

Syllabus

IN THE MATTER OF

NOLAN ATZ, GUSTA ATZ AND JOHN EDWARD ATZ, TRADING AS ATZ'S HATCHERY, ATZ'S BLUE MOUNT HATCHERY AND ATZ'S MAMMOTH HATCHERY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2886. Complaint, Aug. 3, 1936—Decision, Apr. 27, 1937

Where an individual engaged in the hatching, advertisement, sale and shipment of baby chicks by mail and express to purchasers in various States, in substantial competition with others similarly engaged; in advertising her said baby chicks in periodicals of national circulation and among farmers, more particularly—

- (a) Represented that same were hatched from the eggs of hens or old hens, and not pullets, through such statements as "Superior grade from old hens' eggs," "from all old hens' eggs," facts being not more than ten percent of the flocks from which she purchased eggs, gathered by trucks from the various farmers and poultry raisers for hatching and sale of chicks were composed entirely of old hens, and there was no practical way for a large hatchery to obtain or definitely select and separate the old hens' eggs, chicks from which, as meaning hens that have completed one or more laying seasons, are preferred by many purchasers as more likely to live than those from eggs of a young hen or pullet;
- (b) Represented that the eggs from which her said chicks were hatched had been "blood tested" for either eleven or twelve consecutive years, facts being that, while individual in question did make annual tests of the flocks from which she bought eggs for hatching, such testing did not and could not make any flock 100% free from the diseases or blood tested at the various times at which the eggs were obtained for hatching; and
- (c) Represented that she had at all times had chickens of various breeds or types available for immediate delivery, facts being she did not at all times have ample supply of various breeds and types, as represented, available for such delivery, and at times made substitutions of different breed or type from those specifically ordered, without obtaining purchaser's consent, or failed to make shipment or notify purchasers promptly of her inability to fill order or return money forwarded therewith, or failed to make shipment within time specified or a reasonable time thereafter or to notify purchasers of such unreasonable delay;

With result that purchasers were misled and injured by such misrepresentations and practices as respects such matters of major importance to purchaser as time of delivery and delivery of kind ordered, and a substantial portion of the purchasing public were misled and deceived into the erroneous belief that the said representations, as above set forth, were true, and, acting thereon, were induced to order and buy her said products, and trade was diverted to her from those of her competitors who do not misrepresent their products or engage in such practices; to the substantial injury of competitors in commerce and of the public:

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Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. John W. Norwood*, trial examiner.

Mr. Wm. T. Chantland for the Commission.

Mr. C. B. Hays, of Corydon, Ind., for respondents.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission, having reason to believe that Nolan Atz, Gusta Atz, and John Edward Atz, trading under the names Atz's Hatchery, Atz's Blue Mound Hatchery, and Atz's Mammoth Hatchery, hereinafter referred to as respondents, have been and now are using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint and states its charges in that respect as follows:

PARAGRAPH 1. Respondents Nolan Atz, Gusta Atz, and John Edward Atz, are individuals doing business at all times since on or about 1924, under the trade names Atz's Hatchery, Atz's Blue Mound Hatchery, and Atz's Mammoth Hatchery with their principal places of business located in Milltown and Huntingburg in the State of Indiana.

Respondents are now, and have been for several years last past, engaged in the business of hatching, selling, and distributing poultry, more particularly young chickens which are commonly known and referred to as "baby chicks." The business in which the respondent is engaged is commonly known as and is hereinafter referred to as the chick hatchery business. Respondents in the course and conduct of their business sell and distribute said "baby chicks" to members of the public and cause said "baby chicks" when sold to be transported from the State of Indiana, or the State of origin of the shipment, to purchasers thereof located at points in the various States of the United States other than the State of Indiana, or the State of origin of the shipment. There is now, and has been during all the times herein mentioned, a constant current of trade in commerce in products sold by respondents between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their business, respondents are now, and have been during all the times herein mentioned, en-

gaged in substantial competition with various other individuals, firms, and corporations engaged in hatching, selling and offering for sale "baby chicks" to members of the general public in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. Many purchasers of "baby chicks" believe that a "baby chick" hatched from the egg of an "old hen" is more likely to live than one hatched from a young hen, commonly known as a pullet; and the term or designation "old hen" refers to a hen that has completed one or more laying seasons. There is a preference among purchasers of "baby chicks" for "baby chicks" hatched from the eggs of "old hens."

In the course and conduct of their business as aforesaid in soliciting the sale of and in selling their "baby chicks" in said commerce, respondents advertise and have advertised in periodicals having national circulation, more particularly among farmers. In said advertisements respondents falsely represent, among other things, that the "baby chicks" advertised and offered for sale by them are hatched from the eggs of "old hens."

When in truth and in fact not all the "baby chicks" advertised and offered for sale are hatched from the eggs of "old hens" but many are hatched from the eggs of young hens or pullets with no definite determination of percentage of either.

PAR. 4. To purchasers of "baby chicks" the term "blood tested" means and refers to poultry flocks that have been tested for certain diseases common to poultry and from which flocks the diseased poultry have been eliminated, and it is believed by such purchasers that "baby chicks" hatched from the eggs of flocks that have been "blood tested" for a period of several years are less likely to be infected with said diseases than are those from flocks that have not been "blood tested" over such period of time. There is a preference among such purchasers for "baby chicks" hatched from the eggs of poultry flocks that have been "blood tested" for a period of several years.

In the course and conduct of their business as aforesaid, in soliciting the sale of and in selling their "baby chicks" in interstate commerce respondents, by the means and in the manner above alleged, falsely represent, among other things, that flocks producing the eggs from which respondents' chicks are hatched have been "blood tested" for either 11 or 12 consecutive years.

When in truth and in fact the flocks producing the eggs from which respondents' chicks are hatched have not been "blood tested" for a period of either 11 or 12 consecutive years.

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PAR. 5. There are various breeds and types of chickens, each having its own characteristic and value to purchasers of "baby chicks."

In the course and conduct of their business as aforesaid, in soliciting the sale of and in selling their "baby chicks" in said commerce, respondents, by the means and in the manner above alleged, falsely represent that they have chickens of various breeds or types available for immediate delivery.

When in truth and in fact said respondents do not have the various breeds and types of chickens as represented, available for immediate delivery; and upon receipt of orders for specific breeds or types from purchasers, substitute a different breed or type of "baby chick" from those specifically ordered without first obtaining the consent of the purchasers for such substitution.

PAR. 6. The time at which delivery of "baby chicks" is made is of major importance to the purchaser, for the business is of a seasonal and hazardous nature and unless delivery is made as specified in the contract of purchase the "baby chicks" are worthless or of much less value to the purchaser than they are when delivered as specified. Because of these facts, "time of the delivery of baby chicks becomes of the essence" in every contract for the purchase and sale of "baby chicks."

In the course and conduct of their business respondents, by the means and in the manner above alleged, falsely represent, among other things, that their "chicks are hatched by the thousands daily for immediate delivery."

When in truth and in fact said respondents have not "baby chicks" of specific breed or types available for immediate delivery in all cases. In this connection, in many instances, the respondents do not make any shipment at all, nor do they notify the purchasers of their inability to fill the orders or return the purchase money forwarded with the orders. In other instances, shipment is not made within the time specified or within a reasonable time thereafter, and purchasers are not notified of this unreasonable delay, nor do the respondents offer to or return the purchase money paid.

PAR. 7. There are among the competitors of respondent, as mentioned in paragraph 1 hereof, those engaged in the business of producing, selling and offering for sale in said commerce "baby chicks" who do not in any way misrepresent their "baby chicks"; and who do not substitute a type of breed of chickens different from those ordered; and who do not delay or refuse shipment.

PAR. 8. The acts and practices of the respondents as above alleged in the course of selling and offering for sale their "baby chicks" in commerce as aforesaid, have the capacity and tendency to

mislead and deceive and have misled and deceived a substantial portion of the purchasing public into the erroneous belief that the said representations are true and, acting on such erroneous belief, the said purchasing public has been induced to purchase and has purchased respondents' products, thereby diverting trade to the respondents from those of its competitors who do not misrepresent their products, whereby substantial injury is done to respondents' competitors in interstate commerce and to the injury of the public.

PAR. 9. The above and foregoing acts and practices have been and are all to the prejudice of the public and the respondents' competitors and constitute unfair methods of competition in interstate commerce within the meaning and intent of Section 5 of "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on August 3, 1936, issued and served its complaint in this proceeding upon respondents, Nolan Atz, Gusta Atz, and John Edward Atz, trading under the names Atz's Hatchery, Atz's Blue Mount Hatchery, and Atz's Mammoth Hatchery, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. On August 10, 1936, respondent, Nolan Atz, filed his answer to said complaint. Thereafter, on October 27 a separate stipulation was entered into between said Nolan Atz and the Federal Trade Commission, pursuant to which an order was entered on October 30, 1936, closing the case as to Nolan Atz.¹

On August 11, 1936, respondent, Gusta Atz, filed an answer on behalf of herself and respondent, John Edward Atz. Thereafter testimony and evidence in support of the allegations of said complaint were introduced by William T. Chantland, attorney for the Commission, before John W. Norwood, an examiner of the Com-

¹ "This matter coming on for consideration by the Commission upon the record and it appearing that the respondent, Nolan Atz, has entered into a stipulation of the facts and an agreement to cease and desist from certain enumerated practices, which stipulation and agreement, on the 27th day of October 1936, was approved by the Commission, and the Commission having duly considered the same, and being now fully advised in the premises:

"It is ordered, That the case against Nolan Atz, respondent, growing out of the complaint hereinbefore issued on August 3, 1936, be, and the same hereby is, closed as to the said Nolan Atz, respondent, without prejudice to the right of the Commission, should the facts so warrant, to reopen the same and resume prosecution of the complaint as to said Nolan Atz, respondent, in accordance with its regular procedure."

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mission theretofore duly designated by it, and in defense of the allegations of the complaint by C. B. Hays, attorney for the respondent Gusta Atz; and said testimony and evidence was duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and evidence, and brief in support of the complaint, respondents having filed no brief; and the Commission having duly considered the same, and being now fully advised in the premises, finds that this proceeding is in the interest of the public, and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents, Gusta Atz and Nolan Atz, since about 1924 and up to July 1, 1935, were associated in the business of hatching baby chicks and of advertising them for sale and selling and shipping same by mail and express to purchasers in various States of the United States from a hatchery and place of business at Milltown, Ind., and since November 1, 1935, also from a hatchery at Huntingburg, Ind. Said business is commonly known as the chick hatchery business. Since July 1, 1935, respondent, Gusta Atz, has personally owned and conducted said businesses except that for a part of the "off season" of 1935, the Milltown plant and business was turned over to her son, John Edward Atz, and his wife, to conduct on their own and make what they could out of it. The advertisements then used were prepared and the business policy controlled by respondent, Gusta Atz.

PAR. 2. At all times during said period there has been a constant current of trade in baby chicks sold by respondent, Gusta Atz, in commerce between and among various States of the United States. The volume at times in the late winter and early spring, in what is known as "the season," was such that it brought in receipts up to \$1,000.00 per day. For 1934, the gross receipts for chicks shipped outside the State of Indiana was approximately 80% of \$28,813.47. In 1936 the gross sales were \$94,034.78 from Huntingburg and \$71,525.73 from Milltown.

PAR. 3. In the course and conduct of her business, respondent, Gusta Atz, is now, and has been during all the times herein mentioned, engaged in substantial competition with various other individuals, firms, and corporations engaged in hatching, selling and offering for sale baby chicks to members of the general public in commerce among and between the various States of the United States

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and in the District of Columbia. Quite a number of such competitors are located throughout southern Indiana, in the vicinity of respondent's plants.

PAR. 4. In the course and conduct of her business as aforesaid in soliciting the sale of and in selling baby chicks in said commerce, respondent, Gusta Atz, advertises and has advertised in periodicals having national circulation, more particularly among farmers. In said advertisements she has represented, among other things, that the baby chicks advertised and offered for sale by her are hatched from the eggs of hens or old hens, meaning thereby birds of a prior season's hatch, and not pullets. In such advertisements respondent made, among others, the following representations as to the chicks offered for sale by her:

Superior grade from old hens' eggs;
from all old hens' eggs;
from hens' eggs; and
these (baby chick) cockerels and pullets are from old hens' eggs and our special matings.

The baby chicks sold by respondent, Gusta Atz, following the making of such representation were not in fact all hatched from hens or old hens, in that not more than 10% of the flocks from which said respondent has purchased eggs which are gathered by trucks from the various farms and poultry raisers for hatching and sale of chicks were composed entirely of old hens, and there is no practical way for a large hatchery to obtain or definitely select and separate old hens' eggs from pullets' eggs.

Such advertising is an inducement to purchase chicks from said respondent, in that many purchasers of baby chicks believe that a baby chick hatched from the egg of an old hen is more likely to live than one hatched from a young hen, commonly known as a pullet; and the term or designation "hen" or "old hen" refers to a hen that has completed one or more laying seasons, and there is therefore a preference among purchasers of baby chicks for baby chicks hatched from the eggs of hens or old hens.

PAR. 5. In the course and conduct of her business as aforesaid, in soliciting the sale of and in selling baby chicks in interstate commerce respondent, Gusta Atz, represents in her advertising that flocks producing the eggs from which respondent's chicks are hatched have been "blood tested" for either 11 or 12 consecutive years.

Such advertising is an inducement to buy said respondent's chicks in that, to purchasers of baby chicks the term "blood tested" means and refers to poultry flocks that have been tested for certain diseases common to poultry and from which flocks the diseased poultry have

been eliminated, and it is believed by such purchasers that baby chicks hatched from the eggs of flocks that have been blood tested for a period of several years are less likely to be infected with said diseases than are those from flocks that have not been blood tested over such period of time. Blood testing, as generally understood in the chick hatchery business and by poultry buyers, is made on each bird of a flock, and is for reactions to disclose the presence either of "B. W. D.", (bacillary white diarrhea) or fowl typhoid, which are two serious ailments to poultry.

Respondent, Gusta Atz, in fact did make annual tests of the flocks from which she bought eggs for hatching, but such testing did not and could not make any flock 100% free from the diseases or blood tested at the various times at which the eggs were obtained for hatching. Such blood testing is a beneficial and highly necessary practice, as is evidenced by the fact that on first tests of a new flock, the reactions would run around 20% to 25% of the number tested, whereas tests in flocks from blood tested parentage would show perhaps only 1% or 2% reactions. There, is therefore, a preference among such purchasers for baby chicks hatched from the eggs of poultry flocks that have been blood tested for a period of several years.

PAR. 6. In the course and conduct of her business as aforesaid, in soliciting the sale of and in selling baby chicks in said commerce, respondent, Gusta Atz, has represented that she has at all times had chickens of various breeds or types available for immediate delivery.

Such advertising is an inducement to buy said respondent's chicks, in that the time at which delivery of baby chicks is to be made is of major importance to the purchaser, for the business is of a seasonal and hazardous nature, and unless delivery is made of the kind ordered and at the time specified in the purchase order, the baby chicks are worthless or of much less value to the purchaser, than they are if delivered promptly as specified or promised. Thus time and accuracy as to specified breed and kinds and sex of the delivery of baby chicks is a strong inducement to those ordering baby chicks.

Respondent, Gusta Atz, did not at all times have an ample supply of the various breeds and types of chickens as represented, available for immediate delivery; and at times, upon receipt of orders for specific breeds or types from purchasers, substitutions of a different breed or type of baby chicks from those specifically ordered were made, without first obtaining the consent of the purchasers for such substitution. The result was the purchasers were misled to their injury by such misrepresentations and practices of respondent.

In other instances, said respondent did not make any shipment at all, or notify the purchasers promptly of her inability to fill the or-

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ders or return the purchase money forwarded with the orders. In still other instances, the shipment was not made within the time specified or within a reasonable time thereafter, and purchasers were not notified of this unreasonable delay. In other instances undue delay occurred before adjustments were made. These acts and practices resulted in injury to the purchasers.

PAR. 7. There are among the competitors of respondent, Gusta Atz, those engaged in the business of producing, selling, and offering for sale in commerce baby chicks who do not in any way misrepresent their product or its character and origin; and who do not substitute a type or breed of chickens different from those ordered; and who do not unduly delay or neglect to ship.

PAR. 8. The acts and practices of the respondent, Gusta Atz, alleged in the course of selling and offering for sale her baby chicks in commerce as aforesaid, have the capacity and tendency to mislead and deceive and have misled and deceived a substantial portion of the purchasing public into the erroneous belief that the said representations are true and, acting on such erroneous belief, the said purchasing public has been induced to purchase and has ordered and purchased said respondent's products, thereby diverting trade to said respondent from those of her competitors who do not misrepresent their products or engage in such practices, whereby substantial injury is done to respondent's competitors in interstate commerce, and to the public.

CONCLUSION

The aforesaid acts and practices of the respondent, Gusta Atz, are to the prejudice of the public and of the respondent's competitors, and constitute unfair methods of competition in commerce, within the intent and meaning of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission against respondents, Gusta Atz and John Edward Atz, and the answer of said respondents, testimony and other evidence taken before John W. Norwood, an examiner of the Commission theretofore duly designated by it, in support of the allegations of the said complaint and in opposition thereto, brief in support of the complaint, respondents' counsel having waived the filing of a brief, and the Commission having made its findings as to the facts and its conclusion that said respondent, Gusta

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Atz, has violated the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is ordered, That the respondent, Gusta Atz, personally and trading as Atz's Hatchery, Atz's Blue Mount Hatchery, and Atz's Mammoth Hatchery, her representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of baby chicks in interstate commerce or in the District of Columbia, do forthwith cease and desist, directly and indirectly, from representing:

1. That baby chicks hatched from pullet eggs are hatched from hens' eggs or from old hens' eggs;

2. That baby chicks are from eggs of flocks 100% blood tested at the time the eggs are purchased for setting, when said eggs are from flocks over which she has not had continuous control and supervision since said flocks were tested;

3. That prompt delivery of baby chicks of the kind and quantity ordered is guaranteed, or can and will be made, when such is not the fact;

4. That prompt adjustments or refunds on complaints will be made, when such is not the fact, and when no advice is promptly given of inability, for any reason, properly and promptly to fill any order.

It is further ordered, That this proceeding as to John Edward Atz be, and the same is hereby, dismissed.

It is further ordered, That the respondent, Gusta Atz, shall, within 60 days after service upon her of this order, file with the Commission a report in writing setting forth in detail the manner and form in which she has complied with this order.

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IN THE MATTER OF

KING TRADING CORPORATION ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2655. Complaint, Sept. 14, 1936¹—Decision, Apr. 28, 1937

Where the names, letters, and symbols "Marconi," "Victor," "R. C. A.," "Edison," "Bell," and representation of a bell, "Majestic," "Brunswick," and the letters "G. E." in a circle with scroll-like interior decorations, as names and designations of well-known and long-established individuals, companies, and corporations, and long used and extensively advertised by the various owners thereof, had come to be known and identified with the radio sets, radio parts, and like products of said owners, and constituted their standard brands and symbols when used as company, corporate and trade names, and, as well-known marks and brands on such products thus identified, had a fixed and stable value in the trade and industry generally, throughout the United States and foreign countries, upon which well-known brands, etc., purchasing public relied when thus used on radio sets, etc., and in said industries, as indicating high standard, reliable and genuine products, and use of such names, letters, and symbols influenced purchase thereof and increased sales, and said names, letters, and symbols, thus attached, had value to the thousands of dealers engaged in the sale and distribution of such standard brand products, and were valuable to the owners thereof, who had used and used and employed the same in commerce; and thereafter

- (1) Two corporations and three individuals, officers and agents thereof, engaged in manufacture of escutcheons and name plates upon which they etched or stamped names, marks, brands, and symbols for use on radio sets and radio parts, and in sale thereof to manufacturers and dealers in such products;
- (2) Two corporations and three individuals, in their individual capacity and as agents of said corporations, engaged in manufacture, assembly, and sale of radio sets upon which they placed and caused to be placed escutcheons and name plates purchased from the hereinabove described manufacturers and sellers thereof; and
- (3) Four corporations and two individuals engaged in sale and distribution of such products purchased from the hereinbefore described concerns and individuals and upon which there were affixed, as above set forth, escutcheons and name plates with names, marks, brands, and symbols etched or stamped thereon to designate the names, etc., of the makers and brand names of the said products; in furtherance of a scheme engaged in by such various manufacturers and dealers to deceive the public and compete unfairly with other manufacturers and dealers in such sets and parts, and escutcheons and name plates, through affixing such articles, bearing names, marks, brands and symbols of corporations and individuals well known and long established in the radio and similar industries, and

¹ Amended and supplemental.