

Decision

IN THE MATTER OF
FOTO MURALS OF CALIFORNIA, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 6708. Complaint, Jan. 9, 1957—Decision, Dec. 9, 1957*

Order dismissing, for failure to sustain the allegations, complaint charging that use in advertising of the terms "photo mural", "Foto Mural", etc., by a Beverly Hills, Calif., dealer, for photogravure reproductions of photographs, designed as wall decorations or coverings, constituted false advertising.

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

Adelman & Schwartz, of Beverly Hills, Calif., for respondents.

INITIAL DECISION DISMISSING COMPLAINT BY EARL J. KOLB, HEARING
EXAMINER

This proceeding is before the undersigned hearing examiner for final consideration, upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by both parties, and all findings of fact and conclusions of law proposed by the parties respectively, not hereinafter specifically found or concluded, are herewith rejected, and the hearing examiner having considered the record herein and being now fully advised in the premises, makes the following findings as to the facts and conclusions drawn therefrom and order:

1. Respondent Foto Murals of California, Inc., is a California corporation located at 8401 Wilshire Boulevard, Beverly Hills, Calif. It is engaged in the sale and distribution in interstate commerce of reproductions of photographs designed to sell as wall decorations or wall coverings. These products are referred to as "Photo Murals," "Foto Murals," and "Muralettes."

2. In the production of its murals the corporate respondent causes an original color transparency to be made of a scene to be reproduced on a mural. This transparency is subjected to further photographic processing to obtain four color separation negatives which are used to make printing plates of specified color for transfer to respondent's

specialized paper by means of the photogravure process. This photogravure processing is performed by independent printing concerns under contracts with respondent.

3. The complaint in this proceeding alleges that the use of the term "Foto Murals" in respondent's trade name, and the use of the terms "Photo Murals" and "Foto Murals" to designate or describe respondent's products, constitute false, deceptive, and misleading representations in violation of the Federal Trade Commission Act because respondent's products are not enlarged photographs on photographic paper. This allegation is not supported by the testimony and other evidence in this proceeding. Respondent's murals are reproductions of original color transparencies printed by the photogravure process from plates prepared by photographic methods and can properly be referred to as "photo murals." The record herein does not demonstrate any public interest in limiting the term "photo murals" to an enlargement on sensitized paper.

4. The complaint also alleges that representations that respondent manufactures its products are false and misleading in that a substantial portion of the purchasing public have a preference for dealing direct with a factory and manufacturer of merchandise. No evidence was introduced as to any public preference for dealing direct with the printing concern printing the products as opposed to a concern which designed and caused the products to be produced according to its specifications. In the absence of such testimony as to preference, this charge has not been sustained.

5. The further allegation of the complaint that respondent has falsely represented that the price of custom photographic murals is two to twenty times the price of respondent's products, is wholly unsupported by the record in this proceeding.

6. On the basis of the present record, it appears that there has been a total failure to sustain the allegations of the complaint.

It is therefore ordered, That the complaint in this proceeding be, and the same is hereby, dismissed.

OPINION OF THE COMMISSION

By Secrest, Commissioner:

This matter is before the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner dismissing the complaint for failure of the evidence to sustain the allegations. The complaint charges respondents with violating the Federal Trade Commission Act through the use in advertising of false, misleading, and deceptive statements and representations in

connection with the sale of reproductions of photographs designed to sell as wall decorations or wall coverings.

The basis of the appeal is the dismissal of the complaint with respect to the charge that respondents, through the use of the terms "photo mural," "photographic mural" and "Foto Mural," to describe or refer to their products, have misrepresented the true nature of such products. Specifically, this charge is that respondents, by the use of these terms, have represented that their products are actual enlarged photographs on photographic paper when they allegedly are not such, but are prints or mechanical reproductions of photographs, printed or lithographed from metal or gelatin plates on ordinary paper. Counsel in their appeal contend that the record contains substantial evidence to sustain the complaint in this particular.

The actual process employed in the making of respondents' products is explained in the initial decision as follows:

"In the production of its murals the corporate respondent causes an original color transparency to be made of a scene to be reproduced on a mural. This transparency is subjected to further photographic processing to obtain four color separation negatives which are used to make printing plates of specified color for transfer to respondent's specialized paper by means of the photogravure process."

There is no showing in this record that the purchasing public understands the terms "photo mural," "photographic mural" or "Foto Mural" to be so limited in meaning as to exclude murals made by the above-described process. Such evidence as there is on this point is all to the contrary. William C. Mayfield, engaged in business as technical consultant for users of photographic arts, testified to the effect that, based on his selling contacts with people, it is the end result that counts with the buying public, not the process. He testified in part:

"When people go out to buy these things, I think they buy primarily from what they see. They buy the beauty of the thing. They buy from the standpoint of whether it will fit their budget; they do not consider the processes as such; to them, one process is the same as the other."

Considering the record as a whole, we do not think that the evidence warrants a finding that respondents have engaged in misrepresentation or deception by use of the terms "photo mural," "photographic mural" and "Foto Mural."

Counsel appealing also contend that the hearing examiner erred in not receiving as evidence a stipulation which one of the individual respondents, Peter C. Goldsmith, had entered into with the Commis-

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sion and which allegedly dealt with issues here involved. The examiner did not flatly reject the offer of evidence but ruled that in the then present state of the record, he was unable to determine the admissibility of the document. He suggested that it be withdrawn, to be offered later after the introduction of additional testimony, so that the circumstances could then be determined. The document was never again offered. It does not appear at all unreasonable for the examiner to have so deferred his ruling on such an offer. Under the circumstances, we cannot find that he committed error in this matter.

The appeal of counsel supporting the complaint is denied and the initial decision of the hearing examiner dismissing the complaint is affirmed.

FINAL ORDER

Counsel supporting the complaint having appealed from the hearing examiner's initial decision dismissing the complaint in this proceeding; and the matter having been heard upon the record, including the briefs of counsel, and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It is ordered, That the order contained in the initial decision dismissing the complaint be, and it hereby is, affirmed.

Decision

IN THE MATTER OF
HENRY BROCH AND OSCAR ADLER TRADING AS HENRY
BROCH & CO.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECTION 2(c)
OF THE CLAYTON ACT

Docket 6484. Complaint, Jan. 11, 1956—Decision, Dec. 10, 1957

Order requiring Chicago brokers to cease violating section 2(c) of the Clayton Act by granting a buyer a percentage of their brokerage fee in connection with the purchase of apple concentrate; specifically accepting a 3-percent commission instead of the customary brokerage fee of 5 percent whereupon the seller lowered its established price to the buyer, recouping part of the reduction out of what respondent brokers would have earned at the normal brokerage fee.

Mr. Edward S. Raysdale supporting the complaint.

Mr. Harold Orlinsky and *Mr. Fred Herzog*, of Chicago, Ill., for respondents.

INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on January 11, 1956, charging them with having violated section 2(c) of the Clayton Act, as amended. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint charges, in substance, that respondents granted and allowed a percentage of their commission or brokerage fee to a buyer of food products, in connection with such buyer's purchase of such food products in commerce. Respondents appeared by counsel and filed answer to the complaint in which they denied, in substance, having engaged in the illegal conduct charged.

Hearings on the charges were held before the undersigned hearing examiner, theretofore duly designated to hear this proceeding, on various dates between May 8, 1956, and October 3, 1956, at Chicago, Ill., and Pittsburgh, Pa. The oral deposition of a witness for respondents was also taken on August 6, 1956, at Kentville, Nova Scotia, before a notary public, the undersigned being present at the taking of said deposition, by agreement of counsel.¹

¹ It was agreed by counsel that the undersigned could be present during the taking of said deposition, with the right to address appropriate questions to the witness, to observe his demeanor in testifying and to take such observation into account in determining the credibility of the witness. The deposition was made a part of the record as an exhibit on behalf of respondents, in lieu of being read into the record.