

IN THE MATTER OF
ASKIN'S RETAIL STORES, INC.

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

Docket 3225. Complaint, Sept. 13, 1937—Decision, July 29, 1938

Where a corporation, engaged in the offer, sale, and distribution of coats, suits, dresses, hats, and other merchandise, through a chain of stores owned and operated by it in several States and in the District of Columbia—

Held out, through advertisements and sales talks, offer to give "free," or in some cases "gratis," and without cost to the purchaser, an article of merchandise of a certain assigned value with the purchase of certain other merchandise amounting to a certain figure, and made so-called "combination" sales, in which sale of certain merchandise was accompanied by the delivery of other merchandise designated as "in combination," through such statements or representations, among others, as "Men's Hat FREE with the purchase of any of these new spring suits or topcoats * * * \$24.50," "Lady's Dress free with the purchase of any of these new spring coats or suits—\$14.95";

Facts being that in such and similar transactions in which a specified article was offered to be included "free" or "gratis" or "in combination," the theretofore selling price of the other merchandise, purchase of which at the price named was made a condition precedent to the receipt of the "free" or "gratis" or "in combination" articles, had been marked up so that the prices were substantially greater than those at which they were regularly and originally sold when unaccompanied by such "free" or "gratis" articles;

With capacity and tendency to confuse, mislead, and deceive a substantial portion of purchasing public into erroneous belief that merchandise thus designated as "free," "gratis," or "in combination," was given to purchaser of other merchandise in the amount stated absolutely free and without cost, as a gratuity, and with result that many purchasers, relying on such representations, bought merchandise in the mistaken and erroneous belief that the articles designated and offered as "free," "gratis," or "in combination," were given to them absolutely free and without cost, and as a gratuity, and with effect of misleading and deceiving prospective purchasers, and causing many of such purchasers erroneously and mistakenly to believe that said so-called "free," etc. merchandise was given free and as a gratuity, and without cost to them, and of causing a substantial portion thereof to buy its said products, and of thereby unfairly diverting substantial trade to it from its competitors, among whom there are many who do not in any way misrepresent the selling price of their products and do not falsely represent that they will give to the purchaser free or as a gratuity, certain articles with the purchase of merchandise in any given amount; to the injury of its competitors and that of the public:

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

Before *Mr. Edward E. Reardon*, trial examiner.

Mr. Carrel F. Rhodes for the Commission.

Heller & Grossman, of New York City, for respondent.

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 Askin's Retail Stores, Inc., a corporation hereinafter referred to as respondent, has been, and is now, using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to the 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, Askin's Retail Stores, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 425 Fourth Avenue, New York City, N. Y. Respondent is now, and for more than 1 year last past has been, engaged in the business of manufacturing, advertising, selling, and distributing men's clothing and women's wearing apparel and other articles. It now causes, and for more than 1 year last past has caused, its said products when manufactured to be shipped from its principal place of business in New York City in said State through and into the several States of the United States other than the State of origin of such shipment and in the District of Columbia, where said products are delivered to retail stores owned and operated by respondent or by others.

Respondent, in the course and conduct of its said business, advertises and sells its said products to the consuming public through a chain of stores owned and operated by it in the several States of the United States and in the District of Columbia under various trade names. Among the retail stores so owned and operated by respondent is one located at 737 Seventh Street, Washington, D. C., known and designated by the trade name Fit-Well Clothing Company.

Respondent's method of sales is through advertisements and sales talks whereby it holds out to the public as an inducement to buy its merchandise, an offer to give free and without cost to each purchaser of a man's suit or topcoat sold at a price of \$22.50 or \$24.50, certain merchandise including hats of a value up to \$4.95, dress shirts up to a value of \$1.95, and silk ties up to a value of \$0.95; and to each purchaser of a woman's coat or suit sold at a price of \$14.95, a free gift of a dress, or other articles of value.

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Respondent is now, and for more than 1 year last past has been, in substantial competition with other corporations and with persons, firms, and partnerships engaged in the sale of men's clothing and women's wearing apparel and other articles like or similar to those sold by respondent 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 its said business as described in paragraph 1 thereof, in soliciting the sale of and selling its said products, respondent now represents, and for more than 1 year last past has represented, in newspapers, magazines, pamphlets, circulars, letters, radio broadcasts and other forms of advertising media having an interstate circulation—published and circulated under the names Askin's Retail Stores, Inc., Fit-Well Clothing Company, and other trade names—and in sales talks and on signs posted around its retail stores located in the several States of the United States and the District of Columbia, as follows:

Sensational Free Offers and Extra Easy Credit! Men's Hat free with the purchase of any of these new spring suits or top coats—\$24.50. As little as \$1.00 a week will do it!

Ladies' Dress free with the purchase of any of these new spring coats or suits—\$14.95. . . .

Men! Get a complete "Master Built" Outfit and hat, shirt and tie free with every suit Fri. and Sat. One dollar down delivers everything. Four-piece "Master Built" Outfit complete—\$22.50 up.

PAR. 3. In truth and in fact the cost of the \$4.95 hat, the \$1.95 shirt, and the \$0.95 tie and the dress or other merchandise offered to be given "Free" to the purchaser by respondent with each purchase of a \$22.50 or \$24.50 man's suit or topcoat and with each purchase of a ladies' \$14.95 suit or coat or other like merchandise bought as described in paragraph 2 hereof is included in the said \$22.50 or \$24.50 paid for the man's topcoat or suit and in the said \$14.95 paid for the ladies' suit or coat or other merchandise purchased; and said so-called free goods are not in any sense a gift or gratuity given to customers without cost to them.

PAR. 4. The representations of respondent as aforesaid are false and misleading and have had and do have a tendency and capacity to mislead and deceive members of the purchasing public into the mistaken and erroneous belief that upon making purchases of said specified amounts of respondent's merchandise, the articles advertised as "Gifts" will be received unconditionally and without cost, when such is not true in fact. The said representations of respondent have had and do have the capacity and tendency to induce members of the purchasing public to buy respondent's merchandise because of the erroneous beliefs engendered by said false and misleading representations and to divert trade unfairly from competitors of respondent

engaged in the sale of men's clothing and women's wearing apparel and like merchandise similar to that sold by respondent in commerce in and among the various States of the United States and in the District of Columbia. Said acts and practices deceive the public and injure competitors who do not misrepresent the conditions or terms upon which their said sales are made and place in the hands of others the means whereby the public might be deceived.

PAR. 5. The above-alleged acts and practices of respondent are all to the prejudice and injury 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 the Federal Trade Commission Act, the Federal Trade Commission, on September 13, 1937, issued, and on September 16, 1937, served, its complaint in this proceeding upon the respondent Askin's Retail Stores, Inc., a corporation, charging it 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, testimony and other evidence in support of the allegations of said complaint were introduced by Carrel F. Rhodes, attorney for the Commission, before Edward E. Reardon, an examiner of the Commission theretofore duly designated by it, and in opposition to the allegations of the complaint by Morton D. Grossman, of the firm of Heller & Grossman, attorney for the respondent, and a stipulation of certain facts was entered into by and between the attorney for the Commission and the attorney for the respondent, and the said testimony, stipulation, 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, stipulation, testimony, and other evidence, and briefs in support of the complaint and in opposition 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, Askin's Retail Stores, Inc., is a corporation organized and existing under the laws of the State of Dela-

ware, with its principal office and place of business at 425 Fourth Avenue, New York, N. Y. Respondent is engaged in the offering for sale, sale, and distribution of coats, suits, dresses, hats, and other merchandise. It conducts its business through a chain of stores owned and operated by it in several States of the United States and one store located at 737 Seventh Street, N. W., in the city of Washington, D. C., which latter store is operated under the name of Fitwell Clothing Company.

Respondent is now, and at all times for more than 1 year last past has been, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in the sale of men's clothing and women's wearing apparel, and other articles of merchandise at retail to the public.

Respondent's method of sales is through advertisements and sales talks whereby it holds out to the public as an inducement to buy its merchandise an offer to give "free" and without cost to each purchaser of a man's suit or a topcoat sold at a price of \$22.50 or \$24.50 certain merchandise including hats of a value up to \$4.95 and dress shirts up to a value of \$1.95, and silk ties up to a value of \$0.95; and to each purchaser of women's suits or coats sold at a price of \$14.95 a "free" gift of a dress or other article of value.

PAR. 2. In the course and conduct of its said business as described in paragraph 1 hereof, respondent causes its aforesaid products to be transported from its principal place of business in New York City, in said State, through and into other States of the United States other than the State of New York, and into the District of Columbia, where the products are sold and distributed to the public.

In the course and conduct of such business, respondent is now, and has been, in substantial competition with other corporations, and with partnerships and individuals engaged in the sale of men's clothing, women's wearing apparel, and other articles of merchandise similar to those sold by respondent in like commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business, and in the sale and distribution of its aforesaid merchandise, respondent causes to be made, published, circulated, and distributed to the public throughout the United States and in the District of Columbia, and posted in its place of business in Washington, D. C., certain advertisements wherein it represented that certain merchandise was given "free" with the purchase of other merchandise. Among others, the respondent published and circulated in the District of Columbia and adjoin-

ing States on April 9, and April 23, 1937, advertisements containing, in part, the following representation:

Sensational Free Offers and Extra Easy Credit! Men's Hat Free with the purchase of any of these new spring suits or topcoats * * * \$24.50. As little as \$1.00 a week will do it.

Lady's Dress free with the purchase of any of these new spring coats or suits—\$14.95.

PAR. 4. The prices at which merchandise was offered for sale and sold by respondent during the year 1937, and during and after the time when the representations made in said advertisements as hereinabove set out, in which articles of its merchandise were offered for sale and sold by respondent, and with which other articles designated as "free" or, in some instances, "gratis" were included, were substantially greater than the prices at which the same articles were customarily and ordinarily sold when unaccompanied by articles designated as "free" or "gratis."

Subsequent to the publication of said advertisements, the respondent made sales of articles of merchandise in the District of Columbia in which transactions articles of merchandise designated as "free" or "gratis" were delivered to the purchaser. The articles designated as "free" or "gratis" were not given to the purchasers of other merchandise "free," "gratis," or without charge as represented and implied.

PAR. 5. Respondent, through its Washington, D. C. store, on April 12, 1937, sold a lady's suit to a customer for \$22.96, and a lady's dress, of the cost to respondent of \$2.25 designated "gratis" by it, was delivered to the customer with the suit, without further charge than the sum of \$22.96. The selling price marked on the suit before the sale without the so-called "free" or "gratis" merchandise was \$19.95, which selling price of \$22.96 with the so-called "free" or "gratis" merchandise represents, or was the result of, a mark-up over the cost of the suit to respondent of approximately 25 percent more than the mark-up over cost of the merchandise made by respondent in fixing or designating the regular selling prices of such merchandise when offered for sale and sold by it without including therewith any other article of merchandise as "free" or "gratis."

On April 26, 1937, the respondent sold a man's suit to a customer for \$39.50 and delivered to the customer therewith a hat, designated by respondent as "gratis." The hat cost respondent \$1.37. This suit was price marked before its sale without the so-called "free" or "gratis" merchandise at \$37.50, and this selling price of \$39.50, when sold with the so-called "free" or "gratis" merchandise, represents or was the result of a mark-up of approximately 25 percent more than the mark-up over cost of such suits and other articles in fixing or design-

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nating the selling prices of such merchandise when it was to be sold separately or apart from other merchandise, and without the so-called "free" or "gratis" merchandise.

In addition to the above transactions, subsequent to the advertisements set out hereinabove in paragraph 3, the respondent made sales of merchandise called combination sales in its store at Washington, D. C., wherein articles of merchandise were sold to customers accompanied by the delivery of other merchandise, designated "in combination," where the selling price of the article sold was marked up 8 percent to 10 percent over and above the original selling price of said article when not sold in combination with other articles.

All of the aforesaid statements and representations made by respondent in connection with and relating to the aforesaid "free" gifts of merchandise, sometimes otherwise designated by respondent as "gratis" or "in combination," are in truth and in fact false, deceptive, and misleading.

PAR. 6. The representations of respondent that articles of merchandise would be given "free" to purchasers of other merchandise in the amount of \$14.95, \$24.50, or any other amount, have had, and do have, a capacity and tendency to confuse, mislead, and deceive a substantial part of the purchasing public into the mistaken and erroneous belief that merchandise so designated as "free," "gratis," or "in combination" was given to the purchaser of other merchandise in the amounts stated absolutely free and without cost, and as a gratuity.

Many purchasers relying on the said representations bought merchandise in the amounts of \$14.95, \$24.50, or other amounts, under the mistaken and erroneous belief that the articles of merchandise designated as "free" and offered as "free," "gratis," or "in combination" were given to them absolutely free and without cost, and as a gratuity.

PAR. 7. There are among competitors of the respondent many corporations, firms, and individuals who sell and distribute men's suits and women's wearing apparel and other articles of merchandise in interstate commerce and in the District of Columbia who do not in any way misrepresent the selling price of their products and who do not falsely represent that they will give to the purchaser free or as a gratuity certain articles of merchandise with the purchase of merchandise in a given amount.

PAR. 8. The use of the representations and implications above set forth by the respondent in the course and conduct of its business in said commerce has a tendency and capacity to, and does, mislead and deceive prospective purchasers and causes many of such prospective purchasers erroneously and mistakenly to believe that said

so-called "free," "gratis," or "combination" merchandise is given free and as a gratuity and without cost to the purchasers, and causes a substantial portion of such prospective purchasers to purchase respondent's said products, thereby unfairly diverting substantial trade in said commerce to the respondent from its competitors, to their injury and to the injury of the public.

CONCLUSION

The aforesaid acts and practices of the respondent Askin's Retail Stores, Inc. are to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony, stipulation, exhibits, and other evidence taken before Edward E. Reardon, an examiner for the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief filed herein by Carrel F. Rhodes, counsel for the Commission, and by Morton D. Grossman, of Heller and Grossman, counsel for the respondent, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent corporation, Askin's Retail Stores, Inc., its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of coats, suits, dresses, hats, and other merchandise in interstate commerce or in the District of Columbia, do forthwith cease and desist from representing in any manner:

That articles of merchandise included with other merchandise being sold are "free" or "gratis" when the prices for such other merchandise are greater than the prices at which such other merchandise is usually and ordinarily sold by respondent in the regular course of trade.

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

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IN THE MATTER OF
MADISON MILLING COMPANY

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

Docket 3439. Complaint, May 21, 1938—Decision, July 29, 1938

Where a corporation, engaged in the manufacture of flour and in the sale and distribution thereof—

Supplied to dealer purchasers of its said product lottery card for display and use in connection with sale of its said flour, under plan by which purchaser of such flour from particular dealer customer, successful in chance selection of that 1 of 40 numbers on card corresponding to number concealed beneath master seal, was entitled to receive and was awarded a 49-pound sack of flour without further charge, and thereby supplied to and placed in the hands of others means of conducting a lottery in the sale of its said product in accordance with aforesaid plan, and in violation of the established policy of the United States Government and of the criminal laws, and in competition with many who are unwilling to offer or sell their flour by the aforesaid, or any other method involving a game of chance or lottery, and refrain therefrom;

With tendency and capacity to induce purchasers of flour to buy its said product in preference to that offered and sold by its competitors, and with result that many dealers in and ultimate purchasers of said product were attracted by said method and element of chance involved in sale thereof, as above set forth, and were thereby induced to purchase said flour thus sold by it in preference to that offered and sold by competitors who do not use same or equivalent methods, and with capacity and tendency, because of such game of chance, to divert to it trade and custom from its competitors who do not use the same or equivalent methods, to exclude from the trade involved all competitors unwilling to and who do not use such methods as being against public policy and unlawful, and to lessen competition in said trade and create a monopoly thereof in it and such other distributors of flour as use the same or similar methods, and to deprive the purchasing public of the benefit of free competition, and with capacity and tendency to eliminate from trade in question all actual competitors, and exclude therefrom all potential competitors, who do not adopt and use such or equivalent methods:

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

Mr. Henry C. Lank for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Madison Milling Co., a corporation, hereinafter referred to as respondent, has violated the