

Decision

IN THE MATTER OF

RAY S. KALWAJTYS ET AL.
DOING BUSINESS AS GENERAL PRODUCTSORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6211. Complaint, Sept. 17, 1954¹—Decision, Jan. 27, 1956

Consent order requiring a Chicago firm to cease inducing and attempting to induce purchasers of photograph albums to breach their contracts with competitors and to purchase respondents' albums;

Order requiring the same sellers of photograph albums, engaged in selling certificates for photographs to be taken at various associated studios, to cease representing falsely in advertising, on certificates issued to customers, and through statements made by their sales representatives that they sold only to selected persons, their albums were given free, the prices at which they regularly sold were promotional or reduced prices, and the photographs provided by their certificates were of natural gold-tone finish; and representing falsely through their salesmen that the salesmen were those of competitors.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On September 17, 1954, the Federal Trade Commission issued its amended and supplemental complaint in this proceeding, charging the Respondents with false, deceptive and misleading statements and representations and unfair methods of competition, in violation of the Federal Trade Commission Act, in connection with the sale and distribution of photographic albums and certificates for photographs to be taken at independent studios in various States of the United States.

On October 25, 1955, Respondents submitted an amended answer denying the principal charges of the complaint, which was thereafter modified by a further amendment on the record during the course of the hearing. Subsequently, a Stipulation For Consent Order as to the allegations of Paragraph Seven of the amended and supplemental complaint, relevant to Respondents' alleged practice of inducing persons to breach their contracts of purchase with Respondents' competitors, was entered into by Respondents and counsel supporting the complaint, which removed these allegations from controversy.

Evidence relative to the issues raised by the other allegations of the complaint was duly received in the record, and forms the basis

¹ Amended and supplemental complaint.

for the factual findings and conclusions relative thereto which are herein made.

1. Respondents Ray S. Kalwajtys, Walter J. Kalwajtys, Bernice Kalwajtys and Weronika Kalwajtys, are individuals and copartners doing business as General Products, with their office and principal place of business located at 4234 North Lincoln Avenue, Chicago, Illinois.

2. As admitted by Respondents in their answer, and as shown by the evidence of record, Respondents are now, and for more than two years last past have been, engaged in the sale and distribution of photograph albums, together with certificates for photographs to be taken at independent "associate" studios. In the course and conduct of their said business, Respondents have caused their photograph albums, when sold, together with the certificates, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States. They maintain, and at all times mentioned in the complaint have maintained, a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in said commerce has been and is substantial. Respondents also admit their further engagement in commerce, in that they transmit various instruments of a commercial nature to their customers located in States other than the State of Illinois and receive like instruments from said customers.

3. At the present time, and during the period of time covered by the allegations of the complaint, Respondents are and have been in direct and substantial competition with other corporations, firms and individuals engaged in the sale and distribution of photograph albums, together with certificates, for photographs to be taken at independent studios.

4. In connection with, and as a part of, their business, Respondents have entered into agreements or understandings with a large number of photographic studios, located in all or most of the States of the United States, whereby said studios have agreed to honor certificates for photographs issued to purchasers of Respondents' albums, the designation of which is BUILD-A-BOOK. These certificates provide that the holders thereof are entitled to receive ten 8 x 10 portraits, one of which may be a family group, the portraits to be made at the rate of two a year at intervals of not less than ninety days. Under the terms of the agreement or understanding, the studio may make a charge of \$1.00 for each sitting, if the certificate-holder does not order additional photographs. The price which Respondents receive for their album-certificate combination is

\$39.95. The album is designed to hold as many as 100 photographs. In the course and conduct of their business, Respondents employ a large number of salesmen who obtain orders by door-to-door solicitation. Purchasers of Respondents' Build-A-Book generally are young parents with one or more children.

5. In the course and conduct of their business, as aforesaid, Respondents, through statements made in various advertising media, on certificates issued to customers, and by means of oral statements made by their sales representatives, have made, directly or by implication, representations which are found to be misleading and deceptive, as follows:

(1) At times when prospective purchasers have been approached by Respondents' representative, they have been told that they were to receive a gift of an album, which was being presented only to selected families with a baby or young child, and that only a few of such albums would be given in their area. In truth and in fact, Respondents' prospective purchasers were selected merely on the basis of their belonging to a class of families who, because they had young children, were naturally interested in purchasing pictures of their children and an album to contain them. The names of such prospects were in fact secured from public birth records. The idea of special selection was made more deceptive by the assertion that only a few of the albums were to be placed in an area. The number of albums "placed" in any given area was in fact limited only by the number of possible purchasers and the ability of the salesmen to sell the albums.

(2) Respondents' representatives told prospective purchasers that the album was to be free, and that a charge was to be made for photographs to be taken thereafter. In actuality the albums were not given free, because the purchasers thereof were required to pay \$39.95 to Respondents for the combination of album and certificates entitling them to purchase photographs, for which they were later charged, by the studio taking the pictures, at the price of \$1.00 each, unless they ordered more than one photograph, in which event they were to receive one photograph without charge on paying the studio's regular price for the remaining photographs ordered. Therefore, Respondents' charge of \$39.95 was in large part the price of the album, which, accordingly, was not in fact free.

(3) Respondents' prospective purchasers were also told that a price of \$39.95 was being charged for the album-certificate combination, which was a promotional and reduced price, the album-certificate combination being represented as having the value of \$114.50. Inasmuch as the evidence shows that the album-certificate

combination was usually and customarily sold for the price of \$39.95, such price was not promotional or reduced.

On the other hand, the latter part of the above representation, to the effect that the album-certificate combination is of a value of approximately \$114.50, is hypothetically possible. Respondents' evidence shows that the album has been offered for sale by Marshall Field of Chicago for a price of \$34.50, and that photographs comparable to those offered through Respondents' album-certificate combination are being sold in many areas of the United States for a price of \$8.00 each, making a total price for 10 photographs, involving 10 separate sittings, of \$80.00. This amount, added to the \$34.50 for the album, equals Respondents' claimed value of \$114.50.

Because of the natural tendency of parents, when purchasing photographs of their children, to buy more than one print of each sitting, the hypothetical value of \$114.50 will seldom be received by purchasers of Respondents' album-certificate combination. That value, however, may actually be realized by the purchaser if he is willing to comply strictly with Respondents' terms of sale: that is, to purchase only one print of each sitting, and to allow the pictures to be taken at the rate of two sittings per year for a period of five years.

(4) Some of such prospective purchasers were informed that they would receive a natural gold tone finish portrait. The record shows that Respondents' photographs were not and are not natural gold tone finish, but instead are ordinary sepia finish prints.

6. The use by Respondents of the false, deceptive and misleading statements and representations and unfair methods of competition, as herein found, had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were true, and to induce the purchasing public to purchase substantial quantities of Respondents' album-certificate combinations as a result thereof. Consequently, substantial trade in commerce has been unfairly diverted to Respondents from their competitors, and substantial injury has thereby been done to competition in commerce.

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

7. As previously stated, Respondents, on March 11, 1955, entered, with counsel supporting the complaint, into a "Stipulation For Con-

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sent Order As To Paragraph Seven Of The Amended And Supplemental Complaint," in which Respondents identify themselves as above shown. They also admit therein all the jurisdictional allegations set forth in the complaint, and stipulate that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance therewith.

All parties agree that the answers filed by Respondents on September 10 and October 25, 1954, insofar as they relate to Paragraph Seven of the amended and supplemental complaint, be withdrawn, and for all legal purposes said answers, insofar as they so relate to Paragraph Seven of the amended and supplemental complaint, will hereafter be regarded as withdrawn. As to the allegations contained in said Paragraph Seven of the complaint, all parties expressly waive any further hearings before a hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the Respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Respondents agree that the order contained in the Stipulation For Consent Order shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon, and specifically waive any and all right, power or privilege to challenge or contest the validity of the provisions of the order entered in accordance with this stipulation.

It is also agreed that this stipulation, together with the complaint, shall constitute the entire record in this proceeding, upon which the initial decision, insofar as it relates to the allegations contained in Paragraph 7 of the amended and supplemental complaint, shall be based. The stipulation sets forth that the complaint herein may be used in construing the terms of the aforesaid order, which may be altered, modified, or set aside in the manner provided by statute for orders of the Commission.

The stipulation further provides that the signing of the "Stipulation For Consent Order As To Paragraph Seven Of The Amended And Supplemental Complaint" is for settlement purposes only, and does not constitute an admission by Respondents that they have violated the law as alleged in said paragraph of the complaint.

8. In view of the Stipulation For Consent Order as outlined above, and the fact that the order embodied therein is identical with the provisions of the order accompanying the amended and supplemental complaint which relate to the allegations contained in Paragraph

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Seven of such complaint, it appears that such order will, with respect to such allegations, safeguard the public interest to the same extent as could be accomplished by the issuance of an order after full hearing and all other adjudicative procedure waived in said stipulation. Accordingly, in consonance with the terms of the aforesaid stipulation, as to the allegations of Paragraph Seven of the amended and supplemental complaint, and after consideration of the entire record herein as to the remaining allegations of such complaint, the hearing examiner accepts the "Stipulation For Consent Order As To Paragraph Seven Of The Amended And Supplemental Complaint," submitted herein; finds that this proceeding is in the public interest; and issues the following order:

It is ordered, That the Respondents, Ray S. Kalwajtys, Walter J. Kalwajtys, Bernice Kalwajtys, and Weronika Kalwajtys, individually and as copartners doing business as General Products, or under any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of photograph albums or certificates for photographs, do forthwith cease and desist from:

1. Representing, directly or by implication:
 - (a) That they sell only to selected persons;
 - (b) That their albums are given free or without cost;
 - (c) That the prices at which they regularly or customarily sell their products are promotional or reduced prices;
 - (d) That the photographs provided by Respondents' certificates are of natural gold tone finish;
2. Inducing or attempting to induce purchasers of photograph albums of competitors to breach their contracts with such competitors and to purchase Respondents' photograph albums;
3. Inducing or attempting to induce prospective purchasers to breach their contracts for the purchase of competitive photograph albums and to purchase Respondents' photograph albums by:
 - (a) Offering to allow as part payment of the purchase price of their own photograph albums any sum paid on the purchase price of the photograph albums of their competitors;
 - (b) Offering to indemnify such persons against loss which might accrue to them by reason of such breach;
 - (c) Offering to furnish the services of attorneys to such persons to defend suits brought by Respondents' competitors for the purchase price of their photograph albums;

4. Representing, directly or by implication through their salesmen or employees, or otherwise, that their salesmen or employees are the salesmen or employees of their competitors.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The amended and supplemental complaint charges false, deceptive and misleading statements and representations and unfair methods of competition, in violation of the Federal Trade Commission Act, in connection with the sale and distribution of photograph albums and certificates for photographs to be taken at independent studios in various localities.

Subsequently, a stipulation for consent order as to certain charges was entered into and trial was had on the remaining allegations. The charges settled by the stipulation are covered in Paragraphs 2, 3 and 4 of the order in the initial decision. As to the remaining charges, the hearing examiner found against the respondents and issued an order accordingly.

The challenged portion of the order to cease and desist would prohibit respondents from:

1. Representing, directly or by implication:
 - (a) That they sell only to selected persons;
 - (b) That their albums are given free or without cost;
 - (c) That the prices at which they regularly or customarily sell their products are promotional or reduced prices.

Respondents manufacture and sell (among other things) photograph albums, known as Built-A-Book, which is the product involved here. The method of distribution is by salesmen who obtain orders through personal solicitation. As part of the transaction, the salesmen turn over to purchasers, certificates which are to be presented to a designated local studio, with whom respondents have made previous arrangements. These certificates provide that the holders thereof are entitled to receive ten 8 x 10 portraits, one of which may be a family group, the portraits to be made at the rate of two a year at intervals of not less than ninety days. Under the terms of the agreement or understanding, the studio may make a charge of \$1.00 for each sitting, if the certificate-holder does not order additional photographs. The price which respondents receive for their album-certificate combination is \$39.95, all of which is collected and retained by respondents.

It is not disputed that respondents secured the names of prospective customers by the "birth lead method." That is, the names were secured from public birth records.

The written instructions furnished the salesmen by respondents (See Comm. Ex. 6) contained the following directions as to the sales talk to be employed after the salesman had gained admittance to the home:

"I am looking for the John Jones family * * * Mrs. Jones, I am from General Products. We have, in reality, a gift for selected families with (a baby) or (a young child). The reason we check so close is because the gifts are quite expensive and they have been promised to a selected number of families and, of course, we want to be sure we have the right families".

Respondents' evidence is to the effect that the circulation of Ex. 6 was abandoned in 1953. Nevertheless, it was stipulated "that if the hearing was held, now scheduled in Appleton, Wisconsin, the witnesses called there would testify in substance as follows:

"(1) That at the time they were approached by a representative from General Products, they were told that they were receiving in reality a gift for selected families with a baby or young child and that there would only be a few of these books placed in the respective areas.

"(2) That they understood the album to be free and that the charge was made for the photographs.

"(3) That the price of \$39.95 for the album-certificate combination, was a promotional and reduced price.

"(4) That the album-certificate combination was of the value of \$114.50.

"(5) That representations were made to some of the witnesses that they would receive a natural gold tone finish portrait, when such was not always the case."

Respondents call attention to 57 Corpus Juris 106 where the word "select" is defined as follows:

"Select. A word which, whether we look to its derivation or to its universal use, means to choose, and take from a number; to cull; to pick out or take from among a number, to take by preference from among others, to take some particular part or number from a greater."

The real question, however, is what impression did respondents' representations make on the prospective purchaser. It seems clear that the impression sought to be created was that the particular person had been specially chosen and that only a few were chosen. The truth, of course, was that each person was called on, simply because he belonged to a certain class, thought to be good prospects, to wit, the parents of a baby or a child. It is true this class would be smaller than the entire group of the population. Nevertheless,

the sales appeal was not made on the basis that all in that class were in fact being called on and no other. Such a selling proposition could easily and clearly have been made had respondents desired to do so. The natural impression made by the sales approach used was that for some reason the prospective purchaser was being specially and individually chosen, rather than that he was only one member of a certain group who, because of the circumstances, would be likely to buy. The representations had the capacity and tendency to deceive and the hearing examiner clearly found them to be misleading and deceptive.

Each person accepting respondents' offer was required to pay \$39.95. For that, he received one Build-A-Book and certificate which entitled him to have not to exceed 10 pictures taken by a specified photographer, for which the photographer could charge \$1.00 each. All the \$39.95 went to the respondents.

It is respondents' claim that the album was given free and that the \$39.95 was for the making of the pictures. The written instructions to the salesmen refer to the album as "in reality, a gift" and the testimony of the witnesses was that they were told they were receiving the album free. It also appears that respondents manufactured and sold the album and were not financially interested in the picture making business, except that they owned and operated one studio.

The hearing examiner decided that, in actuality, the albums were not given free, that respondents' charge was in large part the price of the album, which, accordingly was not in fact free.

With this conclusion, we agree. Obviously, respondents' interest was in the sale of the Build-A-Book. It does not appear that they had any other reason to help the photographers except as it contributed to the sale of their products. They collected and kept all the money. If the purchaser, for any reason, did not avail himself of the right to have any picture taken, respondents, nevertheless, were entitled to keep the money. The transaction did not involve a gift of the album as that term is commonly understood. Instead, it was a sale for \$39.95 of one album, plus certain contract rights set out in the certificate.

The final question has to do with alleged misrepresentations that \$39.95 was a promotional and reduced price.

As found by the hearing examiner:

"Respondents' evidence shows that the album has been offered for sale by Marshall Field of Chicago for a price of \$34.50, and that photographs comparable to those offered through respondents' album-certificate combination are being sold in many areas of the United

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States for a price of \$8.00 each, making a total price for 10 photographs, involving 10 separate sittings, of \$80.00. This amount added to the \$34.50 for the album, equals respondents' claimed value of \$114.50."

About all this proves is that an individual purchaser, by following a certain course, might realize a value of \$114.50 from his \$39.95 purchase. Nevertheless, it appears that the album-certificate combination, with its various possibilities so far as the individual purchaser was concerned, usually and customarily sold for \$39.95.

We think the hearing examiner decided the issues correctly. His findings, conclusions and order are approved and adopted as the findings, conclusions and order of the Commission.

Respondents' appeal is denied. It is directed that an order issue in accordance with this opinion.

FINAL ORDER

This matter having come before the Commission upon respondents' appeal from the hearing examiner's initial decision, and the matter having been heard on the whole record, including briefs in support of the appeal and in opposition thereto [oral argument not having been requested]; and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It is ordered, That respondents Ray S. Kalwajtys, Walter J. Kalwajtys, Bernice Kalwajtys, and Weronika Kalwajtys, individually and as copartners doing business as General Products, shall, within sixty (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 the order contained in said initial decision.

Complaint

IN THE MATTER OF

CORDOVA DISTRICT FISHERIES UNION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6369. Complaint, June 27, 1955—Decision, Feb. 4, 1956*

Consent order requiring an association of fishermen engaged in the catching of the Dungeness crab in the waters adjacent to Cordova, Alaska, and three canning firms, to cease concertedly fixing minimum prices and otherwise restraining competition in the sale and distribution of Dungeness crab and crab meat in commerce.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.

Mr. Roy E. Jackson, of Seattle, Wash., for Cordova District Fisheries Union, Harold Z. Hansen, James Nichols, Charles Simpler, Lyle Lufkin and John Johnson.

Dalton & Bibb, of Seattle, Wash., for John W. Dawson and William O. Lutz.

Mr. Herald A. O'Neill, of Seattle, Wash., for Cordova Fish & Cold Storage Co.

Medley & Haugland, of Seattle, Wash., for H. M. Parks Co.

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 parties hereinafter referred to as respondents have violated the provisions of Section 5 of the Federal Trade Commission 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 this respect as follows:

PARAGRAPH 1. Respondent Cordova District Fisheries Union, hereinafter referred to as "respondent Union," is an unincorporated association among whose members are fishermen who fish for Dungeness crab in waters adjacent to Cordova, Alaska including Copper River and Prince William Sound area. Its principal office and place of business is at Cordova, Alaska, where its mailing address is P. O. Box 939, Cordova, Alaska.

PAR. 2. Respondent Harold Z. Hansen is an individual and is Executive Secretary of respondent Union, with his office and place of business being the same as that of respondent Union.