

Certification of Record

IN THE MATTER OF

NED R. BASKIN DOING BUSINESS AS
HOLLYWOOD FILM STUDIOSMODIFIED ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 4902. Complaint, Feb. 8, 1943—Decision, May 10, 1968*

Order modifying a cease and desist order dated January 26, 1951, 47 F.T.C. 913, which charged a Hollywood, Calif., mail-order seller of photo enlargements with certain false advertising practices by adding prohibitions against deceptively representing that customers will receive color enlargements without added cost, will receive two enlargements forthwith and unconditionally, and that cash will be paid for using customer photos in advertising.

CERTIFICATION OF RECORD,
REPORT, AND RECOMMENDATION

OCTOBER 17, 1967

This is a report, recommendation and certification of the record pursuant to order of the Federal Trade Commission dated December 30, 1966 [70 F.T.C. 1851], made in accordance with Section 3.28(b)(3) of the Commission's Rules of Practice effective August 1, 1963,¹ and referred to the undersigned on July 24, 1967. It deals with the question of whether or not the Commission's order to cease and desist, issued against respondent January 26, 1951² should be reopened and modified in the manner proposed.

This proceeding to reopen was commenced September 9, 1966, by the Commission issuing its Show Cause Order as to why the original proceeding should not be reopened and the outstanding order modified by adding certain paragraphs that were set forth in the order of Sep-

¹ Under rules effective July 1, 1967, 32 F.R. 8456, the pertinent section is § 3.72(b)(3). The rule § 3.28(b)(3) reads as follows:

"Whenever an order to show cause or petition to reopen is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and answer thereto, or it may serve upon the parties a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by a hearing examiner. Unless otherwise ordered and insofar as practicable, hearings before a hearing examiner to receive evidence shall be conducted in accordance with Subparts C, D, E and F of these rules. Upon conclusion of hearings before a hearing examiner, the record and the hearing examiner's recommendations shall be certified to the Commission for final disposition of the matter."

² 47 F.T.C. 913.

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tember 9, 1966. On October 28, 1966 [70 F.T.C. 1131], the Commission issued its order reopening the original proceeding and modifying the order to cease and desist in the respects indicated in that order for it appeared at the time that respondent had not responded to the Show Cause Order within the time specified. Later, the Commission determined from a telegram from respondent dated November 9, 1966, that a response had, in fact, been made on September 22, 1966. The Commission, accordingly, treated respondent's telegram as a request to reconsider its October 23, 1966, order and it thereafter vacated and set aside that order. Complaint counsel then filed his answer on December 7, 1966. The Commission by its December 30, 1966 [70 F.T.C. 1851], order determined that hearings should be held for the purpose of receiving evidence in support of or in opposition to the question of whether or not the public interest requires that the Commission reopen its original proceeding and modify the issued order to cease and desist to read the same as the order proposed in the Commission's Show Cause Order of September 9, 1966.

The Hearings

Hearings were held at Los Angeles, California, on August 10 and 11, 1967. Sheldon Feldman acted as counsel supporting the complaint and respondent Ned R. Baskin appeared on his own behalf, without counsel. In addition to respondent, complaint counsel called three witnesses to testify: Robert D. Mott (Tr. 125-146)³ merchandising manager of the Los Angeles Better Business Bureau; Frank A. Orr, United States postal inspector (Tr. 147-154); and Don Mark Hicks, advertising representative for the T.V. Guide magazine (Tr. 157-197). Twenty-seven exhibits were marked on behalf of complaint counsel, and two on behalf of respondent.

At the conclusion of the hearing on August 11, 1967, both sides were given until September 18, 1967, to prepare and exchange proposed findings, conclusions and recommendations and until September 25, 1967, to serve and file with the hearing examiner such proposals and counterproposals (Tr. 217-220).

Complaint counsel submitted his proposals on September 13, 1967. Respondent filed counterproposals in the form of a letter dated September 20, 1967, with two testimonial letters as enclosures. All pro-

³ References are:

Tr.=Transcript page

CX=Commission Exhibit

RX=Respondent's Exhibit

CPF=Findings proposed by counsel supporting complaint

RPF=Findings proposed by respondent.

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posals not adopted in terms or in substance are denied as irrelevant, immaterial, or erroneous. At the conclusion of the case for complaint counsel a motion to dismiss was made and argued (Tr. 203-10). Decision was then reserved (Tr. 210). The motion is now denied.

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The record herein consists of 220 pages of stenographic transcript attested by Kenneth R. Feick, the shorthand reporter, and twenty-nine exhibits bound in accordance with the practice of the Records Section of the Commission. Such record as corrected by order of the hearing examiner dated September 14, 1967, and Proposed Findings are hereby certified to the Commission.

Basis for Recommendation

This report, recommendation and certification of the record is based on the entire record and, while principal items of evidence relied upon are cited, no effort has been made to cite all references possibly applicable. Consideration also has been given to the demeanor of the witnesses in determining their credibility. The following findings of fact, conclusions, and recommendations are made accordingly:

Findings of Fact

1. Respondent, Ned R. Baskin, resides at 5847 North Corteen Place, North Hollywood, California, and conducts his business as a photographer at 7021 Santa Monica Boulevard, Los Angeles, California (Tr. 5).

2. Respondent, as sole proprietor, does business under the name Hollywood Film Studios (Tr. 5, 198), but in some current advertisements he uses the name Hollywood Enlargements and the address 7471 Melrose Avenue, Hollywood, California, for the purpose of having certain mail delivered to the Dane Advertising Agency under an arrangement whereby the agency secures 40 cents for every order in response to advertising it places. This permits the agency to check the amount of fees owed to it (Tr. 198-200).

3. Respondent makes enlargements of photographs or negatives, has a hand-coloring service to tint black and white enlargements, and an arrangement to send color photographs to a photofinishing laboratory that specializes in color (Tr. 6).

4. The principal source of respondent's income is mail-order business (Tr. 6). He uses direct-mail solicitation and advertising in newspapers

and magazines (Tr. 6-7). Magazines are now his principal medium of advertising, but he uses some newspapers (Tr. 8). The magazines include movie magazines, McFadden Publications and Ideal Publications (Tr. 7). At one time, he used other media, including matchbook covers and radio (Tr. 7-8).

5. Respondent has been in the mail-order business for approximately 30 years (Tr. 6). Except for two periods, respondent has written the advertising copy or has overseen the writing of it, and in both cases has had authority to change the advertising copy (Tr. 9). The first such period was from 1948 to 1959, when he left the business to work in Chicago (Tr. 23-24). The second period was from December 1964 until September 10, 1965 (CX 10B, Tr. 9, 54), when Albert L. Wolins owned the business and gave full authority to his own advertising agency (Tr. 9).

6. In December 1964, respondent was adjudged a bankrupt and his business and equipment was purchased by Albert L. Wolins (Tr. 9-10). The business was later repurchased by respondent, who had remained as manager during Wolins' ownership. Wolins still owns the equipment, uses it under an arrangement to pay for it in installments. He has been unable to keep up promised payments (Tr. 11-12). Respondent is now responsible for formulating the acts and practices of the business (Tr. 11-12).

7. Respondent employs 10 persons in the business and receives an approximate average of 1,500 responses to his advertisements each week (Tr. 12-13). The responses consist of one or two pictures and ten cents or twenty cents or no money at all (Tr. 63). The pictures may be negatives, color slides or positives (Tr. 13-14).

8. Respondent was recently visited by an attorney named R. Keith Van Hoff and had previously been visited by Gerald Rosenblatt, both from the Federal Trade Commission (Tr. 14-15, 38-39). He was also visited by complaint counsel during the week preceding the hearing and was shown documents relating to a previous compliance hearing in federal court (Tr. 15, 34).

9. During the period from January 1951 to November 1951 respondent and his attorney William A. Romanek had correspondence with the Division of Compliance of the Federal Trade Commission. The letters and other documents which passed between that division and respondent or his counsel are contained in Commission Exhibit 1. (See Tr. 17-34. CX 1 was received solely for the purpose of showing the correspondence and other documents that were passed back and forth and it has not been considered in making this recommendation for any other purpose.)

10. On July 5, 1957, the United States District Court for the Northern District of Illinois Eastern Division issued an order holding respondent not in compliance with the cease and desist order of the Commission (CX 2B-F; see also Tr. 36-38 for limitation on receipt of exhibit and respondent's position regarding the same).

11. During 1965, respondent supplied Gerald Rosenblatt of the Federal Trade Commission with copies of literature utilized by respondent at about that time. These copies were an envelope and a business reply card (CX 3A-C); a form letter from Hollywood Studios (CX 4A-B); a rush order blank, a self-addressed envelope, and a card (CX 5A-C); and a form letter (CX 6). Respondent also supplied Mr. Rosenblatt with an advertisement (CX 7C-D; Tr. 44-48). This advertisement was used at the time and was placed by Mr. Wolins' agency when he owned the business (Tr. 46). The advertisement appeared to be respondent's advertising, but respondent could not identify the magazine in which it appeared (Tr. 49; see explanation of hearing examiner at Tr. 54).

12. Respondent also identified a card that he had used in his business in the past but was not currently using (CX 8; Tr. 48).

13. On August 27, 1965, respondent sent to complaint counsel a letter regarding compliance in which he enclosed a notice of bulk transfer from Mr. Wolins to himself (CX 10 A-B; Tr. 55). Respondent testified, however, that the statement he had made in his letter—"We are using the same advertising we have used the past 10 years"—was incorrect (Tr. 55-57). The advertising is changed and has different pictures (Tr. 57).

14. Respondent supplied Commission's attorney Keith Van Hoff with a current advertisement (CX 11), a form letter (CX 12 A-B), three form cards (CX 13 A-F), and a rush order blank (CX 14). These are currently in use (Tr. 60-61). When a customer responds to the advertisement (CX 11) he is sent routinely a form letter (CX 12 A-B) and also a business reply card (CX 13 A-F without the handwriting; Tr. 57-67). Sometimes the customer also receives another form letter (CX 14; Tr. 68). If the picture cannot be made into a good enlargement, as determined later by the laboratory man, a form (CX 5C) is sent to the customer (Tr. 69-70).

15. Respondent admitted that he had received a few complaints expressing surprise at the offer sent to sell coloring services (Tr. 71-72) and that he had used the card (CX 8) in the distant past (Tr. 72). It was his recollection that the card had not been used "in many many years" (Tr. 72). He agreed that the card (CX 8) could be used in connection with his current advertising (CX 11; Tr. 74-75). He argued that there was no reason to incorporate the information on Commission

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Exhibit 8 into Commission Exhibit 11 for a fraction of one percent of the viewers that possibly don't have a third grade education and do not understand the advertisement (Tr. 75). He added that "Lucky Strike don't tell you on television that if you buy their cigarettes, it may cause cancer. They just tell you it tastes good" (Tr. 75).

16. A bound volume of correspondence selected from the Commission's consumer complaint file by complaint counsel (CX 15) covering the period March 5, 1951, through May 24, 1967, was received, with respondent's acquiescence, for the limited purpose of indicating the dates on which respondent's advertisements and other forms were used and not for the truth of the statements of facts made by the complainants (Tr. 91, 92).

17. Respondent estimated that about 50 percent of the persons who responded to his advertisements did not use the business reply card (CX 13 A-F) and that about 30 percent returned the cards marked "Do not color" (Tr. 93). There is presently a block or square on Commission Exhibit 13 A-F for the customer to check to permit respondent on payment of \$100 each to use the pictures submitted, for advertising (CX 13 A-F; Tr. 92). A number of customers check this block. A number of customers check this block, although they must write in "Do not Color." However, respondent does not feel it is necessary to put a similar block or square for the customers to check if they do not desire to have the photographs hand colored (Tr. 93). If customers do not send in the card with their pictures, they automatically get a black and white enlargement, usually within two weeks, although it could be thirty days (Tr. 94-95). Respondent fell behind on one occasion when a camera breakdown occurred (Tr. 95). If the consumer moves there also may be further delay (Tr. 95).

18. Pictures entrusted to respondent are often irreplaceable (Tr. 95-96). Respondent offers two free enlargements to compete with the hundreds of thousands of drugstores (Tr. 97). Respondent claims that he gives to customers precisely what he advertises (Tr. 97) and, in return for the free enlargements, all he asks is the privilege of sending the customer the information regarding the hand-coloring service that he offers (Tr. 98-99). He does not feel it is necessary to show in his advertisement how much the coloring service will cost (Tr. 98).

19. Respondent does not send out pictures that have been hand colored unless the customer authorizes it in writing on a form like Commission Exhibit 13 A-F, because of Post Office regulations (Tr. 94). He sends out two, three, or four hundred c.o.d. packages with hand-colored enlargements per week at his peak (Tr. 100), and an average of 200 (Tr. 101). The price is \$2.50 per picture (Tr. 100). About 50

to 100 people pay in advance to save c.o.d. charges (Tr. 102). About 10 percent of the persons who are sent hand-colored pictures c.o.d. reject them (Tr. 103), and respondent recalled that rejections had at times run as high as 20 percent for various reasons (Tr. 103-04). In case of a rejection of a c.o.d., respondent returns the customer's original photographs and offers to sell the already produced hand-colored enlargements at a reduced rate (RX 1; Tr. 105-16).

20. Respondent testified that he did not intend to deceive his customers because a satisfied customer could be expected to return for many, many years (Tr. 105). He made changes in his advertisements because of the objections of the Division of Compliance of the Federal Trade Commission (Tr. 104).

21. The cost to respondent of making the "free" enlargements exceeds the handling charge in each case and where a negative has to be made the cost is greater than when the customer submits a negative (Tr. 107-12).

22. Respondent's literature (CX 12 B and also CX 15) has photographs of two children with a statement that they received \$100 each. The business reply card (CX 13 A-F) contains a box that, when checked, grants permission to respondent to use the photographs sent by the customer for advertising if \$100 is paid. The same photographs have appeared for many years and no one since that time has ever been paid \$100 (Tr. 113-15).

23. Respondent's reply cards (like CX 13 A-F) contain a box to indicate by a check what color of free frame is desired. Respondent produced 39 cards where colored photographs were not ordered showing the use customers made of this card. Of 39 such cards 15, although not ordering hand-colored photographs, checked the box. One card had written in handwriting "No Color, No Frames" (RX 2; Tr. 118-22).

24. The Los Angeles Better Business Bureau evaluates complaints received and processes them by asking the company complained about for an explanation. Then, the Bureau reports to complainant (Tr. 126, 130-31). It also receives inquiries from other better business bureaus (Tr. 131). In the past two and one-half years, the Los Angeles Better Business Bureau received between 30 and 35 complaints, which are more than the usual number in cases involving mail-order houses, that concerned the Hollywood Film Studios (Tr. 127); and it also received some inquiries from other bureaus (Tr. 131). Primarily, these came from out of the state (Tr. 126). The pattern of the complaints received by the Bureau was: a response to an advertisement for a specific service, a notification from the company complained about

of an additional offer of a service, a failure to respond to that offer, and a failure to receive the initial service (Tr. 127, 129-30, 133-34). The possibility exists that some of those complaints were because of the consumers' failure to state their names (Tr. 138-39) or because the consumers moved (Tr. 140). Some may also have been because of delay in the processing (Tr. 137-38). In the most recent case received by the Better Business Bureau, the complaint was concerning the quality of the color and the frame (Tr. 144-45). Although the witness for the Better Business Bureau originally testified that he uniformly received no response from the respondent (Tr. 134), later in his testimony, after looking at his file, he stated that it had received unsigned responses (Tr. 136). He estimated that, on the basis of cases had in the past, the complaints received constituted only one or two percent of the persons who had complaints to make (Tr. 128). Although he stated that the pattern did not vary in the case of Hollywood Film Studios (Tr. 133-34), the latest complaint differed from the pattern described in that it related to bad results (Tr. 144). Respondent in his case-in-chief explained that if a poor picture was sent to him, he could not improve it, and he used his form letter Commission Exhibit 6 to explain that to the customer (Tr. 211).

25. The United States Post Office Department has received 229 complaints about Hollywood Film Studios since January 1962 (Tr. 148). There is a pattern to these complaints (Tr. 148). The complainants thought that they were going to get free colored enlargements and free frames for the 20 cents they sent or that they were going to receive \$100 for use of the pictures they sent in (Tr. 149). Other complaints were that the colors were not in oils; that the frames were not the same as indicated in the advertising; or that they were not able to get back their negatives or to get the free enlargements promised by the advertisement (Tr. 149). Mr. Frank A. Orr, the experienced witness from the Post Office Department, estimated that there were about a hundred complaints that could be located, if all leads were developed, for every unsolicited complaint received (Tr. 151). The Post Office Department on June 12, 1963, transmitted to the Federal Trade Commission a letter of complaint, which included enclosures (Tr. 151-52; CX 16 A-G). This letter was received in evidence with the acquiescence of respondent (Tr. 153). Mr. Orr on questioning by respondent stated that he was sure respondent had authorization cards on file for all c.o.d. orders (Tr. 154) and that third-class mail was not forwarded but destroyed in the absence of instructions (Tr. 153).

26. Respondent used T.V. Guide magazine on one occasion. It is a national publication with 79 regional editions in every major market

where there are television stations with different programming (Tr. 157-59). A regional edition is circulated in the area covering the signal strength of the major television stations located there. Advertising is sold both nationally and by edition (Tr. 159-60). Similarly, there are two distinct sections of the book—one, the national editorial section and the other the local editorial and local programming section (Tr. 162).

27. Respondent through his advertising agency purchased space in four different regional editions of T.V. Guide (CX 17 A-D; Tr. 167-68). The same one-eighth of a page advertisement (CX 18), with the exception of a department or key number indicating the location of the advertisement, was inserted in the January 21st issue of T.V. Guide in the San Diego, California, Georgia, Iowa, and New York Metropolitan Area editions (Tr. 189-92; CX 17 A-D, CX 18). The total cost of the advertising was \$823 (Tr. 192). The cost of the one-eighth of a page insertion differed in the New York area from the other localities owing to the size of the circulation (Tr. 193-94).

28. T.V. Guide magazine has a regular procedure of handling complaints received from persons who have responded to advertisements (Tr. 172). Complaints first go to the director of advertising services at headquarters for the magazine (Tr. 171). He then forwards the complaint to the T.V. Guide office involved with instructions to check it out and to get a satisfactory answer to complainant. At the same time, the director of advertising acknowledges the complaint. The correspondence is retained in the normal course until the complaint is satisfied (Tr. 172). About 20 complaints regarding respondent were referred to the attention of T.V. Guide's Los Angeles representative, Don Mark Hicks (Tr. 175). Commission Exhibits 19-24 are correspondence forwarded to Mr. Hicks pursuant to the procedure above outlined (Tr. 172). These complaints were received in evidence as records kept by T.V. Guide in the regular course of business, not for the truth of the facts stated by the persons complaining, but for the fact that complaints had been made (Tr. 177-80). Following receipt of the documents, Mr. Hicks took up the matter with respondent and with his advertising agency. Mr. Baskin told Mr. Hicks that he had had equipment failure and that he would explain it to the complainants (Tr. 182). The T.V. Guide representative never received a copy of any letter of explanation and on one occasion he got a second complaint from the same complainant (Tr. 176-77). It was brought out by respondent on cross-examination that he had told the T.V. Guide representative his camera had to be sent to the manufacturer in Minneapolis and that it would take 30 days to get it back (Tr. 182). He also told the

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representative about the volume of response and the length of time it would take to get the material out (Tr. 183). Respondent had invited Mr. Hicks, the T.V. Guide representative, to visit the plant, but although Mr. Hicks said he would try to come, he never did (Tr. 183). He explained that he did not believe anything would be accomplished by such a visit (Tr. 185) and that the breakdown of the equipment had no bearing on the complaints received (Tr. 184, 186). This was respondent's first advertisement in T.V. Guide (Tr. 186, 211), but T.V. Guide was aware that respondent was advertising in McCall's magazine (Tr. 187). An advertisement in the McCall's July 1967 issue, which was substantially identical to Commission Exhibit 11, was identified by respondent and received in evidence (CX 26; Tr. 198). The representative for T.V. Guide recognized that it was possible, in cases where only one letter was received, that the person complaining later might have received all he was supposed to receive (Tr. 189). But Mr. Hicks could not estimate what response was to be expected (Tr. 195-96).

29. In his case-in-chief respondent testified that while he had had complaints from other publications, he had used such other publications, leaders in their fields, for over 27 years without ever having an experience such as the one he had with T.V. Guide (Tr. 211-12). When a communication from the National Better Business Bureau to the Federal Trade Commission (CX 27) was drawn to his attention, the respondent testified that he attempted to satisfy complainants by writing to them in handwriting and did not have time to send copies to the T.V. Guide and to the better business bureaus, nor did he desire to incur the expense of hiring an additional typist to take care of it (Tr. 215-16).

30. Respondent's advertising and the form letters and cards, which he has used during the past several years, have, except for changes not important here, followed the same pattern. (Compare CXs 3-7 E-D, inclusive, with CXs 11-14, inclusive, and CX 18. Compare Tr. 73, lines 9-10 with lines 14-19. See also CX 15 received for limited purpose; Tr. 87, lines 11-20; and CPF pp. 11-12.)

31. The basic plan through which respondent seeks to obtain responses is very similar to the plan found to be unlawful in the original proceeding. (See 47 F.T.C. 915-21, 923-26.) References to motion picture stars have been eliminated, but the new scheme of holding out possible use of submitted photographs for advertising at a fee of \$100 has been added (CXs 12 A-B, 13 A-F).

32. Respondent's recent advertising and the form letters and cards, which he used, are misleading in the following respects:

(a) The advertisement—that is the initial contact with the prospective customer—is calculated to lead the customer to believe that he will obtain color enlargements free, although read literally the advertisement does not so state (CXs 11, 18). It states in large print “GET 2 FREE ENLARGEMENTS of Your Favorite Photos, 5 x 7” Size.” Then it asks for two color or black and white photos or snapshots and says, “State color of hair, eyes, clothes, for prompt information for finishing, in color with FREE frames.” Respondent states that this means: you are to state this if you desire information. Readers, however, may well interpret it to mean: you are to give this information to us to use in finishing the free enlargements. The fact that color snapshots are solicited as well as black and white strengthens this impression.

(b) The form letter that respondent sends to the customer is also calculated to mislead. There is no mention at all of a charge on the face of the letter (CX 12 A). It merely asks for the return of the reply card enclosed and states, “If you do not wish your enlargements finished in color, mark card Do Not Color.” On the face of the letter in a handwritten postscript, respondent refers to the reverse side, to “a few pictures selected from our customers. These people received \$100 for the use of their picture. Your picture may also be selected, so be sure to return the enclosed card.” This “p.s.” directs the customer's attention away from the first paragraph of the reverse side (CX 12 B). Even this paragraph, however, does not state the charges, only “at very little cost” and “for the small charge we make.” The size of type used by the respondent captures the customer's interest and directs his attention to the photographs and testimonials on the reverse side.

(c) The form of business reply card (CX 13 A-F) enclosed with the form letter (CX 12 A-B) is likewise calculated to direct the customer's attention away from the fact that he is authorizing a charge for \$2.60. In a box at the top of the card, in large print with ample space between lines, the statement appears: “YOUR PICTURE IS BEING CONSIDERED TO BE USED IN OUR ADVERTISEMENTS. YOU WILL RECEIVE \$100 IF YOUR PICTURE IS SELECTED. CHECK BELOW AND RETURN.” At the bottom of the card there is a box that if checked gives respondent permission to use the picture for \$11. On the left in large type appears the word “FREE” followed by the headings “Frames with Colored Enlargements” and “Check Color You Wish.” Then, follows a statement in smaller type that describes the frames, and below this are two boxes

to be checked located opposite frame colors. All of these, plus the statement in an arrow directing attention to the file number, distract the customer's attention from the real reason for the card, which is the statement: "I Will Be Glad to Help with the Few Cents c.o.d. Fees as Well as \$2.60 Which Includes Artist's Labor for Each Oil Painting, Sent to me on Five Day Approval." This sentence in turn appears after another sentence which reads: "I Have Checked the Free Frame You Are to Include for the 'Deluxe' 5 x 7 Inch Enlargements That You Are Having Your Artist Hand Color in Natural Oil Colors." Thus, attention is directed away from the charge and toward the very dubious possibility of a payment of \$100 for use of the photographs submitted and toward the free frames.

33. Respondent had a number of complaints drawn to his attention, and at one time he had a card prepared to explain his advertisement. This card was to be used when complaints were received (CX 8). Thus, respondent knew that the literature he was using was being misinterpreted by prospective customers. Moreover, in a number of cases, prospective customers checked the free frame option when they did not order hand-colored photographs, so respondent could see that such customers had misunderstood the offer (Tr. 117-19). Respondent's apparent reasoning may be gleaned from two statements he made during questioning by the Hearing Examiner. Respondent, after making a critical statement of Lucky Strike advertisements, said, "But, as writing my advertising, I aim it at the average intelligence, which is the masses, and actual figures put out by mail order people, show the masses is less than fifth grade intelligence." (Tr. 87.) In the other passage, after stating that he must give a bargain to get people to send their pictures all the way to California when they could go to a drugstore or supermarket, he claimed that his advertisement was clear and that people got what was advertised. Then he said " * * * and that's the reason we do the business that we do, because there's certainly no shortage of drugstores across the United States and Canada" (Tr. 111-12). The impression created was that he was forced to use the type of advertising he did or he would not be able to get people to send their pictures to him rather than to the local drugstore and that anyone of fifth grade intelligence could understand the nature of his offer, so the fact that anyone else might misunderstand was unimportant.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondent and the acts and practices herein described. Respondent's advertise-

ments and the literature used in connection therewith have been false and misleading as those terms are used in the Federal Trade Commission Act.

2. The changes in respondent's practices made following the decision of the Federal Trade Commission issued January 26, 1951, have not been sufficient to remedy the misleading character of his practices.

3. Respondent's current advertising and the current literature used in connection therewith are false and misleading within the meaning of Section 5 of the Federal Trade Commission Act.⁴

4. It is immaterial that respondent's business is not a profitable one or that on critical analysis his advertising supplies what is specifically offered, because the advertising and other literature used in connection therewith are misleading in character.

5. In order to prevent the misleading nature of respondent's practices it is necessary and in the public interest that the outstanding order of the Federal Trade Commission dated January 26, 1951, be reopened and modified to provide more specifically against the misleading practices that are continuing.

6. There has been no competent evidence offered at the current hearings sufficient to establish the necessity for clauses (b) and (c) of paragraph 1 of the further order proposed in the Show Cause Order, dated September 9, 1966 (p. 5). Accordingly, such clauses should be deleted and paragraphs (a) and (d) combined.

7. It was contemplated by paragraph 4 of said further order proposed by the order to show cause (p. 6) that other misrepresentations be prohibited. Accordingly, the misrepresentation in the advertisements utilizing the name Hollywood Enlargements and the misrepresentation by respondent that photographs sent free by him were being considered for use in his advertisements should be specifically prohibited. Moreover, the business reply card sent by respondent is so susceptible of misconstruction in its present form that its use should be prohibited unless it is recast in a form that will no longer be misleading.

8. The following recommendations should be adopted:

Recommendations

It is recommended that:

(1) The Federal Trade Commission reopen the proceeding against respondent concluded by decision dated January 26, 1951 (47 F.T.C. 913) and issue the order set forth in the order to show cause, dated

⁴ 15 U.S.C. sec. 45.

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September 9, 1966, as in the public interest, with appropriate modification; and,

(2) The order as modified read as follows:

It is ordered, That the respondent, Ned R. Baskin, an individual trading under the name of Hollywood Film 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 plain or colored photographs, or enlargements thereof, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that any photograph or enlargement, colored, or black and white, framed or unframed, will be made and delivered for a stipulated price, unless such photograph or enlargement will in fact be made and delivered for the stipulated price without the imposition or attempted imposition of any condition not clearly disclosed in the representation.

(2) Representing, directly or by implication, that any offer is for a limited time only, when such offer is not in fact limited in point of time, but is made by respondent in the regular course of business.

(3) Using the words "free" or "given," or any other word or term expressly or impliedly importing a like meaning, in advertising, to designate, describe or refer to any article or merchandise which is not in fact a gift or gratuity or which is not given without requiring the purchase of other merchandise or the performance of some service inuring directly or indirectly to the benefit of the respondent.

(4) Using the name "Hollywood Film Studios," together with pictures of motion picture celebrities, on letterheads or in advertising matter; or otherwise representing that the respondent has any connection whatsoever with the motion picture industry.

It is further ordered, That respondent Ned R. Baskin, an individual doing business as Hollywood Film Studios, Hollywood Enlargements, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, furnishing, offering for sale, sale or distribution of photographs, photographic enlargements, photographic coloring or enlargement services, or any other products or services in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Offering to furnish any photograph or any enlargement of a picture, photograph, print, snapshot, negative, slide, color slide, or similar article, either free of cost or for any stated amount or compensation, unless the offered photograph or enlargement is in every instance furnished upon the request therefor, when accompanied by the stated amount or compensation, if any, without first sending to the requesting person any form of communication offering to sell respondent's coloring services or any other services.

(2) Offering to furnish a black and white photograph or enlargement of a picture, photograph, print, snapshot, negative, slide, color slide, or similar article, either free of cost or for any stated amount or compensation, unless in immediate conjunction with such offer, in letters of equal size and prominence, the disclosure is made that the offered photograph or enlargement is black and white.

(3) Requesting information for having any photograph, enlargement, or similar article colored, in any advertisement or in any form of communication, unless in each instance in which such request for information is made:

(a) There is clear and conspicuous disclosure that forthcoming is an offer to sell respondent's coloring services; and

(b) There is clear and conspicuous disclosure of the full amount of respondent's charge for such coloring services.

(4) Falsely stating that photographs submitted to respondent are being considered for use as advertisements and that a fee of \$100 each will be paid for those selected when such is not the case.

(5) Utilizing a business reply card for return by persons who have submitted a photograph or photographs for free enlargement unless such business reply card is recast to:

(a) Delete all reference to consideration of photographs for use in advertisements except a simple statement with a box to check as follows: "☐ If you pay me \$100.00 each you have my permission to use a copy of any of my pictures for your advertising."

(b) Delete all reference to free frames except the statement, "If you desire to authorize our charge of \$2.60 (or other amount) for hand-coloring service please check the color frame desired" preceded by boxes opposite the frame colors available.

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(c) Delete all other statements except the admonition to use the file number and blank for name and address.

(d) Add statements (all of which must be in type of equal size to the largest used and in as prominent a position as any other statement on the card) to the following effect:

(i) Return of this card signed by you is an agreement to pay \$2.60 (or other specified charges) for hand-coloring each photograph; and an agreement to pay the c.o.d. charges; and,

(ii) Identification of each photograph by enclosure or reference to file number.

(6) Misrepresenting in any manner the terms of any offer or the services provided by respondent.

It is further 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 this order.

OPINION OF THE COMMISSION

MAY 10, 1968

By MACINTYRE, *Commissioner*:

The Commission, on September 9, 1966, issued an order requiring respondent herein to show cause why this matter should not be reopened and the Commission's order to cease and desist issued against respondent on January 26, 1951 [47 F.T.C. 913], should not be amended in conformity with the terms set forth in the show cause order.¹ Thereafter respondent responded to such show cause order, and the Commission, in the circumstances and pursuant to its Rules of Practice, referred the matter to a hearing examiner for the purpose of receiving evidence in support of and in opposition to the question of whether or not the public interest requires that the Commission reopen this proceeding and the modification of the order to cease and desist in the manner indicated.

The hearing examiner, on October 17, 1967, after holding the hearings conducted pursuant to the Commission's direction, certified to the Commission the record in the matter, his report thereon and his recom-

¹ The order to cease and desist contained in the show cause order is reproduced in Appendix A, attached hereto. The first part of such order, up to the asterisks separating the two parts, is the original order to cease and desist. (See *In the Matter of Ned R. Baskin*, 47 F.T.C. 913, 928-929 (1951).) The second part of such order constitutes the proposed modification of the original order to cease and desist.

mendation. The examiner made express findings on the issues presented and he recommended that the Commission reopen the proceeding against respondent and issue an order as set forth in the show cause order with "appropriate modification" as in the public interest.

This matter is now before the Commission for its findings and conclusions on the basis of the hearings held and for an appropriate order in the light thereof.

The Commission issued the show cause order in this proceeding because it believed there was reasonable doubt that the language of the order to cease and desist would, as intended by the Commission, remedy all the misleading and deceptive advertising practices found to have been engaged in by the respondent. In particular, the Commission believed the order inadequate to prevent respondent from representing in an advertisement that it would furnish colored 5x7 enlargements for a nominal amount or no charge when, in fact, the purpose of such advertisement was to gain the opportunity to send sales literature to prospective customers to induce them to purchase respondent's photographic coloring and enlarging services.

The Commission therefore indicated in its show cause order that it would amend the order to cease and desist by adding provisions thereto which in part would require respondent to cease and desist from offering to furnish a photograph or enlargement unless he, in fact, furnishes the enlargement (or photo) upon the meeting by the customer of the terms of the initial offer and unless he returns simultaneously the negative, slide or photograph without the imposition or attempted imposition of any condition and without first sending to the requesting party a communication offering to sell respondent's coloring services. The provisions to be added would also include certain requirements as to disclosures in connection with the offering of a black and white photograph or enlargement and in connection with the request for information as to the supplying of coloring services. Finally, the new provisions would include a prohibition against misrepresenting in any manner the terms of any offer or services provided by respondent.²

Respondent engages in, and has engaged in, for many years, the business, which it conducts by mail order in interstate commerce, of making and selling enlargements of photographs (or negatives or slides) supplied by customers in response to his advertisements. Respondent's pattern of doing business has not changed in any basic manner from that used at the time of the original proceeding herein. His principal advertising representations are now, and have been through

² For the exact terms of the provisions to be added to the order to cease and desist under the show cause order, see Appendix A attached hereto.

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the intervening years, essentially the same as those previously considered. The changes are primarily in the details as to the offer made and do not go to the substance of the scheme.

Current advertising materials of the respondent were received into the record. These include a magazine advertisement (attached to the findings of fact as Attachment A), a form letter sent to the customer who responds to the advertisement (attached to the findings as Attachment B-1 and -2), and the business reply card (attached to the findings as Attachments C and D).

A typical magazine or periodical advertisement of the respondent, used at the present time, reads as follows:

Get 2 FREE ENLARGEMENTS of your favorite photos. 5x7" size. Send 2 color or black and white photos or snapshots (returned unharmed). State color of hair, eyes, clothes, for prompt information for finishing, in color with FREE frames. Enclose 20¢ for handling. Hollywood Enlargements, 7471 Melrose Avenue, Dept. 4069, Hollywood, California 90046. (CX 11.)

This advertisement states or implies that respondent will forthwith, upon receipt of photos or snapshots, supply free color enlargements upon the enclosure of 20 cents for handling and without any further conditions or consideration.³ The fact is, however, and the hearings clearly establish, that the offer is not available unconditionally and the enlargements will not be sent forthwith. The condition is that customers must first receive advertising literature essentially offering respondent's coloring services and seeking the return of a business reply card filled out by the customer. It is not until after this further solicitation that a customer will receive his enlargements. Respondent, although he appears to offer enlargements free and without further obligation, something in the nature of a get-acquainted offer, is in reality gaining the opportunity to sell his coloring services.

While the delay for further solicitation may seem to be only a temporary inconvenience to the customer, it is more than that. The opportunity which is thus obtained by respondent is used as the occasion to further mislead and deceive his customers. The pieces of advertising literature attached to the findings of fact themselves testify to the possibility of confusion and deception from their use. See the examiner's findings, pages 902-904 of his certification, and the discussion below. Moreover, the testimony taken shows that respondent's advertis-

³ While the ad instructs: "State color of hair, eyes, clothes, for prompt information for finishing, in color with FREE frames," this does not, on its face, purport to be a condition to the sending of the advertised enlargements, nor does it indicate delay in the receipt of the enlargements for the purpose of further solicitation. Moreover, even if this sentence can be construed as suggesting the condition to the furnishing of the advertised items, it is ambiguous and has the tendency to mislead and deceive. The representation as to furnishing colored photographs will be covered in the subsequent discussion.

ing is misleading and that it has the tendency and capacity to mislead and deceive.⁴

The deception here is not lessened by the fact that respondent eventually sends the enlargements as offered without further cost to the customer even where the customer does not return the business reply card. That is because the customer is not getting that which the initial advertising promises to give him, *i.e.*, the prompt and unconditional receipt of the enlargements upon the meeting of the terms of the offer. *Cf. Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

Respondent's advertisements are otherwise false and deceptive, as the examiner found in his finding numbered 32. The initial advertisement appearing in a magazine or periodical implies, at least, that the customer will obtain color enlargements. It requests the return of information as to color of hair, eyes and clothes for finishing in color, and it also mentions submitting color snapshots. All of this could lead the unsophisticated and the credulous to believe that pictures to be furnished would be in color without further payment.

The form letter (Attachment B-1 and -2 of findings), as well as the business reply card (Attachments C and D of findings), has the capacity and tendency to mislead a customer into unknowingly or unintentionally ordering colored photographs for which he is authorizing a charge of \$2.50. This is done, as the examiner finds, by the use of ambiguous language and by the clever referring of the reader to other items in the advertising literature. The juxtaposition and prominent type of such statements as "Free Frames With Colored Enlargements," "Check Color You Wish" and other statements distract the customer's attention from the real reason for the card, which is to sell respondent's coloring services. The emphasis on the claim that there is a possibility (not true) of receiving \$100 for the use of the customer's pictures would tend to increase returns of the business reply card and the chances of the customer unintentionally ordering coloring services.

⁴Robert D. Mott, merchandising manager of the Los Angeles Better Business Bureau (tr. 124, *et seq.*); Frank A. Orr, United States Postal Inspector (tr. 147, *et seq.*); and Don Mark Hicks, advertising representative of *TV Guide* magazine (tr. 157, *et seq.*), all testified concerning the general nature of the complaints received as to respondent's practices and advertising. For instance, Frank Orr testified that "Generally, the complaints followed the same basic pattern. First of all, we receive most of our complaints from people who say that they have answered an advertisement and they thought they were going to get photographs enlarged, and free frames and color, and subsequently, they receive photographs for which C.O.D. charges were asked * * * " (tr. 149). "The letters the people have written to me indicate that they felt they were misled [sic] because they felt that they were going to get this free colored enlargements, [sic] and free frames, for 20 cents which they sent in, in answer to an advertisement in a publication. This is generally how they did feel they were misled [sic]" (tr. 149-150).

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The likelihood of ordering by mistake is helped by the fact that the business reply card does not contain a box ([]) for checking off "Do not color." The recipient has to understand what is required of him, and, if he is going to return the card, that he must specifically write thereon that he does not want the coloring services. Not all people will be so knowledgeable as to readily see through this device and realize that they do not have to order the coloring services. Thus, the potential for deception is great. Moreover, there would be the tendency in this advertising for the recipient to order the color photographs in the belief that this would be necessary to assure return of valued, and possibly irreplaceable, negatives or photos.

The precise issue before the Commission is whether or not it is necessary to modify the order to cease and desist herein to effectively prohibit respondent's advertising misrepresentations and deceptive practices. The Commission, as stated in its show cause order, issued in 1951 its order to cease and desist, which it believed was the most suitable remedy to correct the misleading advertising practices found to have been engaged in by the respondent. In view of all the circumstances, including the fact that respondent is continuing today to advertise and to use some of the same representations and to engage in substantially the same advertising scheme which the Commission previously found to be misleading and to constitute unfair and deceptive acts and practices injurious to the public creates substantial doubt that the Commission's order issued in 1951 is adequate to correct the illegality and to protect the public interest. (See, for comparison, the findings of fact and conclusions of the Commission *In the Matter of Ned R. Baskin*, 47 F.T.C. 913, 922-928.)⁵

It is concluded, therefore, that the public interest requires that the order to cease and desist issued herein on January 26, 1951, be modified. This is in accordance with the examiner's recommendation. The examiner, however, proposed that the order to cease and desist contained in the Commission's show cause order be modified in certain respects in view of the evidence adduced at the hearing. First, in the second part of the order to cease and desist, he would eliminate subparagraphs 1(b) and 1(c) (see Exhibit A, attached). These prohibit the offering

⁵ With reference to respondent's compliance with the Commission's order to cease and desist, the record contains, for the period from January 1951 to November 1951, correspondence between respondent and the Commission's Division of Compliance, as well as a copy of the July 5, 1957, United States District Court, Northern District of Illinois, Eastern Division, order holding respondent in violation of the Commission's cease and desist order, assessing a fine of a total of \$900 and entering a permanent injunction. These documents were received not for the purpose of showing the truth of the facts contained therein but to show the existence of the documents and related materials.

to furnish of a photograph or enlargement (1(b)) unless the negative, slide or photograph forwarded is returned simultaneously with the offered photograph or enlargement and (1(c)) without the imposition or attempted imposition of any condition. The examiner concluded there was no competent evidence to show the necessity for these provisions. We disagree.

As to the aforementioned 1(b), the evidence shows a pattern of complaints from customers asserting difficulties and delay in getting back their negatives and photographs. While it appears that respondent eventually will return these items, along with the enlargements, this is only after a period of time has elapsed or upon the receipt of the business reply card from the customer. The evidence further shows that the photographs entrusted to the respondent are often irreplaceable, and therefore treasured, items. Delay in their return is a matter of importance to the customer. It is not improbable, considering respondent's method of operation, that he could engage in a variant of his scheme by sending the finished enlargements and retaining the photographs (or negatives or slides) while making his solicitation to sell coloring services. In the circumstances we believe it is necessary to make explicit in the order that the photographs, negatives or slides must be returned simultaneously with the enlargements.

As to the aforementioned 1(c), which prohibits the offering of any photograph or enlargement unless such is in fact furnished in every instance and "without the imposition or attempted imposition of any condition," this provision goes to the heart of the matter now before the Commission. The Commission here is considering the need for modifying the order in view of the fact that respondent did impose or attempted to impose a condition, *i.e.*, the opportunity to sell his coloring services, which was not stated in the initial advertisement and which has misled or tended to mislead and deceive customers. Such a practice is specifically prohibited by 1(d), but we believe it is also necessary to include a general prohibition against the imposition or attempted imposition of any other kind of condition. Accordingly, we believe that the subparagraph 1(c) is justified.

The hearing examiner also adds to the order two new provisions which he believed to be appropriate based on the evidence adduced in the hearing. One of these is the prohibition against the false representation that photographs submitted will be considered for use as advertisements and that a fee of \$100 will be paid therefor. The other is a detailed prohibition which would attempt to "recast" the respondent's business reply card.

Consideration will first be given to the latter. The recasting or re-writing of respondent's advertising literature in the detailed way recommended by the hearing examiner does not appear to be warranted in the circumstances of this case. Other prohibitions of the order would in effect require respondent to revise the language in the business reply card so that it will no longer contain the challenged misrepresentations. Furthermore, respondent will be subject to a prohibition against soliciting the sale of coloring services by the use of such a business reply card prior to the returning of the finished enlargements as advertised so that the business reply card will not hereafter be as likely to contribute to deception. It is preferable, we believe, that the order against respondent be a prohibition against deceptive practices, thus permitting respondent to choose its own advertising representations. Respondent, of course, pursuant to § 3.61(c) of the Commission's Rules of Practice, may request and receive advice as to whether any proposed course of action will constitute compliance under the order.

The other new prohibition recommended by the examiner is that as to the \$100 offer for use of the customer's pictures. The business reply card states in bold letters:

YOUR PICTURE IS BEING CONSIDERED TO BE USED IN OUR ADVERTISEMENTS. YOU WILL RECEIVE \$100 IF YOUR PICTURE IS SELECTED. CHECK BELOW AND RETURN. (CX 13c.)

Other references to this offer are made in the business reply card and in the letter. This is a come-on; an inducement to the customer to return the business reply card. It is cleverly phrased and positioned to create the illusion that the customer has some possibility of earning this \$100. This representation substitutes for one used at the time of the original hearing, consisting of a free offer of a picture of a movie star. It is well demonstrated by the evidence that this offer is false and deceptive. According to the testimony of Mr. Baskin, the respondent, the current pictures have been used for many years and the customers supplying these photographs were the last to receive \$100 and were possibly the only customers ever receiving \$100. Moreover, the current picture appearing in magazines is that of respondent's daughter.

The offer of the \$100 for use of the customer's picture, while false and deceptive in and of itself, is also an integral part of the whole scheme. It is contained in the advertising literature—both the letter and the business reply card—which is sent to the customer after the customer's photographs or negatives have been received. It is part of the inducement to the customer to return the business reply card and

materially enhances the possibility that the customer will order the coloring services.

Misrepresentation as to the \$100 offer would be prohibited by the general prohibition against misrepresentation of the terms of any offer or the services provided by respondent in the Commission's order (see paragraph 4 of the second part of the order in the Commission's show cause order in Appendix A). Nevertheless, since this specific representation is used at this time, we believe an appropriate prohibition as to its deceptive use is needed in the modified order. The order which we will enter will flatly prohibit any reference to payments for use of pictures in advertising because it does not appear that respondent has or ever had a bona fide program to make such use of customers' pictures. At the most, he made payment only in one or two isolated instances. If respondent in the future develops a regular program of this nature, he may request the modification of the Commission's order to permit such representation.

The Commission's Findings of Fact, Conclusions and Final Order are attached hereto. The final order embodies the Commission's views as expressed above.

APPENDIX A

ORDER TO CEASE AND DESIST

CONTAINED IN

SHOW CAUSE ORDER

It is ordered. That the respondent, Ned R. Baskin, an individual trading under the name of Hollywood Film 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 plain or colored photographs, or enlargements thereof, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that any photograph or enlargement, colored or black and white, framed or unframed, will be made and delivered for a stipulated price, unless such photograph or enlargement will in fact be made and delivered for the stipulated price without the imposition or attempted imposition of any condition not clearly disclosed in the representation.

(2) Representing, directly or by implication, that any offer is for a limited time only, when such offer is not in fact limited in point of time, but is made by respondent in the regular course of business.

(3) Using the words "free" or "given," or any other word or term expressly or impliedly importing a like meaning, in advertising, to designate, describe, or refer to any article of merchandise which is not in fact a gift or gratuity or which is not given without requiring the purchase of other

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merchandise or the performance of some service inuring directly or indirectly to the benefit of the respondent.

(4) Using the name "Hollywood Film Studios," together with pictures of motion picture celebrities, on letterheads or in advertising matter; or otherwise representing that the respondent has any connection whatsoever with the motion picture industry.

* * * * *

It is further ordered, That respondent Ned R. Baskin, an individual doing business as Hollywood Film Studios, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, furnishing, offering for sale, sale or distribution of photographs, photographic enlargements, photographic coloring or enlargement services, or any other products or services in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering to furnish any photograph or any enlargement of a picture, photograph, print, snapshot, negative, slide, color slide, or similar article, either free of cost or for any stated amount or compensation,

(a) unless the offered photograph or enlargement is in every instance furnished upon the request therefor, when accompanied by the stated amount or compensation, if any, and

(b) unless the negative, slide or photograph forwarded pursuant to the offer is returned simultaneously with the offered photograph or enlargement, and

(c) without the imposition or attempted imposition of any condition, and

(d) without first sending to the requesting person any form of communication offering to sell respondent's coloring services or any other services.

2. Offering to furnish a black and white photograph or enlargement of a picture, photograph, print, snapshot, negative, slide, color slide, or similar article, either free of cost or for any stated amount or compensation, unless in immediate conjunction with such offer, in letters of equal size and prominence, the disclosure is made that the offered photograph or enlargement is black and white.

3. Requesting information for having any photograph, enlargement, or similar article colored, in any advertisement or in any other form of communication, unless in each instance in which such request for information is made

(a) there is clear and conspicuous disclosure that forthcoming is an offer to sell respondent's coloring services and

(b) there is clear and conspicuous disclosure of the full amount of respondent's charge for such coloring services.

4. Misrepresenting in any manner the terms of any offer or the services provided by respondent.

FINDINGS OF FACT, CONCLUSIONS AND FINAL ORDER

The Commission having reopened this proceeding and having issued its order of September 9, 1966 to show cause why the order to cease

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and desist issued on January 26, 1951 [47 F.T.C. 913], should not be modified; and the hearing examiner, pursuant to the Commission's direction, having conducted hearings and having certified the record of said hearings to the Commission, together with his recommendation that the Commission reopen the proceeding against respondent and issue a modified order; and

The Commission having determined, for the reasons stated in the accompanying opinion, that the public interest requires a modification of the Commission's order issued herein on January 26, 1951, in the respects described in the opinion, now enters its findings of fact, conclusions and final order.

FINDINGS OF FACT

1. Respondent, Ned R. Baskin, resides at 5847 North Corteen Place, North Hollywood, California, and conducts his business as a photographer at 7021 Santa Monica Boulevard, Los Angeles, California (tr. 5).

2. Respondent, as sole proprietor, does business under the name Hollywood Film Studios (tr. 5, 198), but in some current advertisements he uses the name Hollywood Enlargements and the address 7471 Melrose Avenue, Hollywood, California, an arrangement which permits the checking of incoming mail for the purpose of compensating the advertising agency (tr. 198-200).

3. Respondent makes enlargements of photographs or negatives, has a hand-coloring service to tint black and white enlargements, and an arrangement to send color photographs to a photofinishing laboratory that specializes in color (tr. 6).

4. The principal source of respondent's income is mail-order business (tr. 6). He uses direct mail solicitation and advertising in newspapers and magazines (tr. 6-7). Magazines are now his principal medium of advertising (tr. 8). These include movie magazines, McFadden Publications and Ideal Publications (tr. 7).

5. Respondent has been in the mail-order business for approximately 30 years (tr. 6). He employs ten persons in the business and receives an approximate average of 1500 responses to his advertisements each week (tr. 12-13).

6. Respondent's method of doing business is as follows: He publishes advertisements in magazines or periodicals. A typical recent ad states:

Get 2 FREE ENLARGEMENTS of your favorite photos, 5x7" size. Send 2 color or black and white photos or snapshots (returned unharmed). State color of hair, eyes, clothes, for prompt information for finishing, in color with

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FREE frames. Enclose 20¢ for handling. Hollywood Enlargements, 7471 Melrose Avenue, Dept. 4069, Hollywood, California 90046. (CX 11. See Attachment A attached hereto.)

When a customer responds to such an advertisement he is sent routinely a form letter (CX 12-a, -b; see Attachment B-1, -2) and also a business reply card (CX 13-a-f; see Attachments C and D) (tr. 57-70).

7. The form letter includes this representation:

P.S. On the reverse side are a few pictures selected from our customers. These people received \$100 for the use of their picture. Your picture may also be selected, so be sure to return the enclosed card. (CX 12-a.)

The business reply card contains the following statements, among others:

YOUR PICTURE IS BEING CONSIDERED TO BE USED IN OUR ADVERTISEMENTS. YOU WILL RECEIVE \$100 IF YOUR PICTURE IS SELECTED. CHECK BELOW AND RETURN.

* * * * *

Yes, if you pay me \$100 each, you have my permission to use a copy of any of my pictures for your advertising.

* * * * *

I have checked the free frame you are to include for the "Deluxe" 5 x 7 inch enlargements that you are having your artist hand color in natural oil colors. I will be glad to help with the few cents c.o.d. fees as well as \$2.50 which includes artist's labor for each oil painting, sent to me on five day approval. (CX 13-b, -c.)

8. Respondent estimates that about 50 percent of the persons who respond to his advertisements do not use the business reply card (CX 13-a, -b) and that about 30 percent returned the cards marked "Do not color" (tr. 93). If customers do not send in a card with their pictures, they will get black and white enlargements eventually, after some delay. The delay may be thirty days (tr. 94-95).

9. Pictures entrusted to respondent are often irreplaceable (tr. 95-96).

10. Respondent is using substantially the same advertising methods and certain of the same advertising representations at the present time that he was using on or before January 26, 1961, when the Commission issued its order to cease and desist. Respondent's advertising representations in the form letters and reply cards which he has used during the past several years has, except for minor changes not going to the substance, followed the same pattern (CXs 3 through 7-d, inclusive; CXs 11 through 14, inclusive; CX 15 (received for a limited purpose), CX 18; tr. 73). Respondent testified to the effect that he has used the same advertising for the past ten years, the only significant difference being that the current advertising uses different pictures (tr. 57). Compare with findings of the Commission at 47 F.T.C. 922-927.

11. Respondent's advertisement currently used in the magazines and periodicals (CX 11) states or implies, among other things, that (a) the customer will obtain free color enlargements and (b) the customer, upon enclosing 20 cents and a photo or snapshot, will forthwith receive, without any further conditions or consideration, the enlargements offered.

12. In truth and in fact the customer (a) does not receive a color enlargement without additional payment and (b) does not receive two enlargements forthwith and unconditionally. Respondent does not supply colored enlargements unless the customer returns the business reply card sent to the customer after the receipt of the customer's photographs and agrees to pay the c.o.d. fees, as well as \$2.50. The condition to the receipt of the two enlargements is that the customer must first receive additional advertising literature from respondent, seeking to sell the customer respondent's coloring services. It is only upon the return of the business reply card or upon the expiration of a period of time subsequent to the receipt of the advertising literature sent by respondent that the customer will receive the enlargements offered (tr. 57-70, 126-127, 129-130, 133-136, 149-150, 175-177).

13. Respondent, in its advertising literature, has further represented that if the customer checks a box on the business reply card, the customer's picture will be considered to be used in respondent's advertisements, for which respondent will pay the customer \$100 (CXs 12-a,-b; 13-a-f).

14. In truth and in fact the \$100 offer is a spurious offer. Evidence shows that the currently used pictures have been used for many years and the customers supplying the photographs used in such pictures were the last to receive the \$100 and were possibly the only customers ever receiving \$100 (tr. 113-114). The picture used in the current advertisement (CX 11) is that of respondent's daughter (tr. 60).

15. Accordingly, the aforementioned scheme of advertising and advertising representations now used by respondent are false, misleading and deceptive, and they have the tendency and capacity to mislead and deceive the purchasing public into the erroneous and mistaken belief that they were and are true, and into the purchase of respondent's products by virtue of these erroneous and mistaken beliefs (tr. 126-127, 129-130, 133-136, 149-150).

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CONCLUSIONS

1. Respondent's acts and practices as herein found have been and 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.

2. In view of the findings herein there is a reasonable doubt that the order to cease and desist issued by the Commission against the respondent on January 26, 1951 (47 F.T.C. 913, 928), is an adequate remedy to correct the acts and practices found to be unlawful.

3. The public interest requires modification of the order to cease and desist of January 26, 1951, in accordance with the above findings of fact.

FINAL ORDER

It is ordered. That the respondent, Ned R. Baskin, an individual trading under the name of Hollywood Film 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 plain or colored photographs, or enlargements thereof, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that any photograph or enlargement, colored or black and white, framed or unframed, will be made and delivered for a stipulated price, unless such photograph or enlargement will in fact be made and delivered for the stipulated price without the imposition or attempted imposition of any condition not clearly disclosed in the representation.

(2) Representing, directly or by implication, that any offer is for a limited time only, when such offer is not in fact limited in point of time, but is made by respondent in the regular course of business.

(3) Using the words "free" or "given," or any other word or term expressly or impliedly importing a like meaning, in advertising, to designate, describe, or refer to any article of merchandise which is not in fact a gift or gratuity or which is not given without requiring the purchase of other merchandise or the performance of some service inuring directly or indirectly to the benefit of the respondent.

(4) Using the name "Hollywood Film Studios," together with pictures of motion picture celebrities, on letterheads or in adver-

tising matter; or otherwise representing that the respondent has any connection whatsoever with the motion picture industry.

It is further ordered, That respondent, Ned R. Baskin, an individual doing business as Hollywood Film Studios, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, furnishing, offering for sale, sale or distribution of photographs, photographic enlargements, photographic coloring or enlargement services, or any other products or services in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering to furnish any photograph or any enlargement of a picture, photograph, print, snapshot, negative, slide, color slide, or similar article, either free of cost or for any stated amount or compensation:

(a) Unless the offered photograph or enlargement is in every instance furnished upon the request therefor, when accompanied by the stated amount or compensation, if any, and

(b) Unless the negative, slide or photograph forwarded pursuant to the offer is returned simultaneously with the offered photograph or enlargement, and

(c) Without the imposition or attempted imposition of any condition, and

(d) Without first sending to the requesting person any form of communication offering to sell respondent's coloring services or any other services.

2. Offering to furnish a black and white photograph or enlargement of a picture, photograph, print, snapshot, negative, slide, color slide, or similar article, either free of cost or for any stated amount or compensation, unless in immediate conjunction with such offer, in letters of equal size and prominence, the disclosure is made that the offered photograph or enlargement is black and white.

3. Requesting information for having any photograph, enlargement, or similar article colored, in any advertisement or in any other form of communication, unless in each instance in which such request for information is made:

(a) There is clear and conspicuous disclosure that forthcoming is an offer to sell respondent's coloring services, and

Attachment

73 F.T.C.

- (b) There is clear and conspicuous disclosure of the full amount of respondent's charge for such coloring services.
4. Representing that photographs, including those made from submitted negatives or slides, received from customers are being considered for use as advertisements or that a fee of \$100 or any other amount each will be paid for such use.
 5. Misrepresenting in any manner the terms of any offer or the services provided by respondent.

It is further ordered, That respondent, Ned R. Baskin, 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.

Attachment A

[PHOTO]

Get 2 Free Enlargements of your favorite photos, 5x7" size. Send 2 color or black and white photos or snapshots (returned unharmed). State color of hair, eyes, clothes, for prompt information for finishing, in color with FREE frames. Enclose 20¢ for handling. Hollywood Enlargements, 7471 Melrose Avenue, Dept. 4069, Hollywood, California 90046

Attachment B-1

HOLLYWOOD FILM STUDIOS

7021 Santa Monica Blvd., Hollywood 38, California

[PHOTO]

[PHOTO]

Dear Friend:

Your pictures have just arrived. We feel certain they are pictures which you treasure very highly. That is why we are sure that you will want them given special attention and come back to you a real work of art. As advertised we are sending you prompt information on having your one or two originals made into Deluxe 5x7 enlargements, beautifully finished in natural life-like colors and mounted in free frames.

WE HAVE SOME WONDERFUL NEWS FOR YOU. Since the color of hair, eyes and clothing was included, we will make a Deluxe professional 5x7 enlargement from each of your cherished photos or negatives and with your permission have our expert artist **ACTUALLY HAND COLOR THEM IN NATURAL LIFE-LIKE COLORS.** We will then mount them in beautiful Pearl Ivory or Opal Gray Lucite frames. These gorgeous oil-colored enlargements will be mailed promptly together with your originals.

THE UNFINISHED WORK * * * In any picture without color, however good, the "work" so to speak really remains "unfinished." It is only "finished" when you portray a person as living (true, natural and life-like). In other words, you need color to transform a plain photo to a "finished" work of art.

THE FINISHED WORK * * * Everyone knows that colored photography and COLOR movies are wonderful because they bring out people and surroundings so natural and life-like. Now, thanks to the magic touch of our expert artists in blending an array of beautiful colors, colors that have depth, transparency and never-fading qualities, your little snapshot becomes a beautiful work of art, one that you will cherish and keep forever.

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Attachment

NATURAL COLOR * * * Color negatives, transparencies and color slides are finished in gorgeous natural color by Natural Process. Now you can enjoy the beauty of big pictures of your loved one in Color, in your own home, just as you enjoy big pictures in color at the movies.

We want to please you in every way and send your colored enlargements to you without delay. Be sure to check the card telling us the color of the frames you wish—the Pearl Ivory or Opal Gray Lucite—The postcard is addressed and stamped. Mail it today. The sooner you mail the card the sooner you will get your enlargements together with your originals.

Mail color order card NOW for prompt service. If you do not wish your enlargements finished in color, mark card Do Not Color. All originals are returned unharmed.

Sincerely yours,

(S) Ned Ronald

NED RONALD,

Hollywood Film Studios.

P.S. On the reverse side are a few pictures selected from our customers. These people received \$100 for the use of their picture. Your picture may also be selected, so be sure to return the enclosed card.

Attachment B-2

Expert quality hand coloring such as you get from the Hollywood Film Studios for the small charge we make might cost as much as \$10.00 elsewhere. But because of our efficient and up to date methods, every home can now enjoy the advantages of this modern development, color in photography, at very little cost. When you receive your hand colored portrait enlargement we know you will agree that this portrait of your loved one has become "A thing of beauty." We know, too, that you will find it "A joy forever."

THESE ARE CUSTOMERS' PHOTOS SELECTED TO BE USED IN OUR ADVERTISING

THESE PHOTOS RECEIVED \$100.00 EACH

[PHOTO]

[PHOTO]

Submitted by
Mrs. W. T. Overby

Submitted by
Mrs. Harry Howryla

WHAT OUR CUSTOMERS SAY ABOUT HOLLYWOOD FILM STUDIOS

"World's Best"

*"Your Studios Have Them
All Beat"*

Your photo work is the world's best. From now on it's Hollywood Film Studios.

We received our pictures and certainly were well pleased. I think your studios have them all beat.

FRANK K. JR.,
Nashville, Tenn.

MRS. GLENN J. C.
Ely, Nev.

Attachment

73 F.T.C.

"Orders Four More"

Enclosed please find one photo. Please send 4 colored pictures. I have ordered pictures before and have been very much pleased with your work on each one.

MRS. J. WILLIAM K.,
Manluis, Ill.

"A Birthday Gift"

I have received the enlargement which you sent me and I am so pleased with your work. This is for a birthday gift. I plan to have more photo work done later.

ELSIE E. S.,
Wokanda, S.D.

"Very Well Pleased—Tells Friends"

I wish to take this opportunity to tell you how well pleased I was with my handcolored picture. I have shown it to several of my friends and they commented on the wonderful piece of work.

GLADYS M. J.,
New Orleans, La.

*"Sentimental Picture—
Marvelous Work"*

Please make 5x7. Take care of this picture as it is of sentimental value. The work you did on the other picture I sent you is marvelous. All my friends said it was a wonderful piece of work. I know you will do the same on this picture.

ROBERT I.,
Albany, N.Y.

"WORTH \$10.00"

The picture you made me is worth \$10.00. Please make one of each of the enclosed five pictures.

OLGA V.,
Rockwell St., Chicago, Ill.

*"Finest Pictures We
Ever Had"*

These were the finest pictures we have ever had finished. Thanks to the Hollywood Film Studios and their capable staff.

W. H. WOODSTOCK
Ill.

*"More Than
Satisfactory"*

The work that I previously received from you was more than satisfactory. I have told several people about your excellent work and they, too, will send their work to you.

MARJOBIE S.,
Albany, N.Y.

BROOKLYN QUILTING CORP. ET AL.

925

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Complaint

Attachement C

YOUR PICTURE IS BEING CONSIDERED TO BE USED IN OUR ADVERTISEMENTS. YOU
WILL RECEIVE \$100.00 IF YOUR PICTURE IS SELECTED. CHECK BELOW AND
RETURN.

FREE

FRAMES WITH COLORED ENLARGEMENTS

CHECK COLOR YOU WISH

Choice of beautiful pearl ivory or opal grey frames with standing easel back.
Frames are made of lustrous lucite and make your enlargements "a thing of
beauty and a joy forever." Check below color of frame you want.

☐ Pearl Ivory Frames

☐ Opal Grey Frames

Always give file number pictures are filed by number [632753].

I have checked the free frame you are to include for the "Deluxe" 5 x 7 inch
enlargements that you are having your artist hand color in natural oil colors.
I will be glad to help with the few cents C.O.D. fees as well as \$2.50 which in-
cludes artist's labor for each oil painting sent to me on five day approval.

Name_____, Address or R.F.D._____