

Decision

IN THE MATTER OF
AMERICAN ALBUMS, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6571. Complaint, June 18, 1956—Decision, Apr. 23, 1957*

Order requiring a seller in Cleveland, Ohio, of photograph albums together with certificates for photographs to be taken at independent affiliated studios in various States, to cease representing falsely, through salesmen calling upon mothers of new-born children usually, in their homes, that the persons solicited had been especially selected and would receive free a leather-bound album, and at a reduced price for the combination offer; and to cease giving exaggerated fictitious prices as the customary price of the albums.

Mr. Edward F. Downs for the Commission.

Kahn & Danaceau, by *Mr. Harold H. Kahn*, of Cleveland, Ohio, for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

THE CASE

Complaint herein, issued June 18, 1956, charged respondents with the use of false, deceptive and misleading representations in the interstate sale of photograph albums in violation of the Federal Trade Commission Act (15 U.S.C.A. 45). Specifically the complaint charged that in such sale respondents or their representatives, represented, contrary to the fact, that prospective purchasers had been especially selected, would receive an album free, that the price of \$49.95 was a special promotional and reduced price, that the album was bound in leather, and that the albums customarily sold at retail for much higher prices. Respondents' answer admitted only their corporate and officer description and that they were selling photograph albums. Two hearings were held for the reception of evidence in support of the complaint, other evidence, both offensive and defensive, was stipulated and incorporated in the record as exhibits and the proceedings finally closed February 1, 1957. Thereafter, on March 4, 1957, all counsel submitted to the hearing examiner proposed findings of fact and conclusions of law, upon consideration of which, and of the entire record, the latter finds this proceeding to be in the public interest and makes the following findings of fact and conclusions. Any proposed finding of fact or conclusion not hereinafter specifically found or concluded is herewith rejected.

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FINDINGS OF FACT

1. Respondent American Albums, Inc., is a corporation organized November 9, 1954, and since existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business at 8700 Carnegie Avenue, Cleveland, Ohio.

2. Respondent A. G. Newman (erroneously named in the complaint as A. H. E. Newman), M. L. Stonehill, and William Handel, are president, vice president and treasurer, and secretary, respectively, of the corporate respondent, and as such formulate, direct and control the policies, acts and practices of the corporate respondent at the address of the latter.

3. Respondents are, and have been, engaged in the interstate sale in at least 20 states of albums constructed to hold 14 or more portraits, and certificates good for the taking and processing of 14 portraits at independently owned local photographic studios scattered through 34 states and the District of Columbia. Selling is by personal contact through solicitors at the homes of prospects who are recent mothers. Apparently their names and addresses are secured from newspapers, baby lists, birth records, hospitals and maternity or nursing homes. Respondents ship the albums to these solicitors or salesmen from their office in Cleveland, Ohio, in a constant course of commerce, as "commerce" is defined in the Federal Trade Commission Act (15 U.S.C.A. 45), in substantial volume—respondents' business amounting to about \$350,000 to \$400,000 in 1955. The "salesman" calls at the prospect's home, shows the album, explains the certificate entitling the purchaser to the fourteen 8 x 10 inch portraits at the rate of two per year, but not oftener than 90 days apart, collects either the \$49.95 price, or a deposit, in which latter case, time payments are arranged for, all being reflected on a signed contract. The "salesman" leaves the album, and respondents send the certificate from their Cleveland office to the purchaser in a matter of a week or so. The main selling point or "pitch," of course, is to keep a portrait record of the new baby's progress through its childhood years.

4. In this activity, respondents are in direct and substantial competition with other persons, firms and corporations engaged in the same or similar merchandising.

5. At the outset, the status of these "salesmen" and the binding effect of their oral representations on respondents must be determined. Counsel in support of the complaint contends they are agents with such binding authority, counsel for respondents contends instead they are independent contractors. The facts supporting

the latter position are that they are paid only by commission, are not required to devote any specific hours or time on behalf of respondents, are not instructed as to whom they may sell, are not under the direct supervision of respondents, that the latter make no contribution for them to Social Security or old age pension plans, make no deductions from their compensation for such purposes or for tax purposes, that they are not carried on respondents' payrolls as employees, and are not controlled by respondents except as to the territory in which they may sell. On the other hand, respondents furnish these "salesmen" with albums, contract forms having respondents' name with a signature line for their name as representative of respondents, authorize them to receive payment in full, or down payments, or deposits, authorize them to arrange deferred payments in respondents' name, to obtain prospects' local references, arrange credit terms, and enter into binding contracts on behalf of respondents. There is certainly a clothing of their "salesmen" with the indicia of authority to act for and bind respondents, particularly in the eyes of housewives. On substantially the same facts, the same contention was unsuccessfully made in *Steelco Stainless Steel, Inc., et al. v. F.T.C.*, 187 F.2d 693, and many other cases, unnecessary to cite here, are adversely dispositive of respondents' contention. The finding, accordingly, is that these "salesmen" or solicitors were agents and representatives of respondents in this selling activity, and their statements and representations made to prospects within the scope of that activity are, in law, those of the respondents.

6. It is charged in the complaint, and there is substantial credible evidence in the record, that these salesmen of respondents', in their endeavors to obtain orders and cash from their recent mother prospects, represented to the latter that each had individually been especially selected to receive a free gift, to wit, the photograph album, that the \$49.95 price for the certificate for the 14 portraits was a promotional or reduced or special price, and that these albums customarily sold at various retail prices. The facts are that no prospect had been individually or specially selected, the album is not free, but is included in the \$49.95 price for the whole, and that this price is the regular price respondent has charged for several years. It is true that each prospect was a member of a group picked out by respondents for their subtle sales drive—recent mothers—but it was obvious to the hearing examiner, from the testimony of the witnesses who appeared, that each had the impression charged. Respondents contend that because their order blank or sales contract

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plainly shows on its face that the \$49.95 was for the album plus the portraits as a combination, that deception was impossible. However, if the first contact, or interview, or impression is obtained by or gathered from deception, the law is violated, even though the true facts are made known to the buyer before he enters into the contract of purchase. *Carter Products, Inc., et al. v. F.T.C.*, 186 F.2d 821. Furthermore, it was obvious, from the witnesses who appeared, that this was an emotional appeal accompanied by high speed and high pressure selling—some of the salesmen going so far as to loan the down payment to a prospect, unable at the moment to make it. Lastly, the same sort of contention was rejected on substantially the same facts by the court in *Steelco Stainless Steel, Inc. v. F.T.C.*, *supra*. The contention is rejected.

7. All of the above misrepresentations were admitted to have been made at times by one or more of the respondents, the knowledge having come to them in their operation of the business as officers of the corporate respondent. They thereupon cautioned their agents not to do so again, but there is no substantial evidence that further measures, at least effective measures, were employed to prevent a reoccurrence. In fact, from the testimony of some purchaser-witnesses, they did reoccur.

8. Respondents' albums are admittedly bound in vinyl plastic, not leather. Nevertheless, in at least one instance, it was represented to the prospect by respondents' agent as leather. On respondents' order blank or contract form it is described as "Genuine Leather-Lex." Such a name is inherently false—the addition of a suffix having no primary or even secondary meaning to a well-known and understood term such as "leather" cannot help but deceive anyone not engaged in the production or handling of that particular plastic. *Masland Durableather Co., et al. v. F.T.C.*, 34 F. 2d 733. The stipulated testimony of the seller of these albums to respondents shows that this album is sold to only one other purchaser besides respondents, that it has never been sold to retail outlets and that at one one, at the request of respondents, the price of \$47.50 was stamped on the back of the albums shipped to respondents, although the latter pay only \$4.30 each for these albums. Thus, of course, further adds to the deception.

9. Respondents make much of the fact that "Leather-Lex" is a trade name, originated, not by them, but by the plastic manufacturer, and used by him on this material. If a trade name is inherently deceptive, as this one is, it matters not who originated it or how many use it, the use thereof by anyone to make sales in com-

merce is violative of the law. Such sales in commerce by deception are at the peril of the seller, who, by law, must guarantee against deception, regardless of what the trade does, either wholesale or retail.

10. The fact that respondents have cautioned their agents not to misrepresent, when such occurrences came to their attention, shows good faith and a recognition of their duty under the law, but does not excuse the harm to the public. From the standpoint of the latter, a seller who uses, not advertising of his own composition, but oral solicitation through canvassers, is and must be an absolute guarantor of the truth of what they say, and sporadic or intermittent warnings are not enough, he must prevent misrepresentation at his peril. One cannot reap the profits of such activity as this record depicts and then deny liability for the manner of causation.

11. Counsel for respondents criticizes as unreliable, the testimony of some of the young housewives who testified, because they did not remember every detail of conversation, because they did not make a contemporaneous written record thereof, because they did not, when they discovered the deception, immediately write, or write at all, a formal letter of protest to respondents, and because they did not carefully analyze the purchase contract or order blank as a lawyer, professional shopper, or other skeptic by profession might have done. Far from weakening the affirmative case, this strengthens it, because it points up the receptive and unsuspecting nature of the victims, conditioned as they were by their recent motherhood, to the smooth approach on a subject then emotionally close to them—their baby's progress through childhood by portrait.

12. All of these misrepresentations are patently sales-inducing, and many decided cases, too numerous to cite here, so hold.

13. The use by respondents of the foregoing false, deceptive and misleading statements and representations has had, and now has, 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' said albums as a result of such erroneous and mistaken belief. As a result thereof, trade has been, or may be, unfairly diverted to respondents from their competitors and injury has thereby been done, or may be done, to competition in commerce.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, were, and are, all to the prejudice and injury of the public and of

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respondents' competitors and constituted, and may constitute, unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents American Albums, Inc., a corporation, and its officers, and A. G. Newman (erroneously named in the complaint as A. H. E. Newman), M. L. Stonehill and William Handel, individually, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of photograph albums or certificates for photographs, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing directly or by implication:

- (a) That persons solicited are especially and individually selected or that they sell only to selected persons;
- (b) That their albums are given free or without cost;
- (c) That the price at which they regularly and customarily sell their albums and certificates is a reduced or promotional price;
- (d) That their albums are bound with leather;
- (e) That the retail price of their albums is in excess of the price at which such albums are sold by retailers in their regular and usual course of business.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 23rd day of April, 1957, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents herein 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 to cease and desist.

Order

IN THE MATTER OF
THE FREEZIT CORPORATION OF AMERICA ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6658. Complaint, Oct. 18, 1956—Order, Apr. 24, 1957

Order dismissing—for failure to obtain service on defendants—complaint charging Dallas, Tex., sellers with misrepresenting the comparative merits, popularity, patented features, etc., of "Mister Ice" liquid cooling agent and "Fish Charm" product designed to be used by fishermen to attract fish.

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

Mr. Edward F. Downs and *Mr. Garland S. Ferguson* for the Commission.

ORDER DIMISSING COMPLAINT

Whereas, the Commission, on October 18, 1956, issued its complaint in this proceeding, charging The Freezit Corporation of America, a corporation, and Ledger D. Veazey, individually and as an officer of said corporation, with the use in commerce of certain unfair and deceptive acts and practices in violation of the Federal Trade Commission Act; and

Whereas, all reasonable efforts to obtain service of said complaint on the proposed respondents have failed; and

The Commission being of the opinion that in the circumstances the only present alternative is to dismiss the complaint without prejudice:

It is ordered, That said complaint be, and it hereby is, dismissed, without prejudice, however, to the Commission's right to institute a new proceeding against the parties or to take such other action at any time in the future as may be appropriate in the then existing circumstances.