

IN THE MATTER OF
JOHN C. MERRITT, INDIVIDUALLY, AND TRADING AS
MERCO SALES COMPANY

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

Docket 3207. Complaint, Aug. 18, 1937—Decision, Aug. 12, 1938

Where an individual engaged in sale and distribution of various articles of merchandise, including bedspreads, tablecloths and napkins, silverware, lingerie, and others—

Supplied, in connection with the solicitation, sale, and distribution of his aforesaid merchandise, various devices and plans of merchandising which involved operation of gift enterprise or lottery schemes, and distribution of such merchandise to ultimate consumers thereof wholly by lot or chance, and consisted of push cards for use in sale and delivery to purchasing public of said various articles thus sold, under plan by which, substantially, amount, if any, paid by prospective purchaser for selection of a girl's name from the list thereof displayed on the card, depended upon particular number disclosed on card after selection and removal of name chosen, and under which receipt of particular articles of merchandise being sold, varying value of which was greater than cost of a single push from card, was dependent upon chance selection of name corresponding to one of the two concealed under the card's red and blue master seals, as set forth on card's explanatory legend, and thereby supplied to and placed in the hands of others, to whom he furnished said devices and who made use thereof in accordance with aforesaid sales plans, means of conducting lotteries in sale of his merchandise in accordance with such plan as above set forth, and in violation of the public policy long recognized by the common law and in criminal statutes, and contrary to established public policy of the United States Government, and in competition with many who are unwilling to adopt and use such a method of selling or distributing to purchasing public as above set forth, and involving a game of chance or sale of a chance to procure articles at a much lower figure than their normal retail price, or to use any method involving game of chance or sale of chance to win something by chance, or other method contrary to public policy, and refrain therefrom;

With result that many persons, attracted by his said methods and element of chance involved in sale or distribution of said articles of merchandise above set forth, were thereby induced to buy and sell same in preference to that offered and sold by aforesaid competitors who did not use same or equivalent method, and with effect of diverting trade and custom to him from his aforesaid competitors:

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 and Mr. P. C. Kolinski for the Commission.
Beasley & Beasley, of Birmingham, Ala., for respondent.

Complaint

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 John C. Merritt, individually and trading as Merco Sales Co., 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 Merco Sales Co., with his principal office and place of business located at 1321 South Twenty-second Street, Birmingham, Ala. 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, bedspreads, bed sheets, tablecloths and napkins, silverware, men's shirts, ladies' lingerie and hosiery, in commerce between and among 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 the State of Alabama to purchasers thereof in Alabama 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 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:

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The said push cards bear a number of girls' names. Concealed under each name is a number. Also, under a red master seal there is a name corresponding to one of the names on the card, and under a blue 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 5, inclusive, receive the same free of charge. Persons selecting numbers from 6 to 25 pay in cents the amount of such number, and persons selecting numbers over 25 pay 25 cents 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 seals are removed and the persons who selected the names corresponding to the names under the master seals each receive one of the articles 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, or whether they will receive the privilege free of charge, until the selection has been made and the name removed. The names under the master seals are concealed from purchasers and prospective purchasers until all the names have been selected. Those customers selecting names which do not correspond to the names under the master seals 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 customer pays for a chance, or whether the same is free of charge, 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 prac-

tice 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 or distribution of merchandise to the purchasing public in the manner above described 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 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 or distribution 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 an equivalent method. 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 an equivalent method.

PAR. 5. The aforesaid method, 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 the Federal Trade Commission Act, the Federal Trade Commission, on August 18, 1937, issued and thereafter served its complaint in this proceeding upon the respondent, John C. Merritt, individually and trading as Merco Sales Co., 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, the Commission, by order entered herein on June 23, 1938, granted respondent's request for permission to withdraw his said answer dated September 9, 1937, and to file in lieu thereof his substitute answer dated May 31, 1938, admitting all the material allegations of the complaint to be true and

Findings

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waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission on June 20, 1938. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the substitute answer, and the Commission, having duly considered the matter 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 and, prior to May 31, 1938, was doing business under the trade name and style of Merco Sales Co., with his principal office and place of business located at 1321 South Twenty-second Street, Birmingham, Ala. For some time prior to May 31, 1938, the respondent was engaged in the sale and distribution of various articles of merchandise, including, among others, bedspreads, bed sheets, tablecloths and napkins, silverware, men's shirts, ladies' lingerie and hosiery, in commerce between and among the various States of the United States. He caused said merchandise when sold to be transported from his principal place of business in the State of Alabama to purchasers thereof in Alabama and in other States of the United States at their respective points of location. There was for some time prior to May 31, 1938, a course of trade and commerce by said respondent in such merchandise between and among the States of the United States. In the course and conduct of said business, respondent was 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, furnished various devices and plans of merchandising which involved the operation of gift enterprises or lottery schemes and the distribution of such merchandise to the ultimate consumers thereof wholly by lot or chance. Said devices or plans of merchandising consisted 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 substantially as follows: The said push cards bore a number of girls' names. Concealed under each name was a number. Also, under a red master seal there was a name corresponding to one of the names on the card, and under a blue master seal there was another

name corresponding to one of the names on the card. Prospective purchasers selected one of the names and removed the same, disclosing the number thereunder. Persons who selected numbers from 1 to 5, inclusive, received the same free of charge. Persons who selected numbers from 6 to 25 paid in cents the amount of such number, and persons who selected numbers over 25 paid 25 cents for the privilege of selecting one of the names. The push cards bore various legends informing purchasers and prospective purchasers of the plan or method by which said push card was operated and by which the merchandise described thereon was to be distributed. When all the names had been purchased, the master seals were removed and the persons who had selected the names corresponding to the names under the master seals each received one of the articles of merchandise described without further charge, and the person, salesman, agent, or representative who had solicited purchases of chances, as above described, also received an article of merchandise without further charge or additional service. The numbers under the names were concealed from purchasers and prospective purchasers, and they did not know how much they would have to pay for the privilege of selecting one of the names, or whether they would receive the privilege free of charge, until the selection had been made and the name removed. The names under the master seals were concealed from purchasers and prospective purchasers until all the names had been selected. Those customers who selected names which did not correspond to the names under the master seals received nothing but the privilege of making a selection for the money which they paid. The said articles of merchandise varied in value, but each of said articles of merchandise was of a greater value than the cost of a single push from said push card. The various articles of merchandise were thus distributed to the purchasing public wholly by lot or chance, and the amount which the customer paid for a chance, or whether the same was free of charge, was determined wholly by lot or chance.

PAR. 3. The persons to whom respondent furnished said devices used the same in purchasing, selling, and distributing respondent's merchandise in accordance with the aforesaid sales plan. Respondent thus supplied to and placed 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 or distribution of merchandise to the purchasing public in the manner above described involved 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 respondent 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 were attracted by respondent's said methods and by the element of chance involved in the sale or distribution thereof in the manner above described, and were thereby induced to buy and sell respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent who did not use the same or an equivalent method. The use of said method by respondent, because of said game of chance, had the tendency and capacity to, and did, divert trade and custom to respondent from his said competitors who did not use the same or an equivalent method.

CONCLUSION

The aforesaid acts and practices of respondent were all 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 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 and the substitute answer of respondent admitting all 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 the Federal Trade Commission Act.

It is ordered, That the respondent, John C. Merritt, individually and trading as Merco Sales Co., or under any other name, his agents, representatives, and employees, in connection with the offering for sale, sale and distribution of bedspreads, bed sheets, tablecloths and napkins, silverware, men's shirts, ladies' lingerie and hosiery, and other articles of merchandise in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

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Order

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

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

3. Selling or otherwise disposing of such articles of merchandise by the use of push cards or any other lottery devices.

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

IN THE MATTER OF
DAY-LITE ILLUMINATING CORPORATION

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

Docket 2663. Complaint, Dec. 18, 1935—Decision, Aug. 23, 1938

Where a corporation engaged in sale and distribution of electric light fixtures, or the salesmen thereof, as the case might be—

- (a) Represented that its fixtures, and particularly its "Day-Lite Major" and "Day-Lite Junior," gave more and better light than competitive fixtures, "because of the patented magnifying lenses in the bottom," and that, because said lenses were made "of the finest quality crystal clear glass and scientifically designed," they "effectively magnify light rays from the electric lamp," and that glass and lenses used in the construction thereof were patented, facts being its said fixtures do not produce more or better light than do comparable competitive products because of such purported magnifying lenses, which do not magnify rays at all and effect of which on light rays is limited solely to changing direction thereof, and do not give more light in sense of producing more foot-candles thereof, but, because of such change in direction of rays, give more light in some cases directly beneath fixture and in other cases less than do competitors' products of similar construction, and its said light units do not produce more illumination than comparable products of competitors, except by way of concentrating light rays and increasing illumination in certain areas and thereby decreasing it in others, and there is no patent covering glass and lenses such as used by it in its light fixtures; and
- (b) Represented that its said light units, consisting of a light bulb and fixture, would produce twice as much illumination as comparable units of competitors, and, in such connection, made demonstrations, in which particular salesman inserted in unit bulb designed for use on a lower voltage current than that serving prospective customer, and falsely attributed unnaturally bright light, produced through such mismating of bulb and current, to glass and lenses used in units in question; facts being such mismating is injurious to bulb and materially shortens its life, units in question do not produce twice as much illumination as comparable units of competitors, and salesmen's practice of thus mismating bulb designed for use on current of lower voltage deceives prospective purchasers into false belief that its said fixtures produce more illumination than those of competitors using proper bulbs in electric current designed for their use;

With effect of misleading and deceiving prospective purchasers into erroneous belief that such representations are true and of causing a substantial portion of purchasers to buy substantial volume of its products as result of such mistaken and erroneous belief, and of thereby unfairly diverting to it substantial trade from competitors engaged in selling products of same kind and character and who truthfully advertise and represent the character and quality thereof; to the substantial injury of competition in commerce:

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