

IN THE MATTER OF

H. E. WAGLEY, INDIVIDUALLY AND TRADING AS
NATIONAL SALES AND PARAMOUNT SALES

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 3147. Complaint, June 5, 1937—Decision, Aug. 4, 1937

Where an individual engaged in the sale and distribution of clocks and other articles of merchandise to purchasers in the various States, in competition with those engaged in manufacture of clocks and other merchandise and sale and distribution thereof in commerce between and among the various States—

- (a) Furnished devices and plans of merchandising, together with descriptive literature and instructions, which involved operation of games of chance, gift enterprises, or lotteries in distribution to ultimate consumers, wholly by lot or chance, or his said products, and consisted of push cards, through use of which, and under scheme or plan followed, substantially, purchasers paid for right to select one of names of girls set forth on card, in accordance with number pushed by chance, and received article of merchandise involved, of a value exceeding amount paid for chance, or nothing other than right to make a selection, in accordance with their success in selecting name corresponding to that concealed under card's master seal; in violation of public policy long recognized in the common law and criminal statutes, and contrary to an established public policy of the United States Government, and in competition with many who make and sell merchandise and are unwilling to adopt and use said or any method involving game of chance or sale of a chance to win by chance, or any other method contrary to public policy, and refrain therefrom;

With result that many dealers in and ultimate purchasers of his said merchandise were attracted by said method and element of chance involved in sale thereof as above set forth, and were thereby induced to buy and sell or distribute his said products in preference to those offered and sold by said competitors who do not use same or equivalent method, and trade was thereby diverted to him from them, and with capacity and tendency so to divert trade and custom, because of said game of chance, to him from his said competitors who do not use such or an equivalent method;

- (b) Caused representation to be made to his customers and prospective customers, through use of words "factory representative," that he was a direct purchaser from, or a direct distributor of, the manufacturer of the merchandise sold and distributed, notwithstanding fact he was not such representative, but purchased merchandise sold in open market from middlemen, jobbers, or wholesalers;

With effect of misleading and deceiving many of his said customers into the erroneous belief that he was such a direct representative, and that persons dealing with him were buying such merchandise from such direct representative and thereby eliminating profits of middleman and obtaining various advantages not to be had by those buying goods from middlemen, such as, as considered by substantial portion of purchasing public, who

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prefer direct dealing with manufacturer or his representative, lower prices, superior quality, and other advantages not had, in their opinion, through purchase from jobbers or middlemen, and with effect of unfairly diverting trade to him from many competitors who do not falsely represent themselves as representatives of the manufacturer of their merchandise; and

(c) Represented, and caused representation to be made, to customers and prospective customers, that certain rotary clocks sold had retail value of \$5.00, notwithstanding fact said clocks did not have such a retail value, but amount was grossly exaggerated and purely fictitious;

With result that substantial portion of purchasing public, relying on and believing said representation, was induced to buy said clocks by reason thereof, and many of his customers were misled and deceived into believing that said clocks had retail value of \$5.00, and trade was unfairly diverted to him from many competitors who do not falsely represent value of merchandise sold by them:

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

Mr. Henry C. Lank and Mr. P. C. Kolinski for the Commission.

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 H. E. Wagley, individually and trading as National Sales and Paramount Sales, hereinafter referred to as respondent, has been and is 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 stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is an individual with his principal office and place of business located at 508 South Dearborn Street, in the city of Chicago, State of Illinois. Respondent, in carrying on his business, has used the trade names and titles of National Sales and Paramount Sales. Respondent is now, and for some time last past has been, engaged in the sale and distribution of clocks and other articles of merchandise to purchasers thereof located at points in the various States of the United States. He causes and has caused said merchandise when sold to be transported from his principal place of business in Chicago, Ill., to purchasers thereof in the State of Illinois and in other States of the United States at their respective points of location. There is now, and has been for some time last past, a course of trade and commerce by said respondent in such merchandise between and among the various States of the United States. In the course and conduct of said business, respondent is in competi-

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tion with other individuals and with partnerships and corporations engaged in the manufacture of clocks and other merchandise and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the sale and distribution of his said merchandise, respondent has furnished devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes, by which said merchandise is distributed to the ultimate consumers wholly by lot or chance. Said devices and plans of merchandising consist of push cards, the use of which by retail dealers or individuals, in connection with the sale and delivery to the purchasing public of respondent's said merchandise, was and is substantially as follows: The pushcards have a number of partially perforated disks, and when a push is made and the disk is separated from the card a number is disclosed. There are as many separate numbers as there are disks on the card, but the numbers are varied or assorted and are not arranged in numerical sequence. The numbers on said disks are effectively concealed from purchasers and prospective purchasers until a selection has been made and the disk separated from the card. The price of sales varies, depending upon the number obtained. Numbers from 1 to 29 pay the amount of the number in cents. Numbers over 29 pay 29¢. Directly below each disk there is printed a girl's name, and the card has a space prepared for recording the name of each purchaser of a disk opposite the corresponding girl's name. The card also has a master seal which, when removed, exposes a girl's name corresponding to one of those appearing under said disks. The purchaser who pushed the disk corresponding to the name under the master seal is entitled to a specified article of merchandise. The name under the master seal is effectively concealed from purchasers and prospective purchasers until all sales have been made and the master seal removed. Purchasers who select names other than the name appearing under the master seal do not receive anything for their money other than the privilege of pushing a disk from said card. The said articles of merchandise are of a greater value than the cost of a single push from this said card. The fact as to whether a purchaser receives a specified article of merchandise or nothing for his money is thus determined wholly by lot or chance.

PAR. 3. Respondent forwards his pushcards, together with various descriptive literature and with instructions as to how to operate said pushcards or explaining what to do in order to obtain said articles of merchandise, to various members of the public, and a substantial amount of such merchandise is sold or distributed by such persons

by means of said pushcards and in accordance with the instructions furnished by respondent. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of his merchandise in accordance with the sales plan hereinabove set forth.

PAR. 4. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure articles of merchandise at a price much less than the normal retail price thereof. The use by respondent of said method in the sale of his merchandise, and the sale of his merchandise by and through the use thereof and by the aid of said method, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and is contrary to an established public policy of the Government of the United States. Many persons, firms, and corporations who make or sell merchandise in competition with the respondent, as above alleged, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance, or any other method that is contrary to public policy, and such competitors refrain therefrom. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert trade and custom to respondent from his said competitors who do not use the same or an equivalent method.

PAR. 5. Many dealers in and ultimate purchasers of respondent's merchandise are attracted by respondent's said method and by the element of chance involved in the sale of said merchandise in the manner above described, and are thereby induced to buy and sell or distribute respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method, and trade is thereby diverted to respondent from his said competitors.

PAR. 6. In the course and conduct of his said business, respondent has caused and causes the representation to be made to his customers and prospective customers, by the use of the words "factory representative," that he is a direct purchaser from or a direct distributor of the manufacturer of the merchandise which he sells and distributes. A substantial portion of the purchasing public have expressed and have a preference for dealing direct with the manufacturer or his representative of products being purchased, such purchasers believing that they secure lower prices, superior quality, and other advantages that are not obtained when they purchase from jobbers or middlemen. The use by respondent of said representation that he is a factory representative has the capacity and tendency to

and does mislead and deceive many of respondent's said customers into the erroneous belief that respondent is a direct representative of the manufacturer of the merchandise sold by respondent, and that persons dealing with respondent are buying said merchandise from the direct representative of the manufacturer thereof, thereby eliminating the profits of middlemen and obtaining various advantages that are not obtained by persons purchasing goods from middlemen. The truth and fact is that respondent is not the direct representative of the manufacturer but purchases the merchandise which he sells in the open market from middlemen, jobbers, or wholesale dealers. There are many competitors of respondent who do not falsely represent that they are the representatives of the manufacturer of the merchandise sold by them. The use of said representation by respondent has the tendency and capacity to and does unfairly divert trade to respondent from his said competitors.

PAR. 7. In the course and conduct of his said business, respondent, in the sale of certain rotary clocks, has caused and causes the representation to be made to his customers and prospective customers that said clocks have a retail value of \$5.00. A substantial portion of the purchasing public, relying on and believing the said representation, are induced and have been induced to purchase said clocks because of said representation. The use by respondent of said representation has the capacity and tendency to and does mislead and deceive many of respondent's customers into the erroneous belief that said clocks have a retail value of \$5.00. The truth and fact is that said clocks do not have a reasonable retail value of \$5.00 but said amount is grossly exaggerated and purely fictitious. There are many competitors of respondent who do not falsely represent the value of the merchandise sold by them. The use of said representation by respondent has the tendency and capacity to and does unfairly divert trade to respondent from his said competitors.

PAR. 8. The aforesaid method, acts and practices of respondent are all to the prejudice of the public and of respondent's competitors, as hereinabove alleged. Said method, acts, and practices 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."

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 June 5, 1937, issued and on June 7, 1937, served its complaint in this proceeding upon respondent, H. E. Wagley, individually and trading as National Sales and Paramount Sales, charging him with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, the Commission, by order entered herein, granted respondent's request for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the substitute answer, briefs and oral argument of counsel having been waived; 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. Respondent is an individual with his principal office and place of business located at 508 South Dearborn Street, in the city of Chicago, State of Illinois. Respondent, in carrying on his business, has used the trade names and titles of National Sales and Paramount Sales. Respondent is now, and for some time last past has been, engaged in the sale and distribution of clocks and other articles of merchandise to purchasers thereof located at points in the various States of the United States. He causes and has caused said merchandise when sold to be transported from his principal place of business in Chicago, Ill., to purchasers thereof in the State of Illinois and in other States of the United States at their respective points of location. There is now, and has been for some time last past, a course of trade and commerce by said respondent in such merchandise between and among the various States of the United States. In the course and conduct of said business, respondent is in competition with other individuals and with partnerships and corporations engaged in the manufacture of clocks and other merchandise and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the sale and distribution of his said merchandise, respondent has furnished devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes, by which said merchandise is distributed to the ultimate consumers

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wholly by lot or chance. Said devices and plans of merchandising consist of pushcards, the use of which by retail dealers or individuals, in connection with the sale and delivery to the purchasing public of respondent's said merchandise, was and is substantially as follows: The pushcards have a number of partially perforated disks, and when a push is made and the disk is separated from the card a number is disclosed. There are as many separate numbers as there are disks on the card, but the numbers are varied or assorted and are not arranged in numerical sequence. The numbers on said disks are effectively concealed from purchasers and prospective purchasers until a selection has been made and the disk separated from the card. The price of the sales varies, depending upon the number obtained. Numbers from 1 to 29 pay the amount of the number in cents. Numbers over 29 pay 29¢. Directly below each disk there is printed a girl's name, and the card has a space prepared for recording the name of each purchaser of a disk opposite the corresponding girl's name. The card also has a master seal which, when removed, exposes a girl's name corresponding to one of those appearing under said disks. The purchaser who pushed the disk corresponding to the name under the master seal is entitled to a specified article of merchandise. The name under the master seal is effectively concealed from purchasers and prospective purchasers until all sales have been made and the master seal removed. Purchasers who select names other than the name appearing under the master seal do not receive anything for their money other than the privilege of pushing a disk from said card. The said articles of merchandise are of a greater value than the cost of a single push from said card. The fact as to whether a purchaser receives a specified article of merchandise or nothing for his money is thus determined wholly by lot or chance.

PAR. 3. Respondent forwards his pushcards, together with various descriptive literature and with instructions as to how to operate said pushcards or explaining what to do in order to obtain said articles of merchandise, to various members of the public, and a substantial amount of such merchandise is sold or distributed by such persons by means of said pushcards and in accordance with the instructions furnished by respondent. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of his merchandise in accordance with the sales plan hereinabove set forth.

PAR. 4. The sale of merchandise to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure articles of merchandise at a price much less than

the normal retail price thereof. The use by respondent of said method in the sale of his merchandise, and the sale of his merchandise by and through the use thereof and by the aid of said method, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and is contrary to an established public policy of the Government of the United States. Many persons, firms, and corporations who make or sell merchandise in competition with the respondent, as above described, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance, or any other method that is contrary to public policy, and such competitors refrain therefrom. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert trade and custom to respondent from his said competitors who do not use the same or an equivalent method.

PAR. 5. Many dealers in and ultimate purchasers of respondent's merchandise are attracted by respondent's said method and by the element of chance involved in the sale of said merchandise in the manner above described, and are thereby induced to buy and sell or distribute respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method, and trade is thereby diverted to respondent from said competitors.

PAR. 6. In the course and conduct of his said business, respondent has caused and causes the representation to be made to his customers and prospective customers, by the use of the words "factory representative," that he is a direct purchaser from or a direct distributor of the manufacturer of the merchandise which he sells and distributes. A substantial portion of the purchasing public have expressed and have a preference for dealing direct with the manufacturer or his representative of products being purchased, such purchasers believing that they secure lower prices, superior quality, and other advantages that are not obtained when they purchase from jobbers or middlemen. The use by respondent of said representation that he is a factory representative has the capacity and tendency to, and does, mislead and deceive many of respondent's said customers into the erroneous belief that respondent is a direct representative of the manufacturer of the merchandise sold by respondent, and that persons dealing with respondent are buying said merchandise from the direct representative of the manufacturer thereof, thereby eliminating the profits of middlemen and obtaining various advantages that are not obtained by persons purchasing goods from middlemen. The truth and fact is that respondent is

not the direct representative of the manufacturer but purchases the merchandise which he sells in the open market from middlemen, jobbers, or wholesale dealers. There are many competitors of respondent who do not falsely represent that they are the representatives of the manufacturer of the merchandise sold by them. The use of said representation by respondent has the tendency and capacity to, and does, unfairly divert trade to respondent from his said competitors.

PAR. 7. In the course and conduct of his said business, respondent, in the sale of certain rotary clocks, has caused and causes the representation to be made to his customers and prospective customers that said clocks have a retail value of \$5.00. A substantial portion of the purchasing public, relying on and believing the said representation, are induced and have been induced to purchase said clocks because of said representation. The use by respondent of said representation has the capacity and tendency to, and does, mislead and deceive many of respondent's customers into the erroneous belief that said clocks have a retail value of \$5.00. The truth and fact is that said clocks do not have a reasonable retail value of \$5.00, but said amount is grossly exaggerated and purely fictitious. There are many competitors of respondent who do not falsely represent the value of the merchandise sold by them. The use of said representation by respondent has the tendency and capacity to, and does, unfairly divert trade to respondent from his said competitors.

CONCLUSION

The aforesaid acts and practices of the respondent, H. E. Wagley, individually and trading as National Sales and Paramount Sales, are to the prejudice of the public and 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 and the answer of respondent dated July 12, 1937, admitting all of the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of an Act of Congress, ap-

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proved 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, H. E. Wagley, individually and trading as National Sales and Paramount Sales and trading under any other name, his agents, representatives and employees, in connection with the offering for sale, sale and distribution of clocks and other merchandise in interstate commerce, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others pushcards or similar devices for the purpose of enabling such persons to dispose of or sell, by the use thereof, clocks or other articles of merchandise.

2. Mailing, shipping or transporting to members of the public pushcards or similar devices so prepared or printed as to enable said persons, by the use thereof, to sell or distribute clocks or other merchandise.

3. Selling or otherwise disposing of clocks or other merchandise by the use of pushcards or similar devices.

4. Representing directly or indirectly that the respondent is a "factory representative" or a direct purchaser from or a direct distributor of the manufacturer of the merchandise which he sells and distributes.

5. Representing or advertising, directly or indirectly, that the rotary clocks which respondent sells and distributes have a retail value or price of \$5.00 or any value or price in excess of the actual or usual selling price at which said rotary clocks are sold by retailers to the consuming public, or have a retail value or price in excess of the normal or usual retail value or price of similar articles selling at wholesale for prices comparable to the wholesale price of said rotary clocks.

It is further ordered, That the respondent, H. E. Wagley, individually and trading as National Sales and Paramount Sales, shall, within 30 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 hereinabove set forth.

IN THE MATTER OF
W. H. BONIFIELD, TRADING AS CHICOPEE MEDICINE
COMPANY

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

Docket 2740. Complaint, Mar. 10, 1936—Decision, Aug. 5, 1937

Where an individual engaged in sale of so-called "Chicopee Native Indian Herbs" medicinal preparation, either direct to members of the purchasing public or through druggists for resale thereto, in substantial competition in interstate commerce with those engaged in sale and distribution, in commerce among the States and in the District of Columbia, of similar medicines or those intended for and adapted to treatment of various bodily ailments for which his said preparation was adapted or recommended—

- (a) Made use of printed coupons or circulars in offer and sale of his said product, and caused said medicine to be placed in cartons, upon which coupons and cartons there were depicted representation of generally accepted idea of an "Indian Medicine Man" preparing concoction over a fire with a wigwam as a background, along with various statements in regard thereto which, together with aforesaid name "Chicopee Native Indian Herbs," used to designate said medicine, represented that such product was composed of native Indian herbs;
- (b) Represented, through many statements on said coupons or circulars, that said medicine was a cure, remedy or competent and adequate treatment for diseases of the kidneys, liver, bowels, or stomach, and for constipation, biliousness, colds, pain in the neck, sick headache, rheumatism, similar complaints, and other ailments and conditions, and that it would give relief therein and would relieve any ailment or abnormal bodily condition, and that it would relieve "pain in the neck, shoulders, side, back, or hips in one day," and la grippe and colds, and certain other specified ailments in the same period of time;
- (c) Represented that it was a wonderful remedy of nature and was effective from the very first dose and did its work surely, safely, and quickly, and brought health and happiness, and was the oldest and most reliable medicine known which would improve health 100%, and that it was a medicine that nature grows and a general tonic, and that it relieved bilious or sick headache, in two hours, and heartburn and palpitation of the heart and other conditions at once; and
- (d) Caused to be printed on aforesaid coupons or circulars "YOUR FUTURE HOROSCOPE FREE! TEN PAGES! BUY A PACKAGE OF CHICOPEE TODAY. AND GET THIS VALUABLE HELP";

Facts being said horoscope was not the individual horoscope of the purchaser, but a mimeographed form printed and distributed in large quantities, medicine in question was not composed of native Indian herbs, nor a cure, remedy, or competent and adequate treatment for diseases of the kidneys, liver, etc., as above set forth, statements that such medicine would relieve such diseases and conditions as above were not warranted, and were inac-