

Decision

IN THE MATTER OF

JOSEPH NEWGARDEN, SR., TRADING AS
WESTBROOK STUDIOSORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6382. Complaint, June 29, 1955—Decision, Feb. 8, 1956*

Order requiring a photographer in Willoughby, Ohio—charged with making false representations on certain form permit post cards mailed to all residential patrons of certain post offices in four States to promote the sale of his pictures—to cease representing falsely that he was conducting a photographic contest to select "The Child of the Year," that pictures of the child selected would be featured in a series of newspaper and magazine advertisements, that he would pay the selected child the usual modeling fee and award him a one-year contract, and that he would pay one dollar to each child at the time of posing.

Mr. William R. Tincher, counsel supporting the complaint.

Mr. Joseph Newgarden, Sr., pro se.

INITIAL DECISION OF HEARING EXAMINER JOHN LEWIS

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondent on June 29, 1955, charging him with having engaged in unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act. Said complaint, in substance, charges respondent with having falsely represented that he was conducting a photographic contest and with having made certain false and misleading statements in connection therewith. A copy of said complaint and notice of hearing were duly served upon respondent. No written answer to the complaint was filed by respondent.

Following the issuance of the aforesaid complaint and service thereof upon respondent, a hearing was held before the undersigned hearing examiner, theretofore duly designated to hear this proceeding, on October 17 and 18, 1955, in Cleveland, Ohio. At the opening of such hearing respondent, who appeared without counsel, was permitted to make oral answer to the complaint, placing in issue the main allegations thereof. Testimony and other evidence were thereafter offered in support of and in opposition to the allegations of the complaint, which testimony and other

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evidence were duly recorded and filed in the office of the Commission. Counsel supporting the complaint and respondent were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues. At the close of the evidence, both sides were given an opportunity to file written proposed findings of fact and conclusions of law. Proposed findings and conclusions and a suggested order were thereafter filed by counsel supporting the complaint, on November 25, 1955. Respondent did not avail himself of the opportunity to submit proposed findings and conclusions, but filed a written statement requesting that the complaint be dismissed because of a failure of proof. Such request is disposed of in accordance with the findings, conclusion and order hereinafter made.

Upon the entire record in the case and from his observation of the witnesses, the undersigned finds that this proceeding is in the public interest and makes the following:

FINDINGS OF FACT

I. The Business of Respondent and
the Interstate Commerce

Respondent Joseph Newgarden, Sr., is an individual trading as Westbrook Studios. From about January 1953 to August 1955, respondent operated his business at 4126 Erie Street, Willoughby, Ohio. In or about August 1955, respondent moved his place of business to 900 Penn Avenue, Pittsburgh, Pennsylvania. Respondent's business is now, and has been for several years last past, that of photography, involving the promotion, sale and distribution of photographs taken by respondent, his agents or employees.

In the course and conduct of his business, respondent has caused said photographs, when sold, to be transported from his place of business in the State of Ohio to purchasers thereof located in various other States of the United States. At the times mentioned herein, respondent has maintained a substantial course of trade in commerce in said photographs.¹

In connection with the solicitation of prospective customers, respondent has engaged in the extensive use of the United States mails. Respondent and his agents have also, in connection with the solicitation of prospective customers, engaged in extensive travel between and among various states of the United States.

¹ The complaint also alleges that respondent is in substantial competition in commerce, with others engaged in the sale of photographs. While the evidence establishes that respondent is engaged in commerce, there is no evidence to support the allegation that respondent competes, in commerce, with other firms engaged in the sale of photographs.

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II. The Alleged Illegal Practices

A. *The Charges*

The charges of wrongdoing here involved arise out of respondent's solicitation of customers by the use of certain form permit postcards. Such postcards are addressed and mailed to all residential patrons of certain local post offices. A typical postcard used, in this connection, is as follows:

DEAR MADAM:

You are cordially invited to bring your child, 2 months to 6 years, to be photographed by our staff specialist! We are planning a series of newspaper and magazine ads featuring "The Child of the Year"! *Whether your child is selected or not*, the child will be paid a brand new dollar bill for posing! If selected your child will be paid the usual model's fees and may be given a one year contract (subject, of course, to the parents' permission).

Up to twelve different poses will be taken and our selection will be made on photogenic personality only. We wish to make it very clear *THERE IS NO CHARGE AND NO OBLIGATION OF ANY KIND!* You will be shown all the proofs, and will then have the opportunity to place an order if you wish.

Yours very truly,

WESTBROOK STUDIOS-----OHIO DIVISION
"Photographers of Children *Exclusively*"

It is alleged that by means of the statements appearing in these postcards respondent has represented, directly or by implication, that:

(a) He is conducting a photographic contest to select "The Child of the Year"; (b) pictures of the child so selected will be featured in a series of newspaper and magazine ads which respondent will insert; (c) the child selected will be paid the usual and customary model's fees for posing and will be given an advantageous contract for a year; and (d) each child who poses will receive a brand new one dollar bill at the time of posing. It is alleged that these representations are grossly exaggerated, false and misleading in that: (a) Respondent is not conducting a photographic contest but has disseminated the postcards for the purpose of selling photographs to parents; (b) no child of the year has been selected and no such child's picture has been featured in newspaper and magazine advertisements; (c) no payments have been made to any child and no contract has been given; and (d) respondent has not given each child who poses a dollar bill at the time of posing.

B. *The Facts*

Respondent commenced operating under the promotional plan which is the subject of this proceeding in or about June 1954. The plan involved the sending of postcards of the type above described to householders in various communities throughout Ohio,

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Pennsylvania, New York, and West Virginia. During the balance of 1954, approximately 300,000 of such cards were mailed to persons in those four states.

The card, in addition to the above subject-matter, indicated the exact time when, and place where, a representative of respondent would be present in the particular community for taking of photographs. Persons who appeared at the indicated time and place had their child's picture taken by the photographer and were instructed to return in about two weeks to see the proofs of the pictures. When they returned two weeks later they were shown the proofs and given an opportunity to order any number of pictures that they desired at prescribed rates. In addition, they usually received a one dollar bill at the time the proofs were exhibited.

Respondent selected a so-called "Child of the Year" around the latter part of November 1954. This occurred after respondent had received several visits from Commission investigators inquiring into the bona fides of his operations. The child selected was one Kim Persons of Elyria, Ohio. The child received a check for \$25.00 and a so-called "Contract of Employment" was entered into with her parents, dated November 23, 1954, giving respondent the exclusive right to use photographs of the child for advertising purposes, and providing that the child would receive \$25.00 for one-half hour of time spent before the camera. The contract did not run for any specific time but gave either party the right to terminate it upon thirty days' written notice to the other party. Outside the \$25.00 payment which was made in the latter part of November, no other payment was made to the Persons child or her parents. No advertisements featuring the Persons child as the "Child of the Year" were inserted by respondent in any newspapers or magazines.

During the year 1955, however, respondent used the picture of the Persons child on a postcard similar to the one above described. The second postcard described the Persons child as "The Child of the Year for 1954" and invited the householders to whom it was addressed to bring in their children to be photographed by respondent's photographer, stating that respondent would "again select 'The Child of the Year' to feature in our advertisements." Approximately 296,000 such cards were sent out by respondent during 1955. No further payments were made to the Persons child for the use of its picture on these direct mail advertisements. In April 1955, respondent inserted an advertisement in a local Ohio newspaper advertising that a child "whose picture will be featured

in all our national advertisements" would again be selected. The advertisement made reference to the fact that the Persons child had been selected as the 1954 "Child of the Year" and that she had received "a substantial check" from respondent. While the advertisement contained a picture of a child, it was not that of the Persons child but of a professional model. There is no evidence to indicate that any child was selected during 1955, or that any child received any fees for posing or that any contract of any nature was made with any such child.

C. Contentions and Conclusions

There is no question, and it is so found, that by his use of the above-mentioned postcards and other advertising matter respondent represented that he was going to conduct a photographic contest for the purpose of selecting a "Child of the Year." It is also clear, and is so found, that by the aforesaid advertising, the respondent undertook to feature such child in a series of newspaper and magazine ads, to pay the child the usual and customary model's fees and to give the child an advantageous contract for a year. While a child was selected in the latter part of November, it was not featured in any newspaper or magazine advertisements and outside of one \$25.00 fee, it received no other benefits from the selection. During the year 1955, no child whatsoever was selected and there were no payments made to, or advertisements inserted featuring, such child.

It is the contention of respondent that at the time he inaugurated the promotional plan here involved, he contemplated conducting a bona fide contest to select a child of the year and to feature the child in magazine and newspaper advertisements which would result in the child being advantageously remunerated, but that as the plan developed and the anticipated revenues from the sale of photographs did not come up to expectation, he had to abandon carrying out the plan because of its lack of "feasibility." The undersigned cannot, however, accept this contention of respondent as valid. The examiner is convinced, in the light of the record as a whole, that respondent never had any serious intention of conducting a bona fide contest for the selection of a "Child of the Year," and that the whole operation was simply a promotional scheme to facilitate the sale of pictures.

Respondent's own testimony concerning the plan and its execution, or reasons for non-execution, was so thoroughly confused, contradictory and unconvincing that no credence can be given to his claims. Thus, for example, at one point in his testimony he

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stated that he planned to conduct his contest like the Miss America contest.² However, at a later point when asked whether the Miss America contest was the genesis of his idea, respondent gave the following evasive and contradictory response:

A. Well, I said it may have been the genesis. It is pretty hard to say where an idea comes from. I think now that that may have been the thing that—

Q. Well, was the Miss America contest of 1954 the genesis of your idea or the Miss America contest idea in general?

A. I probably say in general.³

It seems evident from the record that at the time he inaugurated the widespread mailing of postcards advertising his "Child of the Year" contest, respondent's plans for its execution were extremely vague and ethereal, if at all existent. Significantly, he took no steps to inquire into the feasibility of the alleged plan for advertising his child of the year until September 1954, shortly after a visit from a Commission investigator, at which time he made inquiry of a Cleveland advertising agency as to the cost of an advertisement in Parents' Magazine. Respondent's explanation as to why he did not follow through on his inquiry was thoroughly unconvincing. His explanation suggested, alternately, that he was unable to reach the advertising agency by telephone and, again, that he didn't have the money to go through with the plan anyway.

By coincidence, the so-called selection of a "Child of the Year" in November 1954, like the inquiry from the Cleveland advertising agency, followed a visit from a Commission investigator. Respondent sought to explain his choice of November as the month for selecting the child of the year on the ground that:

The idea was from the Miss America selection in Atlantic City, which was probably the genesis of my own idea. She is selected at the end of the year, and publicized through the coming year.⁴

Respondent finally conceded, as is common knowledge, that Miss America is selected at the end of the bathing season in September, rather than at the end of the year.

Although respondent did choose a child of the year in the latter part of November, the so-called "Contract of Employment" which was entered into with its parents was of a hollow and synthetic nature. It was for an indefinite term, terminable upon thirty days notice. The child did receive one \$25.00 payment, but nothing further was done to feature the child so as to enable it to earn further modeling fees.

² R. 56.

³ R. 147.

⁴ R. 123.

After being impelled by events to select a child and to pay it a minimal fee, respondent sought to exploit this selection solely to his own advantage. The picture was used only on postcards advertising another⁵ contest for 1955 and sought to create the impression that the child selected in 1954 had received substantial benefits.⁵ The advertisement which respondent did insert in a newspaper in 1955, and on which the Persons child might have been entitled to a fee, contained the picture of a professional model. The advertisement, however, referred to the Persons child as having been selected as the child of the year, referred to the fact that it had received a "substantial check," and tended to create the impression that the picture featured in the advertisement was that of the child selected in the contest.

Respondent's explanation for not using the picture of the Persons child in the newspaper advertisement was that it was not "photogenic" enough because the child had changed in appearance between the time of taking the original picture and her selection in the contest. When asked why he did not use the original photograph of the child, which had evidently been sufficiently photogenic to justify selection of the child as the child of the year, respondent gave the unconvincing explanation that he had lost the negatives.

Further evidence of respondent's lack of good faith and of any genuine intent to conduct a child of the year contest was his repetition of substantially the same plan in 1955, after its alleged lack of feasibility had been amply demonstrated. While it is true that the postcard mailing in 1955 referred to the fact that the child of that year would be "featured in our advertisements" instead of in "a series of newspaper and magazine ads," as had the 1954 cards, this is a distinction without a difference. The sum total of the statements made was the same, as far as the probable effect on the public was concerned, *viz*, that respondent was conducting a bona fide contest in which the winner would have an opportunity to win substantial benefits. It is significant that in the newspaper advertisement which respondent inserted regarding the contest in 1955, the expression used was that the child selected would be featured in all respondent's "national" advertising. While respondent testified that he sought to minimize the benefits under the contest in talking to prospective customers, it is evident from his testimony that the impression had already been created that the winner could expect to receive substantial benefits. The record also shows that certain of respondent's agents helped encourage

⁵ In addition to the picture of the child described as "The Child of the Year for 1954!", the card contained the legend: "Little Kim signs her contract."

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this impression.⁶ In any event, no child was selected in 1955, and no child was featured or compensated in any way, shape or form.

Viewing the record as a whole, the examiner is convinced and finds, that respondent never had any serious intention of conducting a genuine contest for the selection of a child of the year, or to feature any child selected in newspaper and magazine ads, or to pay the child selected the usual and customary model's fees for posing for such ads, or to give the child a contract for a year for some advantageous purpose. The basic purpose of respondent's plan was admittedly to promote the sale of photographs. No definite plans were made for any contest and no steps of any kind were taken to carry it into execution until after the respondent had received official impetus in the form of an investigation by the Commission. Such fulfillment as then occurred, was on a restricted and marginal basis and was evidently calculated to meet what respondent considered to be the requirements of legality. The so-called child of the year received a single \$25.00 payment and a hollow contract. Respondent then sought to subvert, to his own advantage, this limited and grudging fulfillment of his commitments by using the photograph of the child selected solely for the purpose of soliciting new business, on his direct mail advertising, and by using the name of the child in a newspaper advertisement containing the picture of another child. Under all the circumstances, the examiner can give no credence to respondent's contention and explanation regarding his intent to conduct a genuine contest and as to the reasons why it was not carried out.

The only remaining issue is with respect to the statement made in the postcard that each child who posed would be "paid a brand new dollar bill for posing." The evidence discloses that in most instances payment was not made at the time of posing but when the parent called to see the proofs several weeks later. The complaint alleges that the dollar was not even paid at the time the proofs were exhibited, unless the parents insisted upon it. However, the evidence does not support this allegation since it appears that, generally speaking, the persons calling to see the proofs were voluntarily given a dollar bill. The only exception to this was that where more than one child in a particular family had posed, it was respondent's practice to pay only a single dollar to the family, rather than one dollar for each child posing.

⁶ One customer was told that the child selected might receive a Hollywood screen test. Another was told that the winner's picture would appear in the Saturday Evening Post or Collier's Magazine.

Aside from whether the dollar was paid voluntarily at the time of viewing the proofs or not, it is the contention of counsel supporting the complaint that respondent, in his postcard advertisement, had undertaken to pay the dollar at the time the child posed. Respondent, on the other hand, contends there was no undertaking to pay the posing fee at any particular time. From his own reading of the advertisement and after listening to the testimony of some of the witnesses, the examiner is convinced that the impression which respondent sought to create in his advertising postcard was that the dollar would be paid at the time of posing.

It seems clear from the operation of the plan that the offer of a dollar bill was used as a form of bait, in addition to the so-called contest, to induce persons to come in and have the pictures of their children taken. It is evident that the reason they were not paid the dollar at the time of posing was to give them an inducement to return to view the proofs several weeks later, thereby giving respondent an opportunity to sell them pictures. The result was that those persons who did not return to view the proofs did not receive a dollar bill. While respondent testified that he had a representative who called at the homes of those persons that did not come to see their proofs in order to pay them the dollar bill, it is evident that he called on only some of the customers and, further, that his purpose in calling upon such persons was not to give them a dollar bill but to seek to induce them to purchase pictures. In any event, it is the opinion and finding of the examiner that respondent, by his advertising, represented that each child who posed for a picture would be given a dollar bill at the time of posing and that such representation was false since the only persons who received such dollar bill were those who called to see their proofs at a later date or, in some instances, those upon whom respondent's representative called at their homes.

III. Effect of the Illegal Practices

The use by respondent of the foregoing false, deceptive and misleading statements, representations and practices in connection with the sale and distribution of his photographs in commerce has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasers and prospective purchasers of said photographs into the erroneous and mistaken belief that such statements and representations were and are true, and into the purchase of substantial quantities of the photographs offered for sale in commerce by the respondent.

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CONCLUSION OF LAW

The acts and practices of respondent, as hereinabove found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent, Joseph Newgarden, Sr., an individual trading as Westbrook Studios, or trading under any other name, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of photographs, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication that:

(1) Respondent is conducting, promoting or sponsoring a photographic contest to select the "Child of the Year" or for any similar purpose.

(2) Respondent will feature the picture of the person selected in any such photographic contest in newspaper and magazine advertisements.

(3) Respondent will pay to the person selected in any such photographic contest, modeling fees or award such person a contract.

(4) Respondent will pay one dollar or any other amount to persons for posing unless such sum is paid to all such persons at the time of posing, or unless the announcement that such amount will be paid clearly states that it will be paid at some other time and it is paid at such time to all such persons.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 8th day of February, 1956, become the decision of the Commission; and, accordingly:

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

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IN THE MATTER OF

BENJAMIN D. RITHOLZ ET AL. TRADING UNDER THE
NAMES OF CHICAGO INVISIBLE CONTACT
LENS SERVICE, ETC.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6155. Complaint, Dec. 30, 1953—Decision, Feb. 9, 1956*

Order requiring eight individuals, engaged in the sale of corneal contact lenses from their main office in Chicago and numerous branch offices in other States, to cease representing falsely in advertisements in newspapers, etc., that there was no feeling in the eye when their contact lenses were worn and that they could be worn all day without discomfort; that their lenses were safer than eyeglasses and provided better vision and that eyeglasses could be discarded upon purchase thereof; that their contact lenses were radically different from all others; and that the price of their lenses was reduced to \$50 from \$125 and \$150, and that the lenses were of the latter value.

Mr. Frederick McManus for the Commission.

Frank E. & Arthur Gettleman and *Mr. Benjamin D. Ritholz*, of Chicago, Ill., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that the respondents named in the caption hereof have violated the Federal Trade Commission Act by disseminating false and misleading advertising relating to corneal contact lenses which they manufacture and sell in commerce. Respondents filed an answer denying these charges. Thereafter hearings were held at which testimony and other evidence were received in support of and in opposition to the allegations of the complaint, duly recorded and filed in the office of the Commission. Thereafter proposed findings were presented by counsel.

Upon consideration of the entire record, the following findings are made:

1. Respondents Benjamin D. Ritholz, Samuel J. Ritholz, Sylvia Ritholz, Morris L. Ritholz, Fannie Ritholz, Sophie Ritholz, Jacob Bedno and Anna Bedno, individually and as copartners trading under the names of Chicago Invisible Contact Lens Service, D. C. Invisible Contact Lens Service, Pittsburgh Invisible Contact Lens Service, Fort Wayne Invisible Contact Lens Service, Flint Invisible Contact Lens Service, Lansing Invisible Contact Lens Service, King Optical Company, Midwest Scientific Company, and other