

vacated and set aside. On remanding, the whole record including the initial decision, and conclusions and order to cease and desist, are issuing in lieu thereof.

IN THE MATTER OF
NICHOLS & ASSOCIATES, INC., ET AL.

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

Docket 7248. Complaint, Sept. 4, 1958—Decision, Oct. 21, 1959

Order requiring Chicago sellers of real estate advertising to cease making deceptive representations to mislead owners of small businesses into paying it substantial advance fees for advertising, including claims that it had prospective buyers interested in specific properties; that the property would be sold shortly as a result of its efforts; that it financed purchases; that it assumed all the selling risk and obligation; and that the advance listing or service fee would be refunded if the property was not sold within a certain time.

As to respondent John G. Green, the matter was disposed of by order of Aug. 11, 1959, p. 155, herein.

Before *Mr. William L. Pack*, hearing examiner.

Mr. John W. Brookfield, Jr., and *Mr. John J. Mathias*, for the Commission.

Williams and Leonard, of Chicago, Ill., for respondents.

INITIAL DECISION AS TO ALL RESPONDENTS EXCEPT JOHN G. GREEN

1. The complaint in this matter charged the respondents with violation of the Federal Trade Commission Act in soliciting the listing for sale and advertising of business properties. Respondents Nichols & Associates, Inc., Paul J. Damon, and Richard W. Scott filed an answer denying most of the allegations in the complaint. Respondent O'Neil J. Nichols filed a motion to dismiss the complaint as to him, which was denied by the hearing examiner. Respondent John G. Green elected to dispose of the proceeding as to him by means of an agreement for a consent order, and on March 9, 1959, an initial decision as to this respondent was issued by the hearing examiner, such decision subsequently becoming the decision of the Commission.

2. As to all of the respondents other than John G. Green, hearings were held in regular course and evidence received in support of the complaint, the respondents electing to offer no evidence except certain documents which were offered in connection with respondents' cross-examination of Government witnesses. Proposed findings and conclusions have been submitted by counsel supporting the complaint, respondents electing not to submit such proposals. Oral argument has not been requested, and the case is now before the hearing examiner for final consideration. Any proposed findings and conclusions not included herein have been rejected.

3. Respondent Nichols & Associates, Inc., is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 130 North Wells Street, Chicago, Illinois.

4. Respondents Paul J. Damon and Richard W. Scott are officers of the corporation and formulate, direct and control its policies and practices.

5. The record fails to establish that respondent O'Neil J. Nichols has at any time participated in the formulation, direction or control of the corporation's policies and practices, and the complaint must therefore be dismissed as to him. The term respondents, as used hereinafter, will not include respondent Nichols nor respondent Green.

6. Respondents are engaged in the business of soliciting the listing for sale and advertising of business properties. The businesses involved are usually small, including bakeries, grocery stores, restaurants, garages, shoe repair shops, etc. In conducting their business, respondents send many pieces of advertising and promotional literature to prospective purchasers of their services who reside in

the states of the United States other than Illinois, such material usually being sent through the United States mails. Signed contracts and checks covering payments for respondents' services are constantly being received by respondents from such purchasers, or from respondents' representatives who have obtained such written instruments from purchasers. Respondents are thus engaged in extensive commercial intercourse in commerce, as "commerce" is defined in the Federal Trade Commission Act.

7. Upon receipt by respondents from a prospect of the return postal card supplied by respondents, one of their traveling solicitors or salesmen calls upon the prospect and undertakes to sell him respondents' services. If the solicitor is successful he collects from the customer or subscriber a substantial amount of money as a listing fee or service fee. The solicitors are supplied by respondents with identification cards, contract forms, and various pieces of promotional literature. The amount of the listing fee is always substantial, ranging from possibly \$100.00 to \$1,000.00 or even more, depending largely upon the amount agreed upon by the subscriber and the solicitor as the "asking" price for the property. Along with the payment of the listing fee the subscriber signs a form of printed contract.

8. There is uncontradicted testimony from some nineteen witnesses residing in various places in four states that in obtaining contracts and listing fees from them respondents' solicitors have made one or more of the following representations: (1) that respondents have available prospective buyers who are interested in the purchase of the specific properties sought to be listed with respondents for sale; (2) that the property would be sold within a short period of time as a result of respondents' efforts; (3) that respondents finance or assist in financing the purchase of properties; (4) that respondents assume all risk or obligation in connection with the sale of properties listed with them; (5) that the listing or service fee will be refunded to the property owner if the property is not sold within a designated period of time; (6) that the properties listed with them will be nationally advertised in newspapers and periodicals; (7) that over one thousand real estate brokers are affiliated or associated with respondents; and (8) that respondents' services, in all or most instances, result in the sale of listed properties.

9. These representations were false and misleading. While respondents maintain card indexes and files indicating parties who may be interested in purchasing certain types of businesses, respondents do not have available prospective purchasers for any specific property. Properties listed with respondents usually are not

sold within a short period of time or at all; actually, it is only in rare instances that properties are sold as a result of respondents' efforts. Respondents do not finance or assist in financing the purchase of property; in fact, respondents have no facilities whatever for that purpose. Nor is all risk or obligation in connection with the sale of properties assumed by respondents. On the contrary, as shown above, the property owner is required to pay a substantial amount as a listing or service fee. Only in very rare instances has this fee has been refunded by respondents.

10. Many of the properties listed with respondents are not advertised in trade magazines or in any other periodical. The only newspaper advertising furnished by respondents for many of the properties listed with them consists of a four to ten line insertion in one or two metropolitan newspapers. Such advertising is not national in scope since the newspapers are not read generally outside of the areas in which they are published. The brokers with which respondents claim to be affiliated or associated are not bound by contract or agreement with respondents to perform any services on behalf of respondents' customers. These brokers are connected with respondents only to the extent that they have indicated a desire to receive for their own use information concerning properties listed with respondents. The respondents' principal contact with these brokers is maintained by disseminating to them bulletins describing various types of listed properties. Respondents have no accurate or reliable means of determining what use, if any, is made of this information nor of determining how many of the firms to which the information is sent are still engaged in the brokerage business. These brokers are not affiliated or associated with respondents for the purpose of securing buyer prospects for properties owned by respondents' customers or for any other purpose, nor are they part of respondents' organization.

11. The use by respondents of the representations herein found to be false and misleading has the tendency and capacity to mislead and deceive a substantial portion of the public into entering into contracts with respondents and paying over to them substantial sums of money. Respondents' acts and practices are therefore to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act. The proceeding is in the public interest.

ORDER

It is ordered, That respondent, Nichols & Associates, Inc., a corporation, and its officers, and respondents, Paul J. Damon and

Richard W. Scott, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the solicitation of the listing for sale and advertising of business properties or other properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That respondents have available prospective buyers who are interested in the purchase of specific properties;
2. That property will be sold through the efforts of respondents;
3. That respondents finance or assist in financing the purchase of property;
4. That all risk or obligation in connection with the advertising and sale of listed properties is assumed by respondents;
5. That the listing fee or any other amount paid by the property owner will be refunded, unless refunds are in fact made by respondents in strict accordance with such representation;
6. That respondents will advertise listed property on a nationwide scale in newspapers and periodicals;
7. That a thousand or any other large number of real estate brokers are affiliated or associated with respondents in the sale of property;
8. That, except in rare instances, respondents' services result in the sale of property listed with them.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent O'Niel J. Nichols.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

The complaint in this matter charges respondents with violation of Section 5 of the Federal Trade Commission Act. Counsel supporting the complaint have appealed from the hearing examiner's rulings dismissing two of the allegations of the complaint and from the findings and conclusions on which these rulings were based.

The first question raised is with respect to the hearing examiner's ruling that the evidence fails to sustain the charge that respondents have falsely represented that property listed with them would be nationally advertised in newspapers and periodicals. Although the hearing examiner was apparently of the opinion that respondents had represented that all property listed with them would be advertised nationally through such media, he concluded that the manner in which properties are usually advertised by respondents can probably be regarded as national advertising.

Respondents have represented in advertising and promotional material and in literature furnished their salesmen that they will advertise a customer's property for sale through "Newspapers in Every State" and that they will secure "nationwide coverage" through "directories, newspapers, trade magazines, direct mail, the Wall Street Journal and our Associated Offices of which we have over a thousand." Purchasers of respondents' services have testified that such claims have also been made orally by respondents' salesmen.

The record discloses that respondents rarely, if ever, advertise the property of any customer on what might be considered a nationwide scale. It appears that while respondents have on occasion advertised in the Wall Street Journal, their use of this publication has been confined to the promotion of only the larger properties which they have contracted to handle. The smaller properties listed with respondents are not advertised in any of the nationally known business or financial journals or in any other periodical. The newspaper advertising of such a property consists merely of a four to ten line insertion in one or perhaps two metropolitan newspapers. As we pointed out in a recent decision involving a similar factual situation, such advertising cannot be considered to be national in scope. In the matter of *Trans-Continental Clearing House, Inc.*, Docket 7146. It is our opinion, therefore, that the hearing examiner erred in dismissing the aforementioned charge.

Counsel supporting the complaint also contend that the hearing examiner erred in dismissing the charge that respondents have misrepresented that they have over a thousand real estate brokers affiliated or associated with them. In this connection, respondents have represented through use of such claims as "Associated Offices over the Country" and "Over 1,000 Associated Offices Cover the Country," that Nichols & Associates, Inc., is a nationwide brokerage organization. Their salesmen have also represented that respondents have a "brokerage chain" and "over eleven hundred different outlets."

It is believed that such representations may well lead a customer or prospective customer to believe that by signing a contract with respondents he would thereby acquire the services of an organization composed of a large number of brokers, each of which would actively endeavor to obtain a buyer for the property. The record discloses, however, that the so-called "Associates" of Nichols & Associates, Inc., are not bound in any manner by the contract between respondents and the property owner, nor are they bound by contract with respondents to perform any services on behalf of the property owner. These brokers have no interest whatsoever in respondents'

Order

56 F.T.C.

contractual obligations to promote the sale of property nor have they united or joined together with respondents for any particular purpose. They are independent brokers who have merely indicated a desire to receive for their own use information concerning properties which respondents have contracted to advertise. It is apparent from the testimony of several witnesses that respondents' contact with these brokers is maintained in such a manner that they have no reliable means of determining whether all of them are currently engaged in the brokerage business. For the foregoing reasons, we are of the opinion that the representations that respondents are affiliated or associated with a large number of brokers have the capacity and tendency to mislead and deceive customers and prospective customers as to the value of the advertising and promotional services offered by respondents.

The hearing examiner has also failed to make a specific finding with respect to the charge that respondents have falsely represented that their services, in all or most instances, result in the sale of properties listed with them. This allegation is fully sustained by the evidence and a ruling to that effect should have been included in the initial decision.

The appeal of counsel supporting the complaint is granted and the initial decision will be modified to conform with this opinion.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision; and the Commission having rendered its decision granting the appeal and directing modification of the initial decision:

It is ordered, That paragraph 8 of the initial decision be modified by adding thereto the following:

(6) that the properties listed with them will be nationally advertised in newspapers and periodicals; (7) that over one thousand real estate brokers are affiliated or associated with respondents; and (8) that respondents' services, in all or most instances, result in the sale of listed properties.

It is further ordered, That paragraph 10 of the initial decision be modified to read as follows:

10. Many of the properties listed with respondents are not advertised in trade magazines or in any other periodical. The only newspaper advertising furnished by respondents for many of the properties listed with them consists of a four to ten line insertion in one or two metropolitan newspapers. Such advertising is not national in scope since the newspapers are not read generally outside

of the areas in which they are published. The brokers with which respondents claim to be affiliated or associated are not bound by contract or agreement with respondents to perform any services on behalf of respondents' customers. These brokers are connected with respondents only to the extent that they have indicated a desire to receive for their own use information concerning properties listed with respondents. The respondents' principal contact with these brokers is maintained by disseminating to them bulletins describing various types of listed properties. Respondents have no accurate or reliable means of determining what use, if any, is made of this information nor of determining how many of the firms to which the information is sent are still engaged in the brokerage business. These brokers are not affiliated or associated with respondents for the purpose of securing buyer prospects for properties owned by respondents' customers or for any other purpose, nor are they part of respondents' organization.

It is further ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondent, Nichols & Associates, Inc., a corporation, and its officers, and respondents, Paul J. Damon and Richard W. Scott, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the solicitation of the listing for sale and advertising of business properties or other properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That respondents have available prospective buyers who are interested in the purchase of specific properties;
2. That property will be sold through the efforts of respondents;
3. That respondents finance or assist in financing the purchase of property;
4. That all risk or obligation in connection with the advertising and sale of listed properties is assumed by respondents;
5. That the listing fee or any other amount paid by the property owner will be refunded, unless refunds are in fact made by respondents in strict accordance with such representation;
6. That respondents will advertise listed property on a nationwide scale in newspapers and periodicals;
7. That a thousand or any other large number of real estate brokers are affiliated or associated with respondents in the sale of property;
8. That, except in rare instances, respondents' services result in the sale of property listed with them.

Decision

56 F.T.C.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent O'Niel J. Nichols.

It is further ordered, That the hearing examiner's initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents, Nichols & Associates, Inc., Paul J. Damon and Richard W. Scott, 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