Syllabus

IN THE MATTER OF

E. I. DONAHUE, INDIVIDUALLY AND TRADING AS DONAHUE ADVERTISING COMPANY

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

Docket 3180. Complaint, July 21, 1937—Decision, Aug. 11, 1937

Where an individual engaged in sale and distribution of various articles of merchandise, including, among others, electric clocks, kitchen cutlery sets, tableware sets, hostess tray sets and grill, vacuum coffee sets, and other articles, in commerce among the various States—

Furnished various devices and plans of merchandising which involved operation of gift enterprises or lottery schemes and distribution of his said merchandise to ultimate consumers wholly by lot or chance, and consisted of variety of push cards for sale and distribution, substantially, under a plan or method, and in accordance with said cards' explanatory legends, by which prospective purchasers selecting one of a variety of girls' names displayed on card paid up to certain maximum amount in accordance with number disclosed under name selected, and received article of merchandise being thus disposed of, or nothing other than privilege of undertaking such chance selection, in accordance with their success or failure in selecting name corresponding to that concealed under card's master seal, and under which person, salesman, agent or representative soliciting purchases of chances was similarly compensated, after completing sales thereof, by receipt of article of merchandise without further charge or additional service, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of his merchandise, in accordance with such sales plan as hereinabove set forth, 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 or sell merchandise as above described but are unwilling to adopt and use said or any method involving game of chance or sale of a chance to win something by chance or any other method contrary to public policy, and refrain therefrom;

With result that many persons were attracted by his said methods and element of chance involved in sale in manner above described, and were thereby induced to buy and sell his said merchandise in preference to that offered and sold by said competitors who do not use same or equivalent methods, and with effect, by reason of said game of chance, of diverting trade and custom to him from his said competitors who do not use same or equivalent methods:

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 E. I. Donahue, individually and trading as Donahue Advertising Company, 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 doing business under the trade name and style of Donahue Advertising Company, with his principal office and place of business located at 407 South Dearborn Street, Chicago, Ill. He is now, and for some time last past has been, engaged in the sale and distribution of various articles of merchandise, including, among others, electric clocks, kitchen cutlery sets, tableware sets, hostess tray sets and grill, vacuum coffee sets, roaster sets, smoking stands, ashtray combinations, and pen and pencil sets, in commerce between and among the various States of the United States. He causes and has caused said products when sold to be transported from his principal place of business in the State of Illinois to purchasers thereof in 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 as he is selling or distributing between and among the 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 sale and distribution of similar or like articles of merchandise in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his business, as described in paragraph 1 hereof, the respondent, in soliciting the sale of and in selling and distributing the said merchandise, has furnished various devices and plans of merchandising which involve the operation of gift enterprises or lottery schemes and a distribution of such merchandise to the ultimate consumers thereof wholly by lot or chance. Said devices or plans of merchandising consist of a variety of push cards, the use of which, in connection with the sale and delivery to the purchasing public by the method or plan suggested by respondent, was and is substantially as follows:

The said push cards bear a number of girls' names. Concealed under each name is a number. Also, under a master seal there is a name corresponding to one of the names on the card. Prospective purchasers select one of the names and remove the same disclosing the number thereunder. Persons selecting numbers from 1 to 29 pay in cents the amount of such number, and persons selecting numbers over 29 pay 29¢ for the privilege of selecting one of the names. The push cards bear various legends informing purchasers and prospective purchasers of the plan or method by which said push card is operated and by which the merchandise described thereon is to be distributed. When all the names have been purchased the master seal is removed, and the person who has selected the name corresponding to the name under the master seal receives the article of merchandise described without further charge, and the person, salesman, agent, or representative soliciting purchases of chances, as above described, also receives an article of merchandise without further charge or additional service. The numbers under the names are concealed from purchasers and prospective purchasers, and they do not know how much they will have to pay for the privilege of selecting one of the names until the selection has been made and the name removed. The name under the master seal is concealed from purchasers and prospective purchasers until all the names have been selected. Those customers selecting names which do not correspond to the name under the master seal receive nothing but the privilege of making a selection for the money which they pay. The said articles of merchandise vary in value, but each of said articles of merchandise is of a greater value than the cost of a single push from said push card. The various articles of merchandise are thus distributed to the purchasing public wholly by lot or chance, and the amount which the customers pay for a chance is determined wholly by lot or chance.

PAR. 3. The persons to whom respondent furnishes said devices use the same in purchasing, selling, and distributing respondent's merchandise in accordance with the aforesaid sales plan. 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. The use by respondent of said method in the sale of his merchandise, and the sale of such 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.

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. 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. Many persons are attracted by respondent's said methods and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to buy and sell respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent, because of said game of chance, has the tendency and capacity to, and does, divert trade and custom to respondent from his said competitors who do not use the same or equivalent methods.

PAR. 5. The aforesaid acts and practices of respondent are all to the injury and prejudice of the public and of 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."

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 July 21, 1937, issued and on July 22, 1937, served its complaint in this proceeding upon respondent, E. I. Donahue, individually and trading as Donahue Advertising Company, 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, respondent filed answer thereto, dated July 28, 1937, admitting the facts as alleged in the said complaint to be true. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and answer thereto, 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 doing business under the trade name and style of Donahue Advertising Company, with his principal office and place of business located at 407 South Dearborn Street, Chicago, Ill. He is now, and for some time last past has been engaged in the sale and distribution of various articles of merchandise including, among others, electric clocks, kitchen cutlery sets, tableware sets, hostess tray sets and grill, vacuum coffee sets, roaster sets, smoking stands, ashtray combinations, and pen and pencil sets, in commerce between and among the various States of the United States. He causes and has caused said products when sold to be transported from his principal place of business in the State of Illinois to purchasers thereof in 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 as he is selling or distributing between and among the 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 sale and distribution of similar or like articles of merchandise in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his business, as described in paragraph 1 hereof, the respondent in soliciting the sale of and in selling and distributing the said merchandise, has furnished various devices and plans of merchandising which involve the operation of gift enterprises or lottery schemes and a distribution of such merchandise to the ultimate consumers thereof wholly by lot or chance. Said devices or plans of merchandising consist of a variety of push-cards, the use of which, in connection with the sale and delivery to the purchasing public by the method or plan suggested by respondent, was and is substantially as follows:

The said push cards bear a number of girls' names. Concealed under each name is a number. Also, under a master seal there is a name corresponding to one of the names on the card. Prospective purchasers select one of the names and remove the same disclosing the number thereunder. Persons selecting numbers from 1 to 29 pay in cents the amount of such number, and persons selecting numbers over 29 pay 29¢ for the privilege of selecting one of the names. The push cards bear various legends informing purchasers and prospective purchasers of the plan or method by which said push card is operated and by which the merchandise described thereon is to be

distributed. When all the names have been purchased the master seal is removed, and the person who has selected the name corresponding to the name under the master seal receives the article of merchandise described without further charge, and the person, salesman, agent, or representative soliciting purchases of chances, as above described, also receives an article of merchandise without further charge or additional service. The numbers under the names are concealed from purchasers and prospective purchasers, and they do not know how much they will have to pay for the privilege of selecting one of the names until the selection has been made and the name removed. The name under the master seal is concealed from purchasers and prospective purchasers until all the names have been selected. Those customers selecting names which do not correspond to the name under the master seal receive nothing but the privilege of making a selection for the money which they pay. The said articles of merchandise vary in value, but each of said articles of merchandise is of a greater value than the cost of a single push from said push card. The various articles of merchandise are thus distributed to the purchasing public wholly by lot or chance, and the amount which the customers pay for a chance is determined wholly by lot or chance.

PAR. 3. The persons to whom respondent furnishes said devices use the same in purchasing, selling, and distributing respondent's merchandise in accordance with the aforesaid sales plan. 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. The use by respondent of said method in the sale of his merchandise and the sale of such 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.

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. 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. Many persons are attracted by respondent's said methods and by the element of chance involved in the sale thereof in the manner above described,

and are thereby induced to buy and sell respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent, because of said game of chance, has the tendency and capacity to, and does, divert trade and custom to respondent from his said competitors who do not use the same or equivalent methods.

CONCLUSION

The aforesaid acts and practices of the respondent, E. I. Donahue, individually and trading as Donahue Advertising Company, are to the prejudice of the public and of 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 on the complaint of the Commission and the answer of the respondent dated July 28, 1937, admitting the facts as set forth in the complaint to be true, 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, 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 E. I. Donahue, individually and trading as Donahue Advertising Company, his agents, representatives, and employees, in connection with the offering for sale, sale and distribution of merchandise in interstate commerce, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards or similar devices for the purpose of enabling such persons to dispose of or sell such merchandise by the use thereof.

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

3. Selling or otherwise disposing of merchandise by the use of push cards or similar devices.

4. In any manner, selling or otherwise disposing of merchandise, free of charge, or at varying prices, depending upon lot or chance.

It is further ordered, That the respondent E. I. Donahue, individually and trading as Donahue Advertising Company, 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.

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