

Complaint

IN THE MATTER OF

RUDOLF LESCH FINE 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 4693. Complaint, Feb. 3, 1942—Decision, July 19, 1944

Where six corporations engaged in the publication and interstate sale and distribution of art pictures, prints, etchings, reproductions of paintings and allied products, among the leaders in the industry concerned and doing a substantial portion of the business done by the entire industry and in competition with one another except in so far as said competition had been hindered, lessened and restrained as a result of the acts and practices set forth below; as a result of certain meetings, of which those who did not attend were kept informed and to the decisions reached wherein they assented—

- (a) Agreed upon discounts to be allowed public institutions, school dealers, and semi-jobbers, and decided a jobbing discount would be allowed only in those cases where they had agreed that purchaser concerned was a wholesaler, or where purchaser furnished an affidavit to the effect that at least 75 per cent of his business was wholesale; and
- (b) Prepared and distributed, from lists supplied by the different concerns, a master list of wholesalers agreed upon by them and similar lists of school dealers and semi-jobbers, and, except for isolated instances, adhered to their said classifications and maintained the agreed discounts for the several classes of purchasers, in a number of instances requiring affidavits from prospective purchasers claiming to be wholesalers and in some instances taking certain of said concerns to task because of their alleged failure to maintain their schedule of discounts;

With effect of unduly and unlawfully hindering, lessening and restraining competition among them in the sale and distribution in commerce of art pictures, prints, etchings, reproductions of paintings, and allied products, and with tendency and capacity so to do:

Held, That said acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair methods of competition in commerce.

Before *Mr. Clyde M. Hadley*, trial examiner.

Mr. George W. Williams for the Commission.

Mr. Albert Hirst, of New York City, for Rudolph Lesch Fine Arts, Inc.

Mr. Edwin R. Monnig and *Mr. Harold Goodman*, of Detroit, Mich., for International Art Publishing Co., Inc.

Purdy & Lamb, of New York City, for International Frame & Picture Co., Inc.

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 Com-

mission, having reason to believe that the parties named in the caption hereof, and hereinafter more particularly described, designated and referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Rudolf Lesch Fine Arts, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 225 Fifth Avenue, New York City.

Respondent, New York Graphic Society, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 10 West 33rd Street, New York City.

Respondent, Erich S. Herrmann, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 385 Madison Avenue, New York City.

Respondent, David Ashley, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 230 Fifth Avenue, New York City.

Respondent, Raymond & Raymond, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 40 East 52nd Street, New York City.

Respondent, International Art Publishing Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 242 West Lafayette Avenue, Detroit, Mich.

Respondent, Reinthal & Newman, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 33 West 34th Street, New York City.

Respondent, International Frame and Picture Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 225 Fifth Avenue, New York City.

PAR. 2. Respondents are now and have been for many years, and at least during the last past five years, engaged in the business of publishing, offering for sale, selling and distributing art pictures, prints, reproductions of paintings, etchings and allied products for use and resale in commerce between and among the various States of the United States and in the District of Columbia, and as a result of such sales cause said products to be shipped and transported from their respective places of business to the purchasers thereof, who are located in the various States of the United States other than the States in which the respective respondents' places of business are located. There is, and has been at all times herein mentioned, a continuous course of trade and commerce in said products across State lines between the respective respondents' place of business and the purchasers of said products.

In the regular course of the business aforesaid the various respondents and others engaged therein freely and completely exchange their respective products so that each respondent and member of the industry has, or may have, a full line of said products.

PAR. 3. In the course and conduct of their respective businesses as aforesaid, respondents are now, and during all the time herein mentioned have been, in active competition with other corporations, and with individuals, partnerships and firms engaged in the business of publishing, selling and distributing art pictures, prints, reproductions of paintings, etchings and allied products in commerce, except insofar as said competition has been hindered, lessened or restrained, or potential competition has been forestalled, by the practices and methods of said respondents hereinafter set forth. The volume of business done by said respondents constitutes a substantial portion of the business done by the whole industry.

PAR. 4. Said respondents, during the time herein mentioned, have entered into, and carried out and maintained agreements, understandings, combinations and conspiracies between and among themselves to suppress, hinder and lessen competition in selling and distributing the said products in the course of their aforesaid businesses, in commerce, as herein described.

Pursuant to, and in furtherance of, and to make effective said agreements, understandings, combinations and conspiracies, said respondent members concertedly and in cooperation with each other have performed, and still perform, among others, the following acts and practices:

1. (a) Adopted, fixed and maintained uniform prices, discounts, terms, and other conditions of sale, for their respective products, in connection with the sale thereof.

(b) Exchanged and circulated among each other, directly and through the officers of one of the respondents, lists showing said prices, discounts, terms and other conditions of sale for their respective products.

2. Arbitrarily arranged their customers into the following classifications, namely:

(a) Dealers or retailers,

(b) Jobbers or wholesalers,

(c) Semi-jobbers,

(d) School, educational and institutional group dealers, and have fixed and maintained definite prices and discounts and other terms and conditions of sale predicated upon said classifications.

3. Exchanged and circulated among each other, directly and through the officers of one or more of the respondents, lists showing said classifications, and

4. Refused to sell to their customers except at said prices, discounts and other terms and conditions of sale in accordance with the said classifications.

5. Reported to the officers of one or more of the respondents instances of quotations of prices less or discounts greater than those fixed by said respondents, which information was intended to be used and was used in connection with the enforcement of the foregoing prices, discounts, terms and other conditions of sale.

6. Held meetings and otherwise conferred with each other as to plans and means of fixing and maintaining prices, discounts, terms, and other

conditions of sale of their said products, and the classifications of their customers, as herein set forth, and to make and receive reports of violations of their agreements and to discuss and determine ways and means of correcting and preventing the same.

7. Used coercive measures to bring the membership of the industry into line with said agreements and practices by misrepresenting the activities of the Federal Trade Commission to the members of the industry by stating that respondents were acting under the authority and requirements of the Federal Trade Commission in the fixing of the prices, discounts and other conditions of sale and arranging the trade into the above classifications, as herein set forth, when they were not in fact acting under such authority or requirement; and by stating and intimating that any deviation therefrom would result in the Federal Trade Commission proceeding against such offender for such deviation.

PAR. 5. The capacity, tendency and effect of the aforesaid agreements, understandings, combinations and conspiracies, and the practices and acts and things done and performed by respondents in pursuance thereof are, and have been, to unreasonably lessen, suppress and restrain competition in the sale and distribution of art pictures, prints, reproductions, paintings, etchings and allied products in the United States and in the District of Columbia, and to deprive the purchasing public of the advantages of prices, terms and conditions in connection with the sale and distribution thereof, which they would receive and enjoy under conditions of normal and unobstructed and free and fair competition in said trade and industry, and to otherwise operate as a restraint upon, obstruction and detriment to, the freedom of fair and legitimate competition in said trade and industry.

PAR. 6. The acts and practices of said respondents, as herein alleged, are all to the prejudice of the public; have a dangerous tendency to hinder and prevent and have hindered and prevented competition between and among said respondents in the sale and distribution of said products in commerce, within the intent and meaning of the Federal Trade Commission Act, and placed in said respondents power to control and enhance prices and other terms and conditions in connection with the sale and distribution of the said products; have a dangerous tendency to create in respondents a monopoly in said products in said commerce, and constitute unfair methods of competition within the intent and meaning of Section 5 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 February 3, 1942, issued and subsequently served its complaint in this proceeding upon the parties respondent named in the caption hereof, charging them with the use of unfair methods of competition in commerce in violation of the provisions of that act. After the filing by the respondents, (except respondent Raymond & Raymond, Inc.), of their answers to the complaint, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and

filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the complaint, answers, testimony and other evidence, report of the trial examiner upon the evidence, brief in support of the complaint, and briefs in opposition thereto on behalf of respondents, Rudolf Lesch Fine Arts, Inc., and International Frame and Picture Company, Inc., (oral argument not having been requested); 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, Rudolf Lesch Fine Arts, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 225 Fifth Avenue, New York, N. Y.

Respondent, New York Graphic Society, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 10 West 33d Street, New York, N. Y.

Respondent, Erich S. Herrmann, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 385 Madison Avenue, New York, N. Y.

Respondent, David Ashley, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 230 Fifth Avenue, New York, N. Y.

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Respondent, International Art Publishing Company, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 242 West Lafayette Avenue, Detroit, Mich.

Respondent, Reinthal & Newman, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 6 East 34th Street, New York, N. Y.

Respondent, International Frame and Picture Company, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 225 Fifth Avenue, New York, N. Y.

The Commission having concluded that the evidence is insufficient to establish that respondents, Reinthal & Newman, Inc. and International Frame and Picture Company, Inc., participated in the acts and practices hereinafter described, the term "respondents" as used hereinafter will not include these two parties unless the contrary is indicated.

PAR. 2. The respondents are now and for a number of years last past have been engaged in the publication, sale, and distribution of art pictures, prints, etchings, reproductions of paintings, and allied products. In the course and conduct of their respective businesses the respondents cause and have caused their products, when sold, to be transported from their respective places of business to purchasers thereof located in various States of the United States other than the States in which the respondents' respective places of business are located. Each of the respondents maintains and has maintained a continuous course of trade in its products in commerce among and between the various States of the United States.

The respondents are among the leaders in the publication, sale, and distribution of the better grade of pictures, prints, etchings, and reproductions of paintings in the United States, and the volume of business done by respondents constitutes a substantial portion of the business done by the entire industry.

PAR. 3. In the course and conduct of their respective businesses respondents are and have been in active competition with one another and with other corporations, and with individuals and partnerships, engaged in the sale and distribution of art pictures, prints, etchings, reproductions of paintings, and allied products in commerce among and between the various States of the United States, except insofar as such competition has been hindered, lessened, and restrained as a result of the acts and practices hereinafter described.

PAR. 4. The record discloses that for some time prior to the fall of 1939 the picture publishing industry had been in a somewhat confused and unsettled condition, particularly with respect to the discounts which were being allowed by the members of the industry to various purchasers. Among the troubles besetting the industry was that many purchasers who were in fact doing a retail business only claimed themselves to be jobbers or wholesalers and insisted that they were entitled to the jobbing discount. It frequently happened that one publisher would regard a particular purchaser as a jobber and would accord to him the jobbing discount while another publisher would reach a contrary conclusion and would decline to allow any discount other than the regular discount allowed retail dealers, which was 50% off the publisher's list price. This discount appears to be a trade custom of long standing, having been in effect for many years throughout the entire industry.

Other matters which concerned the respondents at this time were the discount to be allowed public institutions such as schools, libraries, and churches, and the discount to be allowed that class of dealers whose business was confined largely to sales to public institutions. Dealers of this kind are referred to generally in the industry as "school dealers" or "educational dealers." A further matter with which respondents were concerned was that of determining what discounts should be allowed that class of dealers referred to in the industry as "semi-jobbers," that is, dealers whose business was primarily retail but who did a limited amount of jobbing or wholesale business as well. Of equal or greater importance than the determination of the discount to be allowed each class of purchasers was the determination of the particular class in which the various purchasers should be placed.

PAR. 5. For the purpose of considering these matters and reaching a common understanding in respect thereto, the respondents held a series of conferences or meetings, beginning in the early part of November, 1939, and extending into the spring of 1940. At that time certain of the respondents were under investigation by the Federal Trade Commission in connection with alleged violations of the Robinson-Patman Act, and it is insisted by the respondents that the meetings were held solely for the purpose of making their business practices conform to the requirements of that Act. Some six or more meetings were held, each of the respondents being present through one or more of its officers at some or all of the meetings. Those respondents who did not attend the meetings regularly were kept informed by the others as to the progress of the meetings and assented to the decisions reached therein.

As a result of these meetings, definite agreements were reached by respondents with respect to the discounts to be allowed public institutions, school dealers, and semi-jobbers. Public institutions were to be allowed a discount not exceeding 25% off of the list price. School dealers were to be allowed, in addition to the regular retail dealer discount of 50% off of the list price, an additional discount not exceeding 20% of the net price; and the same schedule was to apply to semi-jobbers. With respect to jobbers or wholesalers, apparently the respondents were more concerned with reaching an agreement as to which purchasers should be regarded as wholesalers than with establishing a fixed discount for that class of purchasers. It was decided that a jobbing discount would be allowed only in those cases where respondents had agreed among themselves that the purchaser in question was a wholesaler or where the purchaser furnished an affidavit to the effect that at least 75% of his business was wholesale.

Each of the respondents brought or sent to the meetings a list of those of its customers whom it regarded as wholesalers, and from these lists a master list was prepared containing the names of those purchasers agreed upon by the respondents as being wholesalers. A copy of this master list was supplied to each of the respondents, and as additions to the list were subsequently made each respondent was supplied with a supplemental list showing such additions. Similarly, lists of school dealers and semi-jobbers were agreed upon and copies supplied to each of the respondents.

That these agreements were promptly put into operation and effect is apparent from the record. Except for isolated instances, the respondents adhered to the classifications of customers which they had agreed upon, and likewise maintained the agreed discounts for the several classes of purchasers. A number of instances are disclosed in which certain of the respondents required affidavits from prospective purchasers who claimed to be wholesalers. Instances are also disclosed in which certain of the respondents were taken to task by others because of their alleged failure to maintain the agreed schedule of discounts.

PAR. 6. The Commission therefore finds that the respondents have entered into and put into operation and effect agreements, understandings, combinations, and conspiracies to hinder, lessen, and restrain competition in the sale of their products.

PAR. 7. The tendency, capacity, and effect of the agreements, understandings, combinations, and conspiracies entered into by the respondents, and of the acts and things done pursuant thereto and in furtherance

thereof, as set forth herein, have been and are unduly and unlawfully to hinder, lessen, and restrain competition among the respondents in the sale and distribution of art pictures, prints, etchings, reproductions of paintings, and allied products in commerce among and between the various States of the United States, and unduly and unlawfully to restrict and restrain trade in such products in commerce as aforesaid.

CONCLUSION

The acts and practices of the respondents, as herein found, are all to the prejudice of the public 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 answers thereto, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence, brief in support of the complaint, and briefs in opposition thereto on behalf of respondents, Rudolf Lesch Fine Arts, Inc. and International Frame and Picture Company, Inc. (oral argument not having been requested); and the Commission having made its findings as to the facts and its conclusion that certain of the respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondents, Rudolf Lesch Fine Arts, Inc., New York Graphic Society, Inc., Erich S. Herrmann, Inc., David Ashley, Inc., Raymond & Raymond, Inc., and International Art Publishing Company, Inc., corporations and their officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of art pictures, prints, etchings, reproductions of paintings, and allied products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, agreement, understanding, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties to this proceeding, to do or perform any of the following acts or things:

1. Fixing or establishing uniform discounts, or adhering to or maintaining any discounts so fixed or established.
2. Establishing or maintaining classifications of customers or prospective customers, or fixing or maintaining discounts predicated upon such classifications.
3. Circulating or exchanging among themselves lists showing classifications of customers or prospective customers.

4. Holding meetings or otherwise conferring among themselves for the purpose of establishing or maintaining uniform discounts or classifications of customers or prospective customers.

5. Engaging in any act or practice substantially similar to those set out in this order with the purpose or effect of establishing or maintaining uniform discounts or classifications of customers or prospective customers.

It is further ordered, That these 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 the complaint herein be, and it hereby is, dismissed as to respondents Reinthal & Newman, Inc. and International Frame and Picture Company, Inc.

IN THE MATTER OF
RESEARCH MANUFACTURING CORPORATION,
HAROLD S. GUY AND J. L. SEAT

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

Docket 5063. Complaint, Oct. 15, 1943—Decision, July 20, 1944

Where a corporation and two individuals who controlled and directed it, engaged in the manufacture and interstate sale and distribution to garages and service stations for resale to the purchasing public, of their "Fre-Zex" antifreeze solution for automobile and other internal combustion engines; through statements in folders, circulars and other advertising material, directly and by implication—

- (a) Falsely represented that their said product furnished protection to the cooling system of automobile and other types of combustion engines against freezing and other damaging effects; was safe and dependable for use as recommended, and a superior permanent-type antifreeze, which protected the entire cooling system of automobile engines against corrosion, rust, and deterioration; and that use thereof would prevent rust or other damage to the hose connections, radiators, and other metal and rubber parts of the cooling system and finish of automobiles; and that it would not evaporate or clog passages in the cooling system;

Facts being said preparation, composed of a calcium chloride base, would corrode most metals, including iron, steel, brass, and aluminum, and had caused rust, corrosion, clogged passages, and other serious damage to the engines, radiators, ignition wires, spark plugs, hose connections and the exterior finish of automobiles, and resulted in leakage in the cooling systems of automotive engines; and, if it came in contact with spark plugs or ignition wires, would short circuit the ignition system and necessitate replacement thereof; and

- (b) Failed to inform of the danger of such deleterious and damaging effects, the general public, accustomed to believing that a product advertised as an anti-freeze may be used with safety and without causing results above set forth;

With effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous and mistaken belief that such false statements were true, and of inducing it to purchase substantial quantities of said product as a result thereof: *Held*, That said acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Randolph Preston*, trial examiner.

Mr. Jesse D. Kash for the Commission.

Mr. Herman M. Levy, of New Haven, Conn., for Research Manufacturing Corp. and *Bernard P. Kopkind*, Trustee in Bankruptcy of Research Manufacturing Corp.

Hurwitz & Hurwitz, of Boston, Mass., for Harold S. Guy.