaining due thereon, and also collects for the frame if the customer has agreed to buy one.

Purchasers of pictures are given to understand that they are contracting or dealing with duly constituted agents or representatives of respondents or of one of respondents' trade name companies, and each agent or salesman is furnished by respondents with an identification card or card of credentials to be presented or exhibited by him when interviewing prospective purchasers. Sample cases containing attractive specimens of genuine pastel paintings, oil color and water color paintings, are also furnished agents or solicitors by said respondents for use in soliciting orders in their behalf.

PAR. 5. In the course and conduct of their said business, respondents directly and through their agents and sales representatives employed by them as aforesaid, make and cause to be made various false, misleading and deceptive representations. Typical of such representations, among others, are the following:

That \$3.98, unframed, is the cost of production of one Venetian convex portrait painting; that \$7.90, unframed, is the cost of production of one pastel portrait painting 10½ by 14½ inches in size; that \$15.80, unframed, is the cost of production of one pastel portrait painting 14½ by 20½ inches in size; that pastels and paintings would be made at cost and only for a select few in each community; that Mr. Burney is an artist, has been commissioned to make the pastels or paintings, and it is necessary and advisable to have his signature, as such artist, on each picture; that if the customer would agree to have her children's portraits painted, the same would be placed on exhibition at the Boston Studio of the American Art Association; that a very special offer was being made to selected customers which would expire on a given date; that "special" offers made were due to an advertising campaign being conducted by the respondents; that finished pictures would be hand-painted oil portraits on canvas; that paintings are done on Japanese silk; that work is done by unemployed artists; that the American Art Association, not being in a position to employ live models, was therefore selecting particular types of children for reproduction in their art school; that art work would be performed without charge; that the companies have art classes where paintings are produced; that portrait paintings by the companies are often purchased by advertising concerns and that any compensation received as a result of such purchases would be turned over to the parents of the children whose portraits were thus purchased; that the child's picture submitted would be used as a model in the studio conducted by the respondents in Boston; that the companies were conducting exhibitions from which cereal manufacturers

would select subjects to be used in their advertising; that the prices of \$3.98, \$7.90, and \$15.80 for unframed paintings are special prices.

PAR. 6. In further connection with their selling methods, respondents represent 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 respondents place free paintings in their homes. The agent in connection with said drawing produces 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; 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 or pastel free. 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 "pastel" or "painting" free. The customer is casually and incidentally informed when the agent is departing that there is just a nominal charge to be paid in connection with the transaction, representing the "actual cost" of the materials to be used in making the "painting" or "pastel."

Said alleged "draw" or "drawing" was, and is, a mere sham device employed by respondents 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 pastel or painting "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.

PAR. 7. After obtaining through the representations of the first visiting agent a contract from the customer for the purchase of a pastel or painting, a second and different agent or representative calls upon the customer with an unfinished proof or enlargement of the alleged pastel or painting and on this visit collects or attempts to collect the entire sum due for the unfinished alleged pastel or painting; and at the same time undertakes to sell the customer a frame therefor. The matter of the frame is here mentioned for the first time, and the customer learns, to his surprise and dismay, from the salesman that it will be impossible to obtain a frame for the

alleged pastel or painting from any source other than the said respondents. Said customers are given to understand then that the pictures, pastels, or paintings of respondents are of such a distinct or unusual shape as to make it impossible to obtain frames for them in department, furniture, or other stores; and further, that it would be futile for the customer to attempt to have the pastels or paintings framed by any other organization than those of the respondents, the work being so technical that only their experts could give satisfaction. Said customers in this connection are given to understand that their pictures will soil, smear, or deteriorate unless covered by a suitable frame, including glass, and customers being influenced by said representations thereupon undertake to preserve the pictures they have bought by purchasing frames therefor. The alleged pictures, pastels, or paintings, and frames are sold to customers by respondents at grossly exorbitant prices. In case of unexpected preliminary inquiry from the customer as to whether or not it may be possible to obtain readily a frame for said alleged "pastel" or "painting," respondents' sales agents and representatives falsely, and with a view to effecting the contemplated sale, assure the customer that he will experience no difficulty in obtaining a frame; following which positive assurance, the second salesman who appears at the home for the purpose of collecting any sum due on the painting and selling a frame therefor will break the real news to the customer to the effect that it is only possible to obtain a frame from respondents.

PAR. 8. Respondent, Harry Burney, among others, makes and has made it a practice to call upon various customers for the purpose of exhibiting to them the proof or sketch of the pastel or painting they have ordered, to collect in advance of the completion thereof any sum remaining due on said pastel or painting, and to endeavor to sell the customer a frame for the pastel or painting so purchased by him. On the occasion of these visits respondent Burney represents to the customer that he, Burney, is an artist and that in such capacity he has duly signed his name on said pastel or painting for the customer who has "commissioned" him to paint the same.

In further connection with the conduct of their said business respondents represent that they are, and conduct, an art association or art institute, where works of art may and will be exhibited, in this manner making a distinct impression upon the customer with respect to their standing and reputation in the world of art.

PAR. 9. In truth and in fact, the various statements and representations made by respondents and by their sales agents and representatives in selling and offering for sale their 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 so-called "pastels" or "paintings" as sold by respondents are not pastels or paintings in any sense of the word, but, on the contrary, are merely cheap, quickly made photographic enlargements tinted or colored, costing about \$1.25 each. Said alleged "pastels" and "paintings" are in no instance sold at cost, and the respective prices of \$3.98, \$7.90, and \$15.80 at which respondents sell unframed "pastels" and "paintings" and the prices for which frames therefor are sold, are not special prices offered by respondents to a select few in any community or otherwise, but, on the contrary, are respondents' regular prices, highly exorbitant and fictitious in character representing substantial profit to respondents, and the methods by which said products are sold are the customary methods ordinarily employed by respondents and their agents and sales representatives in the conduct of their businesses. Respondent, Burney, is not an artist and has not been commissioned in any instance to make a pastel or painting for any customer as alleged, and his signature on the proof or finished product of any alleged pastel or painting is not that of a commissioned artist in the sense that such term is used and understood. Children's portraits will not be and have not been placed on exhibition at the Boston studio of the American Art Association, particular types of children are not being selected by respondents for the purpose of reproducing paintings of them in respondents' art school for the alleged reason that respondents are not in a position to employ live models, or for any other reason, and children's pictures are not and have not been used as models in any studio conducted by the respondents in Boston or elsewhere. Alleged portrait paintings by respondents are not purchased by advertising concerns and no compensation is received as a result of such alleged purchases to be turned over to the parents of children whose portraits are stated to have thus been purchased. Finished pictures are not hand-painted oil portraits on canvas and paintings are not made on Japanese silk, nor by unemployed artists. Respondents do not have art classes where paintings are produced and art work is not performed without charge. No special offer expiring on a given date has been or is being made to selected customers, and no special offers are being made as a result of any advertising campaign being conducted by respondents. Neither the respondents nor the trade name companies operated by them conduct exhibitions from which cereal manufacturers select subjects to be used in their advertising.

The Association of American Arts, Inc., the American Art Association, the Royal Art Association, and the Paramount Art Studios

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are not and never have been art associations or art studios in the sense that such terms are known and accepted in the field or world of art. On the contrary, the business conducted now or heretofore by respondents, through the medium of the above styled corporate and trade names, is and has been no more, in fact, than a business enterprise to sell to the public for profit cheap colored or tinted photographic enlargements and frames therefor. The use by respondents of the term "art association" has misled and deceived the public as to the character of the business actually conducted by respondents, and has caused the public to confuse respondents' business with various organizations, some similar in name or designation, which are conducting, and which properly may be designated as, art associations.

Further, representations made by respondents and their agents and sales representatives in connection with the so-called draw are highly deceptive in various aspects, and customers, believing that they have been actually lucky and have obtained an advantage through the draw, are thereby induced to enter into contracts with respondents for the purchase of pictures and frames therefor.

Respondents in further connection with the sale of said frames have deceived customers by withholding from them at the time a pastel or painting is ordered the fact that it will be impossible for the customer thereafter to obtain a frame to fit said pastel or painting except from the respondents and at the prices exacted by respondents therefor.

PAR. 10. The pictures or photographs which are secured from prospective purchasers by the agents and representatives of respondents for the purpose of having "pastels" or "paintings" made from them are, in most instances, pictures of members of the family, or dear relatives, and many such pictures cannot possibly be duplicated. Such photographs furnished to respondents by their customers possess, and have possessed, great sentimental value. In case of controversy as to alleged misrepresentation as to the character or quality of the work done, or for other reasons justified in the mind of the purchaser, the respondents insist upon holding the purchaser to the letter and terms of the contract, and, as a means of enforcing compliance with the contract in every instance, respondents refuse to return the valued family photograph until the money claimed to be due has been paid to respondents. Under such type of duress, many customers who are dissatisfied with the character or quality of the picture made for them, 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. 11. There are among the competitors of respondents, 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 the practices as set forth in paragraphs 3 to 8 of this complaint, but who truthfully represent their products and honestly vend the same; and there are also, among the competitors of respondents, corporations, partnerships, firms, and persons engaged in the business of painting genuine pastels and paintings who truthfully represent their products as such.

PAR. 12. By the use of the within described false and misleading representations, respondents have deceived and are deceiving the public concerning the quality and value of the products sold by them as aforesaid and in the various other particulars as hereinbefore described and related, and have thereby induced, and are inducing, the public to purchase said products under the erroneous belief that the same are and were high-grade quality "pastels" or "paintings," and picture frames therefor, of exceptional merit and value. The use by respondents of the said practices as set forth in paragraphs 3 to 8 of this complaint tends to and does unfairly divert trade from competitors and thereby substantial injury has been done, and is being done, by respondents to competition in interstate commerce among and between the various States of the United States.

PAR. 13. The acts and things above alleged to have been done and the false representations alleged to have been made by respondents are to the prejudice of the public and of respondents' competitors, and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on May 7, 1938, issued, and on May 9, 1938, served, its complaint in this proceeding upon respondents, The Association of American Arts, Inc., a corporation; Edward Ziman and Harry Burney (otherwise known as H. E. Burney, H. E. Bernstein, and Harry E. Bernstein), individually, and trading as partners under the trade names American Art Association, Paramount Art Studios, and Royal Art Association; Jack A. Burney (otherwise known as Jack A. Bernie, Jacob Bernstein, and Jack A. Burnstein), individually, and trading as Burney Fairchild Studio and The Fine

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Art Portrait Company, and as agent for Edward Ziman, Harry Burney, and The Association of American Arts, Inc.; Peter F. Friedman (also known as Peter F. Fairchild), individually, and also trading as The Burney Fairchild Studio, and as agent for Edward Ziman, Harry Burney, and The Association of American Arts, Inc.; Alfred Davis, Paul Seidler, Eli Lictofsky, and Hulbert Beauregard, individually, and as agents for Edward Ziman, Harry Burney, and The Association of American Arts, Inc., charging them with the use of unfair methods of competition in violation of the provisions of said act. After the issuance of said complaint, respondent, The Association of American Arts, Inc., filed a voluntary petition in bankruptcy on May 26, 1938, was adjudicated a bankrupt on May 31, 1938, and thereafter, as of January 1, 1939, pursuant to the provisions of chapter 179 of the acts of 1939 of the State of Massachusetts, was dissolved as nonexistent. After the issuance of said complaint and the filing of respondents' answer thereto, the Commission by order entered herein, granted motions filed by respondents, H. E. Bernie (or Bernstein), J. A. Bernie (or Jack A. Bernie or Bernstein), Eli Lictofsky (or A. Davis), and by Edward Ziman for permission to withdraw their said answer and to substitute therefor answers admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearings as to said facts, which substitute answers were duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and substitute answers, and the Commission having duly considered the matter 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, The Association of American Arts, Inc., with its principal office and place of business prior to and at the time of the filing of the complaint herein, located at 486 Boylston Street, Boston, Mass., was incorporated under the laws of the State of Massachusetts on July 6, 1937, with the following incorporators: Harry E. Bernstein, Edward Ziman, and Jack A. Bernie, who directed the activities and controlled the policies and affairs of such respondent company. These three persons, together with Paul Seidler and Eli Lictofsky, became and served as directors of said corporation.

Respondents, Edward Ziman and Harry Bernie, the latter also known as H. E. Bernie or Bernstein, each hereinafter referred to as respondent, are individuals who, prior to, and at the time of the issuance of complaint herein, resided at Boston in the State of Massachusetts and were engaged in business at 486 Boylston Street, Boston, Mass., where they had been trading as partners under the trade names American Art Association, Paramount Art Studios, and Royal Art Association.

The American Art Association and the Paramount Art Studios, which prior to, and at the time of the issuance of complaint herein, were also located at 486 Boylston Street, Boston, Mass., were registered at the office of the City Clerk at Boston, Mass., by respondents Edward Ziman and Harry E. Bernstein, and on April 13, 1936, these respondents registered at the office of the City Clerk at Boston the Royal Art Co., located likewise at 486 Boylston Street, Boston, Mass. Respondents, Edward Ziman and Harry Burney, trading as individuals and likewise as partners, were the owners and the operators of the business conducted by them at the above stated address and through the medium of the aforementioned corporation and trade name companies and the agents and sales representatives employed by them, directed the activities and controlled the business policies and practices of said companies.

Jack A. Burney, otherwise known as Jack or J. A. Bernie, Jacob Bernstein, and Jack A. Bernstein; and Eli Lictofsky, otherwise known as A. or Alfred Davis, each hereinafter referred to as respondent, prior to and at the time of the issuance of the complaint herein, traded individually, and through the medium of various trade name companies as agents and sales representatives for the said Edward Ziman, Harry Burney or Bernie and the Association of American Arts, Inc., respondent Eli Lictofsky or Alfred Davis, also serving as assistant manager for respondents Harry Ziman and Harry Burney or Bernie and the Association of American Arts, Inc.; at the aforementioned address 486 Boylston Street, Boston, Mass.

PAR. 2. The four above named individual respondents, at the time of the issuance of the complaint herein, and for some time prior thereto, were engaged in the business of offering for sale and selling tinted or colored enlargements of family and other photographs, and of frames therefor. Respondents sold their products directly and through the medium of salesmen or representatives appointed by them as agents in their behalf to customers located in States other than the State of Massachusetts. In consummating such sales and in distributing such products, respondents caused the pictures and frames so

sold by them to be transported and delivered from their places of business in Boston, in the State of Massachusetts 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 their said business, respondents had been and were engaged in direct and substantial competition with various corporations, partnerships, and individuals likewise engaged in the sale of tinted or colored photographic enlargements and frames therefor in commerce between and among the various States of the United States, and likewise with corporations, partnerships, and individuals engaged in the sale of genuine original pastels and paintings, including oil paintings and water color paintings in commerce among the various States of the United States.

PAR. 3. In the course and conduct of their said business respondents directly and through agents and representatives employed by them visited the homes of prospective customers in cities, towns, and rural communities of the various States of the United States. Sales talks containing approved methods of approach and convincing arguments to be used in contacting prospective purchasers of pictures and of frames therefor, and contract forms and blanks, receipts, and similar documents, were prepared and furnished by respondents for distribution and use among their salesmen; also certificates or coupons to be used in connection with the "draw" as hereinafter related.

PAR. 4. Respondents made their pictures in the following manner: A negative was made of a family or other type of photograph furnished by the purchaser or consumer to one of respondents' agents or sales representatives. This photograph was obtained by the salesman or sales representative to serve as a model for alleged Venetian convex portrait paintings, pastel, and other types of so-called "paintings." The negative made from the photograph furnished was then used to make a photographic enlargement of the original photograph. A second and different salesman thereafter submitted an outline or proof of the enlarged photograph in due course, and endeavored at that time to collect the full price theretofore agreed upon for the incompleated alleged "pastel" or "painting," and also to induce the customer to agree to buy a frame therefor. A third and final representative delivered the finished alleged "pastel" or painting," collecting any sum remaining due thereon, and also collected for the frame if the customer had agreed to buy one.

Purchasers of pictures were given to understand that they were contracting or dealing with duly constituted agents or representatives of respondents or of one of respondents' trade name companies, and each agent or salesman was furnished by respondents with an identi-

fication card or card of credentials to be presented or exhibited by him when interviewing prospective purchasers. Sample cases containing attractive specimens of genuine pastel paintings, oil color and water color paintings, were also furnished agents or solicitors by said respondents for use in soliciting orders in their behalf.

PAR. 5. In the course and conduct of their said business, respondents directly and through their agents and sales representatives employed by them as aforesaid, made and caused to be made various false, misleading, and deceptive representations. Typical of such representations, among others, were the following:

That \$3.98, unframed, was the cost of production of one Venetian convex portrait painting; that \$7.90, unframed, was the cost of production of one pastel portrait painting 10½ by 14½ inches in size; that \$15.80, unframed, was the cost of production of one pastel portrait painting 14½ by 20½ inches in size; that pastels and paintings would be made at cost and only for a selected few in each community; that Mr. Burney was an artist, had been commissioned to make pastels or paintings, and it was necessary and advisable to have his signature, as such artist, on each picture; that if the customer would agree to have her children's portraits painted, the same would be placed on exhibition at the Boston Studio of the American Art Association; that a very special offer was being made to selected customers which would expire on a given date; that "special" offers were made due to an advertising campaign being conducted by the respondents; that finished pictures would be hand painted oil portraits on canvas; that paintings were done on Japanese silk; that work was done by unemployed artists; that the American Art Association, not being in a position to employ live models, was therefore selecting particular types of children for reproduction work in their art school; that art work would be performed without charge; that the companies had art classes where paintings were produced; that portrait paintings by the companies were often purchased by advertising concerns and that any compensation received as a result of such purchases would be turned over to the parents of the children whose portraits were thus purchased; that the children's pictures submitted would be used as models in the studio conducted by the respondents in their business; that the companies were conducting exhibitions from which cereal manufacturers would select subjects to be used in their advertising; that the prices of \$3.98, \$7.90, and \$15.80 for unframed paintings were special prices.

PAR. 6. In further connection with their selling methods, respondents represented that a drawing contest would be held for the purpose of deciding who should be one of a few lucky persons in a particular city or town to have respondents place free paintings in their homes. The

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agent in connection with said drawing produced a number of slips of paper. It was represented that most of said slips were blank, but that a few were trade checks or coupons; that a customer was allowed two draws or trials; that if he drew a blank he did not win, but if fortunate enough to draw a winning check or coupon he would be entitled to receive a genuine oil painting or pastel free. The prospective customer drew, and finally, and invariably, drew a lucky coupon, allegedly giving him an oil painting free. The customer was thereupon congratulated by the agent upon his good luck, believing the representations of the agent to the effect that he had been lucky and had obtained a distinct financial advantage. The customer was thereby induced to continue negotiations with said agent and to make a contract with the said agent for a fine "pastel" or "painting" free. The customer was casually and incidentally informed when the agent was departing that there was just a nominal charge to be paid in connection with the transaction, representing the "actual cost" of the materials to be used in making the "painting" or "pastel." Said alleged "draw" or "drawing" was a mere sham device employed by respondents for the sole purpose of inducing the prospective customer to believe that if he drew a lucky "coupon" or certificate, he would thereby have the distinct advantage of obtaining a pastel or painting "free" or at a price below that ordinarily charged customers, when in truth and in fact other customers unknown to each other were approached in the same manner through the use of said drawing scheme and device, and likewise were beguiled into believing that they were exceptional ones favored by fortune and chance when such was not the fact.

PAR. 7. After obtaining through the representations of the first visiting agent a contract from the customer for the purchase of a pastel or painting, a second and different agent or representative called upon the customer with an unfinished proof or enlargement of the alleged pastel or painting and on this visit collected or attempted to collect the entire sum due for the unfinished alleged pastel or painting; at the same time undertook to sell the customer a frame therefor. The matter of the frame was here mentioned for the first time, the customer learning to his surprise and dismay from the salesman that it would be impossible to obtain a frame for the alleged pastel or painting from any source other than the said respondents. Said customers were given to understand then that the pictures, pastel, or paintings of respondents were of such a distinct or unusual shape as to make it impossible to obtain frames for them in department, furniture, or other stores; and further, that it would be futile for the customer to attempt to have the pastels or paintings framed by any other organization than those

of respondents, the work being so technical that only their experts could give satisfaction. Said customers in this connection were given to understand that their pictures would soil, smear, or deteriorate unless covered by suitable frames, including glass, and customers being influenced by said representations thereupon undertook to preserve the pictures they had bought by purchasing frames therefor. The alleged pictures, pastels, or paintings and frames were sold to customers by respondents at grossly exorbitant prices. In case of unexpected preliminary inquiry from the customer as to whether or not it might be possible to obtain readily a frame for said alleged "pastel" or "painting," respondents' sales agents and representatives falsely, and with a view to effecting the contemplated sale, assured the customer that he would experience no difficulty in obtaining a frame; following which positive assurance the second salesman who appeared at the home for the purpose of collecting any sum due on the painting and selling a frame therefor would break the real news to the customer to the effect that it was only possible to obtain a frame from respondents.

PAR. 8. Respondent, Harry Burney, among others, made it a practice to call upon various customers for the purpose of exhibiting to them the proof or sketch of the pastel or painting which they had ordered, to collect in advance of the completion thereof any sum remaining due on said pastel or painting, and to endeavor to sell the customer a frame for the pastel or painting so purchased by him. On the occasion of these visits respondent Burney represented to the customer that he, Burney, was an artist and that in such capacity, he had duly signed his name on said pastel or painting for the customer who had "commissioned" him to paint the same.

In further connection with the conduct of their said business respondents represented that they were conducting an art association or art institute, where works of art might and would be exhibited, in this manner making a distinct impression upon the customer with respect to their standing and reputation in the world of art.

PAR. 9. The Commission finds that the various statements and representations made by respondents and by their sales agents and representatives in selling and offering for sale their pictures in cities, towns, and communities of the respective States of the United States, were false, deceptive, and misleading in the following, among other particulars:

The so-called "pastels" or "paintings" as sold by respondents were not pastels or paintings in any sense of the word, but on the contrary, were merely cheap, quickly made photographic enlargements tinted

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or colored, costing about \$1.25 each. Said alleged "pastels" and "paintings" were in no instance sold at cost, and the respective prices of \$3.98, \$7.90, and \$15.80 at which respondents sold unframed "pastels" and "paintings" and the prices for which frames therefor were sold, were not special prices offered by respondents to a select few in any community or otherwise, but, on the contrary, were respondents' regular prices, highly exorbitant and fictitious in character representing substantial profit to respondents, and the methods by which said products were sold were the customary methods ordinarily employed by respondents and their agents and sales representatives in the conduct of their businesses. Respondent Burney was not and is not an artist and had not been commissioned in any instance to make a pastel or painting for any customer as alleged, and his signature on the proof or finished product of any alleged pastel or painting was not that of a commissioned artist in the sense that such term is used and understood. Children's portraits were not placed on exhibition at the business studio of the American Art Association, particular types of children were not selected by respondents for the purpose of reproducing paintings of them in respondents' art school, and children's pictures were not used as models in any studio conducted by the respondents in business or elsewhere. Alleged portrait paintings by respondents were not purchased by advertising concerns and no compensation was received as a result of such alleged purchases to be turned over to the parents of children whose portraits were stated to have thus been purchased. Finished pictures were not hand-painted oil portraits on canvas and paintings were not made on Japanese silk, nor by unemployed artists. Respondents did not have art classes where paintings were produced and art work was not performed without charge. No special offer expiring on a given date was made to selected customers, and no special offers were made as a result of any advertising campaign conducted by respondents. Neither the respondents nor the trade name companies operated by them conducted exhibitions from which cereal manufacturers selected subjects to be used in their advertising.

The Association of American Arts, Inc., the American Art Association, the Royal Art Association, and the Paramount Art Studios were not art associations or art studios in the sense that such terms are known and accepted in the field or world of art. On the contrary, the business conducted by respondents, through the medium of the above styled corporate and trade names was no more, in fact, than a business enterprise to sell to the public for profit cheap colored or tinted photographic enlargements and frames therefor. The use by respondents of the term "art association" mislead and deceived the

public as to the character of the business actually conducted by respondents, and caused the public to confuse respondents' business with various organizations, some similar name or designation which were conducting, and which properly might be designated as, art associations.

Further, representations made by respondents and their agents and sales representatives in connection with the so-called draw were highly deceptive in various aspects, and customers, believing that they had been actually lucky and had obtained an advantage through the draw when such was not the fact, were thereby induced to enter into contracts with respondents for the purchase of pictures and frames therefor.

Respondents, in further connection with the sale of said frames deceived customers by withholding from them the fact that at the time a pastel or painting was ordered it would be impossible for the customer thereafter to obtain a frame to fit said pastel or painting except from the respondents and at the prices exacted by respondents therefor.

PAR. 10. The Commission finds that the pictures or photographs which were secured from prospective purchasers by the agents and representatives of respondents for the purpose of having "pastels" or "paintings" made from them were, in most instances, pictures of members of the family, or dear relatives, and that many such pictures could not possibly be duplicated. Such photographs furnished to respondents by their customers possess great sentimental value. In case of controversy as to alleged misrepresentation as to the character or quality of the work done, or for any other reasons justified in the mind of the purchaser, the respondents insisted upon holding the purchaser to the letter and terms of the contract, and as a means of enforcing compliance with the contract respondents refused to return the valued family photograph until the money claimed to be due had been paid to respondents. Under such type of duress, many customers dissatisfied with the character or quality of the picture made for them, and who asserted misrepresentation in connection therewith, were nevertheless forced to go through with the contract in order to obtain the return of a treasured family photograph.

PAR. 11. The Commission further finds that all of the representations by the salesmen and representatives of respondents were made with the knowledge, acquiescence, and active cooperation of respondents for the purpose and with the result of selling colored enlargements of 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 fur-

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therance of said fraudulent sales plan and representations by furnishing salesmen and representatives with standardized sales talks containing for their guidance the false and misleading representations hereinbefore set out.

PAR. 12. There were among the competitors of respondents as described in paragraph 1 hereof, corporations, partnerships, firms, and persons who were engaged in the sale of tinted or colored enlargements of photographs and of frames therefor, who did not employ the practices set forth in paragraphs 3 to 8 of the complaint, but who truthfully represented their products and honestly sold the same; and there were also among the competitors of respondents, corporations, partnerships, firms, and persons engaged in the business of painting genuine pastels and paintings, who truthfully represented their products as such.

PAR. 13. By the use of the within described false and misleading representations, respondents deceived the public concerning the quality and value of the products sold by them as aforesaid and in the various other particulars as hereinbefore described and related, and thereby induced the public to purchase said products under the erroneous belief that the same were high-grade quality "pastels" or "paintings," and picture frames of exceptional merit and value. The use by respondents of the said practices as set forth in paragraphs 3 to 8 of the complaint tended to and did unfairly divert trade to the respondents from their competitors hereinabove described who were likewise engaged in commerce among and between the various States of the United States.

CONCLUSION

The aforesaid acts and practices of the within named respondents, as herein found, are all to the prejudice and injury of the public and of 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 Commission upon the complaint of the Commission and the answers of respondents, H. E. Bernie or Bernstein, otherwise known as Harry Burney or H. E. Burney; J. A. Bernie or Bernstein, otherwise known as Jack A. Burney or Jacob Bernstein; Eli Lictofsky, otherwise known as A. Davis or Alfred Davis, and Edward Ziman, in which answers respondents admit all the material allegations of fact set forth in the complaint, and state that they waive all intervening procedure and further hearing as to said facts, and the Commission having made its

findings as to the facts and conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, H. E. Bernie or Bernstein, otherwise known as Harry Burney or H. E. Burney; J. A. Bernie or Bernstein, otherwise known as Jack A. Burney or Jacob Bernstein; Eli Lictofsky, otherwise known as A. Davis or Alfred Davis, and Edward Ziman, individuals, their representatives, agents, and employes, directly or through any corporate or other device, including any trade name, in connection with the advertising, offering for sale, and sale and distribution of colored or tinted photographs or enlargements 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 "pastel" or painting," "oil portraits" or "pastel portrait 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 production of a picture 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 or selected 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. Representing that any portrait will be placed on exhibition in any studio or other place of display, or that respondents' portrait paintings are purchased by advertising concerns and that any compensation received from such sale will be turned over to the customer.

8. Representing that particular types are being selected for the purpose of reproducing "paintings" in respondents' art school, or

that respondents have art classes where paintings are produced and art work performed without charge.

9. Representing by means of any trade name or otherwise that the respondents operate or are connected with any art association or art studio.

10. Representing through the use of a "draw," or any 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.

11. 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 respondents only.

12. 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.

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

14. Retaining the original photograph loaned to respondents for use in making a picture, unless all of the terms and conditions upon which said original photograph is to be retained in connection with the purchase and payment for a picture or 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.

It is further ordered, That this proceeding be, and the same hereby is, closed as to the respondent, The Association of American Arts, Inc., said corporation having been inactive for more than a year and having been duly dissolved, and that the proceeding be closed as to respondents Peter F. Friedman, (also known as Peter F. Fairchild), Paul Seidler, and Hulbert Beauregard, without prejudice to the right of the Commission to reopen the same and resume prosecution thereof in accordance with the Commission's regular procedure should future facts so warrant.

Syllabus

IN THE MATTER OF
GRAVITONIC LIFE RAY CORPORATION, INC., AND
FRED W. REED

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

Docket 3451. Complaint, June 7, 1938—Decision, Dec. 22, 1939

Where a corporation and an individual, its president and in charge of its affairs, engaged, in cooperation with each other, in manufacture, sale and distribution of an electric appliance or table to purchasers in various other States and in the District of Columbia, in competition with others likewise engaged in sale and distribution in commerce among the various States of products and preparations intended, designed, and used for purposes for which they recommended their product; in describing same in advertisements in pamphlets, leaflets, newspapers, and magazines distributed among public in various States—

- (a) Represented that their said device was a scientific discovery which was based upon scientific foundations and forces and which located causes or troubles of disease and purified blood stream by mechanical action thereof; and
- (b) Represented that said device cured and relieved various ailments and conditions, including sinus infections in a few applications, sleeping sickness, blindness caused by tédouloureux, tuberculosis, stomach and gall bladder troubles, kidney trouble and arthritis, cancer, high blood pressure, and a number of others;

Facts being device in question was not a discovery, would not accomplish any such results or locate causes of any troubles or diseases and was not a competent or effective treatment therefor, but was worthless and of no use in diagnosis, cure or treatment of disease, and had no scientific foundation and no beneficial effect on the system, and statements in question were false, misleading and untrue;

With tendency and capacity to mislead and deceive substantial portion of purchasing public into erroneous and mistaken belief that all of their said representations were true, and with result that number of consuming public purchased substantial volume of their said electric tables and trade was thereby diverted unfairly to them from their competitors engaged in sale and distribution in commerce of products and preparations intended, designed, and used for purposes for which their device was recommended, and who truthfully represented effectiveness of their respective products:

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

Before *Mr. Arthur F. Thomas* and *Mr. Randolph Preston*, trial examiners.

Mr. William L. Taggart for the Commission.

Mr. Frederic I. Barrows, of Indianapolis, Ind., and *Mr. J. Carl Lambdin*, of St. Petersburg, Fla., for Fred W. Reed.