

IN THE MATTER OF

MAX SCHREIBER, PHILIP W. SIMONS, AND WILLIAM
KLOMPUS, INDIVIDUALLY, AND TRADING AS DE LUXE
MANUFACTURING COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2294. Complaint, Feb. 7, 1935—Decision, Feb. 9, 1938*

Where three partners engaged in sale and distribution of radio receiving sets and other articles of merchandise to purchasers in practically all the States and in the District of Columbia, in soliciting sale thereof—

Furnished and sent, in response to its advertisements for agents and representatives in periodicals of general circulation, sample pull cards, order blanks, descriptive literature, and advertisements depicting merchandise thus being offered, and circulars describing their said plan of selling such merchandise and of allotting same as prizes to operators of such cards, under plan by which chance purchaser paid for chance varying amount, or nothing, dependent upon number disclosed under various tabs of aforesaid cards, and received radio, or nothing, dependent upon success or failure in selecting feminine name corresponding to that concealed under card's seal depicting such instrument, and thereby placed in the hands of others means of conducting lotteries, games of chance, or gift enterprises in distribution of their products, with knowledge and intent that said cards had been, were, and would be used in sale and distribution of their said merchandise to public by lot or chance, contrary to public policy, and in competition with many who were opposed to use of such cards in sale and distribution of their products and refrained from furnishing same;

With result that sale of similar and like merchandise by such competitors was thereby injuriously affected, and trade was diverted from them to said partners by reason of said furnishing of such cards or like devices, and there was a restraint upon and detriment to the freedom of fair and legitimate competition, and with tendency and capacity unfairly to divert such trade, as aforesaid; to the prejudice and injury of the public and competitors:

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

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank for the Commission.

Nash & Donnelly, of Chicago, Ill., 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 Max Schreiber, Philip W. Simons, and William Klompus, individually and as copart-

ners trading under the name and style of DeLuxe Manufacturing Company, hereinafter referred to as respondents, have been and are using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, 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. Respondents are individuals doing business as a co-partnership under the name and style of DeLuxe Manufacturing Company, with their principal office and place of business in the city of Chicago, State of Illinois. Respondents are now and for more than 1 year last past have been engaged in selling radio-receiving instruments to wholesale and retail dealers located in various States of the United States. They cause said merchandise, when sold, to be transported from their principal place of business in the State of Illinois to purchasers thereof in other States of the United States and in the District of Columbia at their respective places of business, and there is now and has been for more than 1 year a course of trade and commerce by said respondents in such merchandise between and among different States of the United States and the District of Columbia. In the course and conduct of said business respondents are in competition with other partnerships, individuals, and corporations engaged in the sale and distribution of radio receiving instruments in commerce between and among various States of the United States and within the District of Columbia.

PAR. 2. In the course and conduct of their business as described in paragraph 1 hereof the respondents have been and are now soliciting the sale of and selling said radio receiving instruments by means of advertisements inserted in periodical publications having an interstate circulation. These advertisements solicit salesmen for the sale of said radio receiving instruments. Among such advertisements is one inserted in the Specialty Salesman Magazine for the month of January 1935, reading in part as follows:

Make up to \$150 weekly giving away free automobile radios and home sets. * * * With our new unique "punch sales card plan," the only one of its kind in the country, you actually give away free fine automobile radios and beautiful ultra-modern home sets.

In another advertisement inserted in the same magazine in the June 1934, issue appears, among others, the following representation:

Who else wants up to \$150 weekly giving away free radios? Automobile and home set radios actually given away absolutely free with a most sensational unique punch sales card plan.

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Said advertisements are false, misleading, and deceptive and have the capacity and tendency to mislead and deceive prospective salesmen. In truth and in fact the respondents do not give away radio-receiving instruments free but receive the full wholesale value thereof for all instruments distributed by them, and their agents do not regularly make \$150 weekly. Such earnings are the exception and are unusual and are not the usual result to be expected in distributing the respondents' merchandise. The said plan and method of sale is not sensational nor unique and is not new.

PAR. 3. The use by respondents of the above-quoted advertisements and advertisements of like nature and to the same effect are unfair to manufacturers and distributors manufacturing and distributing radio-receiving instruments who do not use the same or similar false and misleading representations in soliciting representatives to sell their product.

By reason of the said false and misleading advertisements, agents are thus induced and persuaded into representing the respondents and in soliciting the sale of and selling respondents' products, all to the injury of the public and respondents' competitors.

PAR. 4. In the course and conduct of their business as described in paragraph 1 hereof the respondents have been and are now soliciting the sale of and selling and transporting in commerce to retail dealers in various States of the United States radio-receiving instruments and in the sale and distribution of said radio-receiving instruments respondents have furnished various devices and plans of merchandising which involve the operation of gift enterprises or lottery schemes and said radio-receiving instruments are distributed 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 by retail dealers in connection with the sale and delivery to the purchasing public of respondents' said radio-receiving instruments and the method or plan suggested by respondents was and is substantially as follows:

The said push cards consist of a booklet containing 110 girls' names and concealed under each name is a number; also, under a master seal there is a name corresponding to one of the 110 names. Prospective purchasers select one of the names and remove the same, disclosing the number thereunder. Numbers from 1 to 35 pay in cents the amount of such number. Persons selecting numbers over 35 pay 35 cents for the privilege of selecting one of the names. The push card bears a legend informing the prospective purchaser that the

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persons selecting a few of the numbers will receive the same free. For illustration:

TEN FREE NUMBERS. NUMBERS 2—3—
4—5—6—7—8—9—10—11
ARE FREE

When all the names have been purchased the master seal is removed and the person selecting the name corresponding to the name under the master seal receives a radio-receiving instrument without further charge and the salesman, agent, representative, or retail dealer soliciting purchasers of chances as above described also receives a radio-receiving instrument without further charge or additional services. The numbers under the names are concealed from the prospective purchasers and they do not know how much they will have to pay for the privilege of selecting one of the names, or whether the same will be obtained free of charge, until the selection has been made and the name removed. Also, the name under the master seal is concealed from the prospective purchasers until all the names have been selected, and the customers or purchasers do not know what they will receive for their money, if anything, until after the master seal has been removed. 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 purchasing public are thus induced and persuaded into purchasing pushes from said card in the hope that they may select the prize-winning name and thus obtain the radio-receiving instrument free of charge or for a sum of money not in excess of 35 cents. Radio-receiving instruments are thus distributed to the purchasing public wholly by lot or chance.

The respondents occasionally sell and distribute other articles of merchandise by the method above described but the sale and distribution of radio-receiving instruments constitute the major portion of their business.

PAR. 5. The aforesaid agents, representatives, salesmen, and retail dealers of the respondents expose said radio-receiving instruments in connection with the aforesaid push cards and sell pushes to the purchasing public in accordance with the aforesaid plan whereby the said radio-receiving instruments are distributed to the purchasers of pushes from the said cards wholly by lot or chance. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the distribution of its radio-receiving instruments, in accordance with the sales plan hereinabove set forth, as a means

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of inducing the consuming public to purchase pushes from said cards in an effort to procure respondents' radio-receiving instruments in preference to purchasing the same from respondents' competitors.

PAR. 6. The sale and distribution of radio-receiving instruments to the purchasing public as above alleged involves a game of chance or the sale of a chance to procure such articles of merchandise in the manner alleged. Such game of chance and the sale of such chance to procure such articles of merchandise in the manner alleged are contrary to the established public policy of the several States of the United States and the District of Columbia and of the Government of the United States, and in many of the States of the United States are contrary to local criminal statutes.

By reason of said facts, many persons, firms, and corporations who sell and distribute such merchandise in competition with the respondents as above alleged are unwilling to furnish push cards or to offer for sale or sell their merchandise in connection with such lotteries or gaming devices, and such competitors refrain therefrom.

PAR. 7. Many dealers in and ultimate consumers of such merchandise are attracted by respondents' said methods and by the element of chance involved in the sale thereof in the manner above described and are thereby induced to purchase such merchandise in preference to merchandise offered for sale by competitors of respondents who do not use the same or equivalent methods. Many dealers in such merchandise are induced to purchase the same so offered for sale and sold by respondent in preference to all other similar merchandise because said ultimate consumers thereof give preference to respondents' merchandise on account of the game of chance so involved in the sale thereof.

Respondents' sales plan as mentioned above tends to and does induce many of the consuming public to purchase respondents' merchandise in preference to the merchandise of respondents' competitors because of the chance of obtaining one of said radio-receiving instruments free of charge or at a price not exceeding 35 cents rather than at the nominal retail price of the same, which is many times greater than 35 cents.

PAR. 8. The use of said method by respondents has a tendency and capacity unfairly and because of said game of chance alone to divert to respondents trade and custom from their competitors who do not use the same or equivalent methods; to exclude from said trade all competitors who are unwilling to and who do not use the same or equivalent methods; to lessen competition in said trade and to tend to create a monopoly of said trade in respondents and such other distributors as use the same or equivalent methods and to deprive the

purchasing public of the benefit of free competition in said trade. The use of said method by respondents has the tendency and capacity unfairly to eliminate from said trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt or use said method or equivalent methods that are contrary to public policy and to criminal statutes as above alleged. Many of said competitors of respondents are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win a radio-receiving instrument by chance, because such methods are contrary to public policy or to the criminal statutes of certain of the States of the United States or because they are of the opinion that such methods are detrimental to the merchandising business or are detrimental to public morals and to the morals of the purchasers of said merchandise or because of any or all of such reasons.

PAR. 9. The aforesaid methods, acts, and practices of the respondents are all to the prejudice of the public and of respondents' competitors as hereinabove alleged. Said methods, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "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 February 7, 1935, issued and served its complaint in this proceeding upon the respondents, Max Schreiber, Philip W. Simons, and William Klompus, individually and as copartners, trading under the name and style of De Luxe Manufacturing Company, charging them 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 respondents' answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Henry C. Lank, attorney for the Commission, and in opposition thereto by John A. Nash, attorney for the respondents, before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it. The said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony, and other evidence, briefs in support of the complaint and in opposition thereto and the oral arguments of counsel aforesaid; and the

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Commission, having duly considered the matter and now being 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. The respondents, Max Schreiber, Philip W. Simons, and William Klompus, are individuals, and at the time of the issuance of said complaint and for some time subsequent thereto were copartners, doing business under the firm name and style of De Luxe Manufacturing Company, with their principal office and place of business located at 173 West Madison Street in the city of Chicago, State of Illinois. At the time of the taking of testimony in this matter, April 27, 1937, the partnership was composed of Max Schreiber, and William Klompus, the said respondent Philip W. Simons having withdrawn from said partnership approximately 2 months prior to said hearing. The respondents Max Schreiber and William Klompus are now, and all of the said respondents for some time last past have been, engaged in the sale and distribution of radio receiving sets and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia. They cause, or have caused, such merchandise, when sold, to be shipped or transported from their principal place of business in Chicago, Ill., to purchasers thereof in the State of Illinois and in practically all of the other States of the United States, as well as in the District of Columbia, at their respective points of location. There is now a course of trade in commerce by said respondents Max Schreiber and William Klompus, and has been for some time past a course of trade in commerce by all of said respondents in such merchandise between and among the various States of the United States and in the District of Columbia. In so carrying on said business, respondents are, or have been, engaged in active competition with other partnerships and with individuals and corporations engaged in the manufacture of similar or like articles of merchandise and in the sale and distribution thereof in commerce 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 as described in paragraph 1 above, respondents in soliciting the sale of and selling their merchandise have adopted and pursued, and still continue, the following methods and practices:

Respondents have caused to be inserted in magazines and periodicals having a general circulation throughout the United States various advertisements soliciting agents, representatives, or salesmen for their

merchandise, and upon receipt of inquiries from members of the public or prospective agents, representatives, or salesmen, send to such persons sample pull cards, order blanks, descriptive literature, and advertisements containing illustrations of the merchandise which they are offering for sale, and circulars explaining respondents' plan of selling such merchandise and of allotting it as premiums or prizes to the operators of said pull cards.

All of the pull cards used by respondents involve, or have involved, the same principle or sales plan or method but vary to some extent in detail. One of the said pullcards bears 110 feminine names with ruled columns for writing in the name of the customer opposite the feminine name selected. Said pull card has 110 small partially separated tabs on each of which is printed one of the feminine names heretofore referred to. Concealed under each tab is a number which is disclosed when the tab is pulled or separated from the card. At the top of said pull card there is a partially perforated seal, concealed under which is one of the feminine names heretofore referred to. The numbers concealed under each of the tabs cannot be ascertained until a pull or selection has been made, and the name concealed under the seal cannot be ascertained until the seal has been removed. The pull card bears printed legends or instructions as follows:

PERSON SELECTING NAME UNDER SEAL RECEIVES A RADIO

(Picture of radio) Do not remove seal until all donations are made.

10 FREE NUMBERS

NUMBERS 2-3-4-5-6-7-8-9-10-11 ARE FREE

Numbers 1 to 35 Pay What you Draw

Numbers Over 35 Pay Only 35¢

NO HIGHER

DIRECTIONS

This catalogue consists of 110 girls' names. The amount of each sale ranges from 1¢ to 35¢. No higher. No sale over 35¢.

There are 10 FREE numbers. Persons selecting numbers 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 pay NOTHING. As each person selects a name the amount to be paid appears on the inside of each slip; for instance: If No. 1 is selected the amount required to pay is 1¢, if No. 26 is selected the amount is 26¢.

Those selecting numbers over 35 pay only 35¢.

Each payment entitles the payee to a free drawing on the radio illustrated in this catalogue when the seal is opened.

Do not remove seal until all money has been collected.

Sales of radio-receiving sets by means of said pull cards are made in accordance with the above described legends and instructions. Said prizes or premiums are allotted to the customers or purchasers in accordance with the above legends. The fact as to whether a customer

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pays a sum of money from 1 cent to 35 cents for a radio-receiving set or receives the same free of charge, and the fact as to whether a customer receives nothing for the amount paid, is thus determined wholly by lot or chance.

As stated above, the other pull cards which respondents furnish are identical in principle but vary in detail. The members of the public to whom respondents furnish their pull cards use the same in the manner suggested by respondents, thereby distributing respondents' merchandise to others by lot or chance. The sale and distribution of respondents' merchandise through the use of or by means of said pull cards constitutes the operation of lotteries, games of chance, or gift enterprises, and the respondents in furnishing said pull cards put in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the distribution of their merchandise.

PAR. 3. The respondents, in furnishing said pull cards, have knowledge that the same are, have been and will be, used in distributing their merchandise, and furnish said pull cards so that their merchandise may be sold or distributed to the public by lot or chance.

PAR. 4. There are in the United States many manufacturers and distributors selling and distributing similar or like merchandise to that distributed by the respondents, who do not furnish pull cards similar to those furnished by respondents, and who do not furnish any device by which their merchandise can be distributed to the public by lot or chance. There are also many competitors of respondents who are opposed to the use of pull cards in the sale and distribution of their merchandise, and such competitors refrain from furnishing such devices. The sale of merchandise by means of said pull cards injuriously affects the sale of similar or like merchandise by such competitors who do not use similar devices in connection with the sale of their merchandise, and trade is diverted to respondents from their said competitors by reason of the furnishing of said pull cards or like devices. The use of such methods by the respondents in the sale and distribution of their merchandise is prejudicial and injurious to the public and to respondents' competitors, and has resulted in the diversion of trade to respondents from their said competitors, and is a restraint upon, and a detriment to, the freedom of fair and legitimate competition.

PAR. 5. The acts and practices of the respondents, as above set out, have the tendency and capacity unfairly to divert trade in said commerce to the respondents from their competitors, to the injury of such competitors, and to the injury of the public. The sale and distribution in interstate commerce of merchandise by lotteries, games of chance, or gift enterprises as herein described by lot or chance is contrary to public policy.

CONCLUSION

The aforesaid acts and practices of the respondents are to the prejudice of the public and of respondents' 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, the answer of the respondents, testimony and other evidence taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein and oral arguments by Henry C. Lank, counsel for the Commission, and by John A. Nash, counsel for the respondents, and the Commission having made its findings as to the facts and conclusion that said respondents have 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 respondents, Max Schreiber, Philip W. Simons, and William Klompus, individually and as copartners trading as De Luxe Manufacturing Company, their agents, representatives, and employees, in connection with the offering for sale, sale and distribution of radio receiving sets and other merchandise in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Selling, supplying to, or placing in the hands of others pull cards or other lottery or chance devices so as to enable such persons to dispose of or sell by the use thereof such articles of merchandise;

2. Mailing, shipping, or transporting to members of the public pull cards or other lottery or chance 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 pull cards or other lottery or chance devices, or in any manner selling or otherwise disposing of such merchandise free of charge or at varying prices depending upon lot or chance.

It is further ordered, That the respondents shall, within 30 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist hereinabove set forth.

IN THE MATTER OF
H. C. BRILL COMPANY, INC.

COMPLAINT, FINDINGS, CONCLUSION, OPINION AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (a) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 3299. Complaint, Jan. 15, 1938—Decision, Feb. 10, 1938

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, SUBSEC. (a)—CUMULATIVE QUANTITY DISCOUNTS—WHERE IRRELATED SIZE OF INDIVIDUAL SHIPMENTS, ORDERS, ETC.

Savings in the cost of serving different customers, aside from differences in methods of sale and delivery, result from the differences in the size of the individual order placed by such customers, irrespective of the aggregate purchases for a given period of time, and a distinction in price between shipping cartons or shelf packages and broken packages is readily understood, and a difference in price based upon the size of individual purchases and shipments is likewise appreciated, large orders ordinarily being obtained, assembled, priced, packed, billed, and delivered at a lower cost per dollar of sales than small orders. Under discount plan, however, based on aggregate volume purchases for given period, it may cost seller more per dollar of sales to serve customer who places large number of small orders, sufficient in aggregate to earn discounts, than customer who places few large orders, total of which is not sufficient to obtain discount, since, while purchasers of large annual amount sometimes buy in larger individual shipments than do buyers whose purchases do not amount to as large a sum, large buyers also place numerous small orders, average size of which is frequently less than that of orders placed by buyers whose aggregate annual purchases are less in volume. There is no certainty and scarcely any probability that the business of the buyer who purchases from \$5,000 to \$10,000 in the aggregate of merchandise within a year will cost the seller more or less in proportion to quantity than the one who purchases more than \$30,000 or less than \$35,000, and cumulative discount is sound only where savings have been achieved by the seller with respect to individual sales made to a particular buyer over a period of time, not reflected in price at which buyer purchased and reserved for purpose of refunding at end of such period.

DISCRIMINATION IN PRICE—CLAYTON ACT, SEC. 2, SUBSEC. (a)—COMPETITIVE EFFECT—SMALL DIFFERENTIALS—WHERE RELATIVE IMPORTANCE PRODUCT, NOT GREAT.

While price differential of 2¼ percent on single product such as ice cream powder, is not sufficient to give chain store organization of national scope any appreciable competitive advantage in all of its business, such organization does receive definite advantage in sale of that particular commodity, and such competitive advantage becomes greater when such company is permitted to obtain such differential from considerable number of sellers; such sum, i. e., 2¼ percent, in case of Nation-wide and of many food chains represent-