

IN THE MATTER OF
INTERNATIONAL ASSOCIATION OF PHOTOGRAPHERS
ET AL.

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

Docket 6165. Complaint, Feb. 5, 1954—Decision, June 1, 1956

Order requiring sellers in Hollywood, Calif., of photograph albums, together with certificates for photographs to be taken at independent affiliated studios, to cease representing falsely in advertising, on certificates sold to customers, and by statements of their salesmen that the person solicited had been specially selected, was to receive an album free, and was charged only for photographs; that their regular prices were promotional and reduced; that the photographs provided by the certificates were of natural gold-tone finish; and that they had arrangements with photographers all over the country who would honor the certificates; to cease obtaining signatures on order blanks on the pretense that they were receipts for free albums, and attempting to collect from the signers; and to cease representing falsely, through use of their corporate name, that their business was an international association of photographers.

Mr. W. J. Tompkins and *Mr. Edward F. Downs* for the Commission.

Arkin & Weissman, of Culver City, Calif., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

HISTORY OF THE PROCEEDING

On February 5, 1954, the Federal Trade Commission issued its complaint in this proceeding, charging the above-named respondents with violation of the Federal Trade Commission Act by the use of false, deceptive and misleading statements and representations in connection with the sale and distribution of photographic albums and certificates for photographs to be taken in independent studios in various States of the United States. On March 5, 1954, the respondents submitted their answer denying the principal charges of the complaint. In due course evidence both for and against those charges was duly received into the record, and proposed findings as to the facts and proposed conclusions were submitted.

IDENTITY AND BUSINESS OF RESPONDENTS

Respondents admit that respondent International Association of Photographers is a corporation organized and existing under and by virtue of the laws of the State of California, with its office and prin-

cipal place of Business located at 1610 North Wilcox Avenue, Hollywood, California; that respondents Ray M. Mitchell, Frank Grzesiek, Raymond C. Ries, John Mason and Betty C. Mitchell, whose address is the same as the one just given, are individuals and officers of the corporate respondent; and that they direct and control the policies, acts and practices of the corporate respondent.

Respondents also admit that they are now, and for more than two years last past have been, engaged in the sale and distribution of photograph albums, together with certificates for photographs to be taken at independent affiliated studios; that in the course and conduct of their said business, respondents have caused their photograph albums, when sold, together with the certificates, to be transported from their place of business in the State of California to purchasers thereof located in various other States; that they maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States; that their volume of trade in said commerce has been substantial; and that they further engaged in commerce in that they transmit various instruments of a commercial nature to their customers located in States other than the State of California and receive from said customers instruments of the same nature.

The record shows that the respondents, in connection with and as a part of their business, have entered into agreements or understandings with a large number of photographic studios located in all or most of the States of the United States, whereby said studios have agreed to honor certificates for photographs to be taken by them and thereafter delivered to the purchasers of respondents' combination album and certificate. These certificates provide that the holders thereof are entitled to receive either ten or fourteen different 8 x 10 photographs of any member of their families, to be taken by the designated studio at the rate of two a year, at intervals of not less than ninety days.

In furtherance of the sale of respondents' album-certificate combinations, salesmen employed by respondents have called upon mothers of newly-born infants, whose names they have usually obtained from lists of births published in newspapers, and have solicited such mothers to purchase respondents' album-certificate combination.

The albums so offered were made either of plastic or leather. The plastic albums have been sold, together with a certificate for ten pictures, for \$39.95, and the leather albums have been sold, together with a certificate for fourteen pictures, for \$49.95.

THE ISSUES

The complaint divides the alleged misrepresentations disseminated by the respondents into three kinds:

1. The alleged misrepresentations made by respondents or their sales agents to prospective purchasers;
2. The alleged misrepresentation of an order blank as a receipt for an album; and
3. The alleged misrepresentation inherent in respondents' use of the phrase "International Association of Photographers" as a corporate name.

In their answer respondents denied that they made some of the alleged representations, and the falsity of all representations they admit making. The issues are, therefore, whether respondents have made the alleged representations, and, if so, whether such representations are in fact false, misleading and deceptive. The determination of these issues requires detailed enumeration of the various representations in question, and a thorough analysis thereof in the light of the entire record. These representations are alleged in the complaint as follows:

REPRESENTATIONS MADE BY RESPONDENTS OR THEIR
SALES AGENTS TO PROSPECTIVE PURCHASERS

1. That the person solicited has been especially selected, was to receive an album free, and that the charge made was for the photographs.

This representation is alleged to be false in that prospective purchasers were not especially selected, and that the album was not free, the price thereof being included in the amount charged the customer for the combination deal of album and certificate.

Respondents admit that they have represented that the persons solicited had been especially selected, but maintain that they were so in fact, in that they are selected in a manner determined by respondents' salesmen, who, respondents contend, are independent dealers rather than agents of the respondents. They also admit that their album has at times been described to prospective purchasers as "free," but contend that all of the requirements concerning the purchaser thereof have been explained to the prospective purchasers before they signed an order blank, and, accordingly, no deception resulted.

All of the above contentions are without merit. The evidence shows that respondents' prospective purchasers were chosen because they belonged to the class of families who have young children and are therefore naturally interested in purchasing pictures of their children and an album to contain them. The names of such prospects were, in

most instances, secured from birth announcements published in newspapers. This basis of selection embraces such a large proportion of the purchasing public that the element of special selection, as that term would ordinarily be understood by a prospective purchaser, is not present, and its use in the instant connotation, therefore is deceptive.

The evidence shows, further, that respondents' salesmen presented both written and oral representations to prospective purchasers in the name of the corporate respondent. The literature, order blanks and certificates used in offering for sale and selling respondents' album-certificate combination were all furnished by and in the name of the corporate respondent. Payments were made by purchasers to the corporate respondent either indirectly, through the salesmen, or directly, by mail. Much of the profit made by respondents through the sale of their album-certificate combinations resulted directly from the efforts of these salesmen. Regardless, therefore, of the fact that respondents consider such salesmen to be independent contract dealers over whose representations respondents assert they have no control, respondents are responsible for all representations made by such salesmen in the process of offering for sale and selling respondents' album-certificate combinations.

No seller of a product can in justice furnish to others literature and order blanks bearing his name, creating thereby in the minds of prospective purchasers the impression that the person selling his product is his authorized sales representative, and thereafter, having enjoyed, through the efforts of such representative, a substantial volume of business, disclaim responsibility for any representation, either oral or written, by which such business was obtained. This principle has been repeatedly affirmed both by the Commission and by the courts.

The album, which is represented by respondents' salesmen as being free, is shown by the evidence not to be free in fact, because its cost is included as part of the price charged for the album-certificate combinations. Furthermore, the salesmen have, at the beginning of their conversation with the prospective purchaser, represented that the album is free, and have by that means gained admittance to the prospect's home. Later explanation of this misrepresentation to the prospective purchaser does not alter the fact that deception was earlier used to gain such admittance. Accordingly, it must be concluded that respondents' prospective purchasers are not especially selected; that the album is not given free; and that the two representations described above, for which respondents are responsible under the Federal Trade Commission Act, are false and misleading.

2. That the prices of \$39.95 and \$49.95 for the albums and certificates were promotional and reduced prices.

It is alleged that these prices were not promotional or reduced prices, but were the prices usually and customarily charged by respondents for their albums.

The evidence shows that these prices were termed "promotional" on respondents' order blanks, and that they were inferentially presented as reduced prices in respondents' correspondence, particularly in respondents' letters to purchasers acknowledging receipt of orders for the album-certificate combination, wherein respondents informed the purchaser that he was receiving, for \$39.95 or \$49.95, merchandise worth \$117.00 or \$159.50, as follows:

These ten separate portrait settings would regularly cost \$79.50, but with this you receive ten portraits and a Genuine Custom Made Album which has an established price of \$37.50. Total cost of this combination offer to you as stated in your contract is \$39.95, plus tax and \$1.00 delivery charges. This equals far less than the price of the portraits alone. * * *

Respondents contend that their prices are promotional, and respondent Mitchell, in his testimony, states that they are reduced prices, because all the items comprising respondents' album-certificate combinations, including the photographs to be furnished by the various studios, would, if purchased separately, on the open market, cost more than \$39.95 or \$49.95. This contention is obviously fallacious. Respondents' prices cannot truthfully be said to be "reduced," since no one can reasonably claim that his price is a reduced price because it is less than someone else's price for a similar item. To be in fact a "reduced" price, the price must have been marked down from the seller's own former higher price. Nor can respondents' prices be truthfully said to be "promotional." They were not made as an introductory or promotional offer; in fact they were no more promotional than any price quoted with the expectation of making a sale. The evidence shows that the two prices at which respondents offer their two album-certificate combinations are the only prices at which these two combinations have been offered for sale; they are, therefore, respondents' usual and customary prices for such combinations, and are not in any sense "reduced" or "promotional."

Accordingly, it must be concluded that this representation is false, deceptive and misleading.

3. That the combination album-certificate deal was of the value of from \$117.00 to \$159.50.

This represented value is alleged to be fictitious because the amounts included for the photographs were in excess of the price charged therefor by photographers affiliated with respondents.

Respondents admit making the above representations as to the value of their album-certificate combination, but contend that such representation is true. Their contention is based on the theory, which is supported by uncontradicted evidence, that the average price of 8 x 10 photographs of comparable quality to those furnished under their certificate would, when added to the self-appraised value of their albums, equal the values of \$117.00 to \$159.50, as represented.

Counsel supporting the complaint does not question the self-appraised value of respondents' albums, or the arithmetical conclusion of the represented values. He contends, however, that since the values of the photographs, as represented by respondents, are based upon an average value of photographs throughout the country, they must include larger as well as smaller prices, so that, in some instances where lesser prices prevail, the represented values must be a misrepresentation. The question to be determined, however, is not whether the values represented by respondents are in some instances higher than the prices prevailing in a particular area, but whether they are, as alleged, fictitious.

Webster's New International Dictionary, 2nd Edition, Unabridged, defines "fictitious" as "feigned, imaginary, pretended—arbitrarily devised." In the light of all the evidence, it is clear that the represented values are not feigned, imaginary, or pretended, because they are based upon averages which approximate true values. There is no evidence in the record to show to what extent the price used as a criterion by respondents varies from the average, and therefore no basis for a conclusion that such variation was in fact substantial. In areas where the average price of photographs prevails, respondents' represented values are in accord with the facts; in areas where the price is higher than the average used by respondents, the variation is in favor of the prospective purchaser; and in areas where the price is lower, the degree of variation has not been shown.

Respondents' represented values cannot be said to be arbitrarily devised, since, according to testimony in the record, they result from a determination of average values of photographs over a considerable area, and were obviously arrived at by means of reasonable calculation based thereon, as distinguished from a random determination of values based on whim or caprice.

Accordingly, it must be concluded that this allegation, that respondents' represented values of \$117.00 to \$159.50 are fictitious, has not been sustained.

4. That Respondents have arrangements with photographers all over the country who will honor their certificates and that no matter where the holders

