

IN THE MATTER OF
JOSEPH W. GRAHAM TRADING AS
GRAYSTONE PORTRAIT AGENCY

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

Docket 7075. Complaint, Feb. 28, 1958—Decision, Jan. 5, 1959

Order requiring a seller of enlarged colored photographs and particularly frames therefor, with headquarters in Chattanooga, Tenn., to cease representing falsely, through his door-to-door salesmen or otherwise, that the finished enlargement was a hand-painted oil portrait done by an artist and as good as the samples exhibited; that frames ordered would be 24 carat gold or walnut, would be airtight, dust proof, and waterproof, with unbreakable glass; and requiring him to disclose that the finished enlargements would be convex and oddly shaped so that they required specially designed frames obtainable only from him.

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

Mr. Bruce C. Bishop, of *Folts, Bishop & Thomas*, of Chattanooga, Tenn., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves charges that respondent has violated the Federal Trade Commission Act by soliciting, selling, and distributing commercially in interstate commerce tinted or colored enlargements of photographs and photographic frames. It is alleged in the complaint that respondent, by means of false, misleading, and deceptive statements and representations of his sales agents or representatives to members of the consuming public, has sold substantial quantities of such photographs and frames in the course and conduct of his business. Respondent in his answer and testimony admits the location and nature of his business, that such business is in interstate commerce and in direct and substantial competition with others in like business, but denies, in substance, that he has violated the Federal Trade Commission Act in any way. This initial decision finds generally that the allegations of the complaint are sustained upon the whole record by a preponderance of the reliable, probative and substantial evidence as required by §7(c) of the Administrative Procedure Act and the Commission's Rules of Practice for Ad-

judicative Proceedings adopted pursuant thereto and that respondent has violated the Federal Trade Commission Act in each of the several particulars alleged in the complaint. A cease and desist order is issued herein appropriate to the findings and conclusions hereinafter set forth.

This case was instituted by the filing of a complaint on February 28, 1958, and after regular service thereof had been had upon the respondent, he filed his answer on April 21, 1958. Thereafter hearings, wherein evidence was presented by Commission's counsel, were held in Chattanooga, Tenn., on June 3, 1958, and in New Orleans, La., on June 5 and 6, 1958, after which Commission's counsel rested. Respondent presented his evidence in Chattanooga on June 30, 1958, and both parties rested. On September 15, 1958, both parties submitted their respective proposed findings of fact, conclusions of law and orders, all of which have been carefully considered in the light of the whole record presented herein. Since the evidence supports the proposed findings of facts, conclusions and order submitted by counsel supporting the complaint, the hearing examiner has adopted them either in *haec verbae* or in substance and effect. Respondent's proposals, insofar as they are in agreement with those tendered by counsel supporting the complaint, have been adopted and all others have been rejected.

The record is fairly brief, consisting of 249 pages of transcript and some ten documentary exhibits, five being offered by each party. The testimony adduced consisted of the respondent and several of his agents and business associates and a number of so-called "consumer witnesses." The latter were residents of the vicinity of New Orleans who had dealt with respondent's agents with respect to the purchase of enlarged and colored photographs and frames therefor.

There is nothing novel in the present case. Respondent's methods of operating his business in commerce in the main follow a type of procedures which have been repeatedly held by the Commission during the past twenty years to be violative of the Federal Trade Commission Act. See *International Art Co., et al.* (1938), 27 F.T.C. 1387; affirmed *International Art Co. v. F.T.C.* (C.C.A. 7, 1940), 109 F. 2d 393, cert. den. (1940), 310 U.S. 632; *George H. Lewis, etc.* (1939), 28 F.T.C. 987; *Midwest Studios, Inc., et al.* (1939), 28 F.T.C. 1583; *Success Portrait Co., et al.* (1942), 35 F.T.C. 227; *Leroy Miller, etc.* (1951), 48 F.T.C. 80; *H. Harold Becko, etc.* (1951), 48 F.T.C. 412; *Clinton Studios,*

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Inc., et al. (1952), 48 F.T.C. 1137; and *Chester Burr Renner* (1952), 49 F.T.C. 456. These photographic cases and others are collated in §5081.612 in Volume 2, *Trade Regulation Reporter* (C.C.H.). Special significance to these decisions is given not only by the refusal of the Supreme Court to review the *International Art* case but also by the fact that in *Success Portrait* it appears that that concern which is still doing business and is the supplier of respondent herein for his photographic materials and frames, together with its representatives, salesmen, and employees, was ordered by this Commission to cease and desist from some of the fundamental practices involved herein, either directly or through any corporate or other device.

The hearing examiner, after hearing and observing all of the witnesses and their conduct and demeanor while testifying, has given full, careful, and impartial consideration to such testimony and to all other evidence presented on the record and to the fair and reasonable inferences arising therefrom, as well as to any and all facts pleaded in the complaint and admitted by the answer. All statements, arguments, and proposals of counsel have been likewise fully considered. Upon the whole record thus evaluated and weighed, it is found that the material allegations of the complaint are each and all fully and fairly established. The hearing examiner therefore specifically finds as follows:

Joseph W. Graham is an individual trading and doing business under the name of Graystone Portrait Agency. His business mail and all related correspondence is handled at P.O. Box 8278, Chattanooga, Tenn. Respondent is now, and for some ten years last past, has been engaged in the sale and distribution of tinted or colored enlargements of photographs and of frames therefor. In the course and conduct of his business, respondent has caused, and now causes, said products, when sold, to be transported from the State of Tennessee to purchasers thereof located in various other States of the United States, namely, Louisiana, Michigan, Mississippi, Arkansas, West Virginia, Kentucky, Ohio, and Indiana.

Respondent has been in direct and substantial competition with other individuals and with firms and corporations engaged in the sale and distribution of photographs, tinted or colored enlargements of photographs, and photograph frames in commerce. Respondent not only admitted this in his answer but named three competing concerns.

In connection with the sale of respondent's said products, in

the first instance of contact, sales agents or representatives employed by respondent, who are called "subdealers" by respondent, visit the homes of prospective customers in cities, towns and rural communities of the aforesaid several states. Said sales agents and representatives, in soliciting orders, carry and exhibit attractive samples of work that are represented as typical of what is done by respondent. Said samples are attractively displayed and have been skillfully done, and many of them closely resemble paintings done by hand. These sales agents and representatives attempt to interest, and often do interest, prospective customers in placing orders for enlargement to be made from photographs or snapshots furnished by the prospective customers.

In cases where sales are made, other sales agents or representatives appear some weeks later with uncolored proofs of the enlargements which are, in fact, merely enlarged unfinished prints or proofs made by photography of the photographs or snapshots previously furnished by the customers to respondent's first sales agents or representatives. These second type of sales agents or representatives, who are called "proof-passer subdealers" by respondent, thereupon obtain instructions for the colors to be used in completing the enlargements and then endeavor to sell, and often succeed in selling, the customers expensive frames for the enlargements.

One of the chief defenses urged by respondent is that these several types of "subdealers" are independent contractors. This doctrine was elaborately presented and argued in *International Art Co., et al. v. F.T.C.*, *supra*, at pages 395-6, but was held unavailing to respondents there. For like rulings as to other types of business where similar claims have been made, for example, see *G. Howard Hunt Pen Co. v. F.T.C.* (C.A. 3, 1952), 197 F. 2d 273, 281, and *Irwin v. F.T.C.* (C.C.A. 8, 1944), 143 F.2d 316, 325. In the case at bar, the order blanks which customers executed in duplicate refer only to respondent here and to no other person, firm, or corporation. The public in dealing with the picture and frame salesmen are dealing with respondent and no one else. In addition to that, a number of the "consumer witnesses" testified that those who sold them the enlarged pictures and frames claimed to be salesmen or representatives of respondent. Respondent bears all the expense of the materials the salesmen carry with them, including the rather expensive cases for pictures and frames carried by the respective salesmen.

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In their initial contacts with the customers, respondent's said sales agents or representatives pursue the policy of making no mention of frames for the finished enlargements they are attempting to sell, nor do they disclose to the customers that the enlargements will be made in other than ordinary shape. Nothing is said by said sales agents or representatives to indicate that the profits obtained by respondent in connection with his business, herein described, are derived from the sale of frames, nor that the real and ultimate purpose of respondent's said sales agents and representatives was and is to sell frames to the said customers.

By failing to disclose to customers that the enlargements ordered by them will be finished in odd and unusual shapes and with a curved or convex surface, thus requiring odd-style frames, the respondent's sales agents and representatives imply that enlargements will be finished in the usual or customary shape and surfaced in the usual manner. Customers are therefore induced to place orders and make deposits who would not have done so had they been apprised of the fact that the enlargements would be finished in odd shapes with a curved surface and that said enlargements would therefore require odd shaped frames which are not generally available and which, in all probability would, of necessity, have to be purchased from respondent at a price fixed by respondent.

By and through oral statements and representations made by the sales agents and representatives, and by the exhibition of samples respondent represented, directly or by implication: (1) that the finished enlargement will be a hand-painted portrait; (2) that the finished enlargements will be hand painted in oils by a well qualified artist; (3) that the finished enlargement will be as good as the samples displayed; (4) that certain frames ordered will be 24 carat gold and that others will be made of walnut; (5) that the frames are airtight and dustproof; (6) that the frames are waterproof; and (7) that the glass in the frames is unbreakable.

The aforesaid representations were and are false, deceptive and misleading. In truth and in fact: (1) Respondent's enlargements are not portraits painted by hand but are photographic enlargements with the color applied by air brush using water colors; (2) the enlargements are not hand painted in oils or by an artist; (3) respondent's finished enlargements are often inferior to the samples exhibited by respondent's agents; (4)

the frames represented as being 24 carat gold were only covered, in whole or in part, by gold lacquer and the frames represented as being made from walnut are made from other, less expensive wood; (5) respondent's frames are not airtight nor are they dustproof; (6) respondent's frames are not waterproof; and (7) the glass in respondent's frames is breakable.

It would serve no useful purpose to detail the testimony of the several witnesses with respect to the statements made and the false character of them. The respondent and his witnesses somewhat freely admitted many of them and none of the original sales representatives' statements, as testified to by the consumer witnesses, were denied by any witness. It is true that respondent called Arthur Penn, who was a "proof-passer," that is, he made the second call carrying the frames. He did not pretend to remember the conversations but relied on the fact that he always made the same sales pitch to all customers and never made any of the representations they claimed were made to them at the time they purchased the frames or were approached with regard thereto. He admitted that his business was substantially all among the poorer and lowly class of people in the New Orleans neighborhood where he lived. The distinctions drawn by respondent's counsel as to the fact that persons would not be deceived into believing many of the statements that were made, which respondent does not admit, are not persuasive. The Federal Trade Commission Act with respect to deceptive practices is intended to protect the public generally, which includes the humble and poorly informed members of the community as well as those who have greater education and opportunities. Citation of authority along this line would be so extensive as to be burdensome, and the principle is now well grained into the law in this type of case. The hearing examiner observed the "consumer witnesses" called in this case. They were not people of much education nor of high intelligence but all bore the imprint of honesty, and in their simple, unaffected ways narrated their respective transactions with respondent's agents and representatives with fairness and candor, and there is no doubt but what the sales methods employed with them were false, misleading, and deceitful in the particulars charged in the complaint. Since these people were held forth as representative of the general type of "consumer witnesses" to whom respondent's appeals were made, it must be found that these practices were general and must be prohibited.

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Respondent further urges that this proceeding is not one in the public interest but, in substance, is in the nature of a number of private litigations between dissatisfied customers and the respondent. The answer to this is obvious and requires no demonstration. The Commission is not interested and makes no attempt in this proceeding to collect damages or otherwise to rectify the state of affairs existing between respondent and any of its customers. Its proceedings and orders look only to the future, and the protection of the public, particularly the gullible and ignorant, from similar deceptive practices on the part of respondent's agents and representatives.

The use by respondent of the foregoing false, deceptive and misleading statements, representations and implications 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, representations and implications are true and to induce the purchasing public to purchase substantial quantities of respondent's products, as a result of such erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to respondent from his competitors and substantial injury has been and is being done to competition in commerce.

There being jurisdiction of the person of the respondent, upon the findings of fact hereinbefore made, the hearing examiner makes the following conclusions of law:

1. The acts and practices of the respondent hereinabove found to be false, misleading, and deceptive are all to the prejudice and injury of the public and constitute unfair and deceptive acts or practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.
2. The Federal Trade Commission has jurisdiction over all of the respondent's acts and practices which have been hereinabove found to be false, misleading, and deceptive.
3. The public interest in the proceeding is clear, specific, and substantial.

Upon the foregoing findings of fact and conclusions of law, the following order is hereby entered:

ORDER

It is ordered, That respondent Joseph W. Graham, individually and trading and doing business as Graystone Portrait Agency,

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or trading under any other name, his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of tinted or colored enlargements of photographs, photograph frames, or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication:

1. That the finished enlargement is a handpainted portrait or is anything other than an enlarged photograph;

2. That the finished enlargement is handpainted in oils or is painted by an artist;

3. That the finished enlargement will be as good as the samples displayed in soliciting the sale, unless such is the fact;

4. That the frames sold by respondent are 24-carat gold, or that they are made of any material other than that which is actually used;

5. That the frames sold by respondent are airtight, dustproof or waterproof;

6. That the glass in the frames sold by respondent is unbreakable.

B. Failing to disclose to customers at the time the enlargements are ordered that the finished enlargements, when delivered, will be so shaped that they can be used only in specially designed odd-styled frames that cannot ordinarily be obtained in stores accessible to the purchasing public, and that it will be difficult, if not impossible, to obtain frames to properly fit the enlargements from any source other than respondent.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The respondent, Joseph W. Graham, an individual trading and doing business under the name of Graystone Portrait Agency, has been charged with violation of the Federal Trade Commission Act. Specifically, the complaint charged and the hearing examiner found that:

By and through oral statements and representations made by the sales agents and representatives, and by the exhibition of samples respondent represented, directly or by implication: (1) that the finished enlargement will be a hand-painted portrait; (2) that the finished enlargements will be hand painted in oils by a well qualified artist; (3) that the finished enlargement will be as good as the samples displayed; (4) that certain frames ordered

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will be 24 carat gold and that others will be made of walnut; (5) that the frames are air-tight and dust-proof; (6) that the frames are waterproof; and (7) that the glass in the frame is unbreakable.

The hearing examiner held that these representations were false, deceptive and misleading.

In addition the complaint charged and the hearing examiner found that the respondent, in selling enlargements of photographs made no mention of frames, even though his ultimate purpose was to sell frames. He also failed to disclose that the enlarged photographs were of unusual dimensions. In fact the record shows that the shape of the enlarged photograph was convex, of unusual dimensions, and that appropriate frames could not be purchased in the open market. Thus customers would of necessity have to purchase odd-style frames from the respondent at respondent's price, a fact of which the customers were unaware when they ordered the enlargements.

On appeal, by briefs only, the respondent contends that the order entered is not supported by reliable, probative and substantial evidence. He questioned the credibility of the witnesses supporting the complaint, and he argued that oral testimony was admitted to alter, vary and contradict the terms of a written contract.

It appears that the respondent questions the credibility of certain witnesses because their testimony was based on conversations between them and respondent's salesmen about three or four years ago. The weight to be given such testimony is a matter to be considered. However, no sound reason has been given why such testimony should be wholly disregarded. The hearing examiner has passed on the credibility of these witnesses. Indeed in some respects the testimony of the respondent himself supports the order entered.

Likewise it is apparent that this case is not concerned with the contracts entered into between these witnesses and the respondent. The complaint is concerned with the nature and veracity of the representations made by respondent's salesmen which induced members of the public to enter into the contracts for enlargements and, later, the separate contracts for frames.

Respondent further claims that he was denied "the right to bring in thousands of satisfied consumer witnesses who would deny the allegations of the complaint."

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In *Independent Directory Corporation v. Federal Trade Commission*, 188 F. 2d 468, 471 (1951), the Court held:

The fact that petitioners had satisfied customers was entirely irrelevant. They [petitioners] cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them.

Also it has long been settled by a multitude of cases that the Commission need not prove actual deception of the injured public but need prove only that the statements in question have the tendency or capacity to deceive.

On appeal the respondent further claimed that he

* * * was not notified prior to the hearing, nor did the proof show which one, or more than one, of his agents or representatives made the alleged statements and representations, and therefore respondent was denied any opportunity to defend himself by having such agent testify and deny the charge or to have his agent or representative face the consumer witness as such testimony was given.

The record does not indicate that the respondent ever requested additional time from the hearing examiner to prepare his defense or in any way indicate to the hearing examiner that he was being prejudiced.

Nor does it appear that this case is a series of private controversies and is not in the public interest as contended by the respondent. The nature of the representations made, the scope of the respondent's activities and the amounts involved all indicate that this proceeding is in the public interest and that action by the Commission is warranted.

It is apparent that the order issued by the hearing examiner is proper and is fully supported by reliable, probative and substantial evidence, and that it was issued in the public interest.

The respondent's appeal is denied, and an appropriate order will be entered.

FINAL ORDER

This matter having been heard on the respondent's appeal from the hearing examiner's initial decision, and the Commission having rendered its decision denying the appeal:

It is ordered, That the hearing examiner's initial decision filed September 17, 1958, be, and it hereby is, adopted as the decision of the Commission.

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It is further ordered, That respondent, Joseph W. Graham, 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 contained in the aforesaid initial decision.

Complaint

IN THE MATTER OF
WILLIAM FREIHOFFER BAKING CO., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SECS. 2(a) AND 2(d) OF THE CLAYTON ACT*Docket 7072. Complaint, Feb. 27, 1958—Decision, Jan. 7, 1959*

Consent order requiring a large corporate baker and its subsidiary in Philadelphia to cease granting certain customers preferential discounts of up to 10% from the regular wholesale prices charged their nonfavored competitors; and paying them advertising and promotional allowances of up to 5% of purchases without making like payments available to their competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of Section 2(a) and 2(d) of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Count I

PARAGRAPH 1. Respondent William Freihofer Baking Company is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 20th Street and Indiana Avenue, Philadelphia, Pa.

Respondent Freihofer Baking Company is a corporation organized and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 20th Street and Indiana Avenue, Philadelphia, Pa.

Respondent Imperial Foods, Inc. is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 20th Street and Indiana Avenue, Philadelphia, Pa.

Respondents Freihofer Baking Company and Imperial Foods, Inc. are both wholly owned subsidiaries of respondent William Freihofer Baking Company.

PAR. 2. Respondents are now, and for several years have