

IN THE MATTER OF

J. A. SCHWARTZ TRADING AS NATIONAL SALES &
NOVELTY COMPANY

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

Docket 3253. Complaint, Oct. 25, 1937—Decision, Jan. 17, 1939

Where an individual engaged in sale and distribution of radio receiving sets and other articles of merchandise to purchasers in the various States, in substantial competition with others likewise engaged in sale and distribution of similar articles in commerce as aforesaid; in soliciting sale of and in selling and distributing his said products—

Furnished various devices and merchandising plans which involved operation of games of chance, gift enterprises, or lottery schemes for distribution thereof to consumer wholly by lot or chance, and consisted of literature, instructions, and push cards for use in such offer and sale by operators of said cards, under scheme in accordance with which person paid for chance secured varying amount, dependent upon number revealed under disk, and received article being disposed of in accordance with such plan or nothing other than chance, dependent upon success or failure in selecting that one of feminine names disclosed on card corresponding with name concealed under card's master seal after sale of all chances, and thereby supplied to and placed in the hands of others means of conducting lotteries in sale of his merchandise in accordance with sales plan above set forth, contrary to public policy long recognized by the common law and criminal statutes and to an established public policy of the United States Government, and in competition with others engaged in sale and distribution in similar commerce of like and similar articles of merchandise who do not sell the same through use of lotteries or games of chance;

With result that many purchasers of his said products were attracted by element of chance involved in his sales method aforesaid, and thereby induced to purchase his merchandise in preference to same or similar goods of competitors who did not, and do not, use such or equivalent methods, and public, by reason of preference aforesaid, bought substantial volume of said goods and trade was unfairly diverted to him from competitors aforesaid:

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

Before *Mr. William C. Reeves*, trial examiner.

Mr. Henry C. Lank and *Mr. D. C. Daniel* for the Commission.

Nash & Donnelly, of Chicago, Ill., 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 J. A. Schwartz, individually and trading as National Sales & Novelty 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 National Sales & Novelty Co., with his principal office and place of business located at 1407 Diversey Parkway, Chicago, Ill. He is now, and for some time last past has 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. 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 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 35 pay in cents the amount of such number, and persons selecting numbers over 35 pay 35 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

Complaint

28 F. T. C.

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 radio receiving sets and other articles of merchandise each have a greater value than the cost of a single push from said push card. The radio receiving sets and other 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 radio receiving sets or other articles of merchandise at a price much less than the normal retail price thereof. Many persons, firms, and corporations who make, sell, or distribute 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 or distribution thereof in the manner above described, and are thereby induced to buy and sell or distribute respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method. 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 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 October 25, 1937, issued, and on October 26, 1937, served its complaint in this proceeding upon J. A. Schwartz, individually, and trading as National Sales & Novelty Co., charging him with the use of unfair methods of competition in commerce in violation of the provisions of the said act. After the issuance of the said complaint, testimony and other evidence in support of the allegations of the complaint were introduced by Henry C. Lank and D. C. Daniel, attorneys for the Commission, and in opposition to the allegations of the complaint by John A. Nash, attorney for the respondent, before William C. Reeves, an examiner of the Commission theretofore duly designated by it, and the said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint, testimony, and other evidence, briefs in support of the complaint, respondent not having filed brief, and oral argument not having been requested; 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

28 F. T. C.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, J. A. Schwartz, is an individual trading under the name and style of National Sales & Novelty Co., with his principal office and place of business located at 1407 Diversey Parkway, city of Chicago, State of Illinois.

In the fall of the year 1936 respondent began selling and distributing radio receiving sets and other articles of merchandise to purchasers thereof located in the various States of the United States. This business was continued by respondent until the month of December 1937. During the time above mentioned, respondent caused said merchandise, when sold, to be transported from his place of business in the State of Illinois to the purchasers thereof located at various points in States of the United States other than the State from which said shipments were made.

Respondent was, at all times mentioned herein, in substantial competition with other individuals and with partnerships and corporations likewise engaged in the sale and distribution of similar articles of merchandise in commerce between and among the various States of the United States.

PAR. 2. In soliciting the sale of, and in selling and distributing, his merchandise, respondent furnished various devices and plans of merchandising which involved the operation of games of chance, gift enterprises, or lottery schemes, by which said merchandise was to be distributed to the consumer wholly by lot or chance.

The methods used by respondent to sell his merchandise were as follows:

Respondent distributed to the public certain literature, instructions, and cards which are known in the trade as "push cards." The afore-said literature describes the manner in which the push cards were to be used by the people who receive them. The literature also explained in detail the manner of allotting certain premiums or prizes by means of the push card.

Each of the push cards had printed thereon a number of feminine names, together with blank spaces opposite an alphabetical list of the names for writing in the names of customers who purchase chances on the push card.

Each push card had a corresponding number of partially perforated disks marked "PUSH." Below each disk was printed one of the feminine names printed elsewhere on the card. Concealed within each disk was a number, which was disclosed when the disk was pushed or separated from the card. Each card had a master disk, concealed within which was one of the feminine names.

When all the disks had been selected or "pushed" by customers, and the master seal removed from the master disk, the person who selected the name corresponding to the name concealed within the master disk, received the article of merchandise specified without further charge. Customers paid in cents the amount of money indicated by the number revealed when the disk was removed or "pushed" by them. Customers selecting who "pushed" or removed disks on said cards which revealed numbers higher than the number 35 paid only 35 cents. Customers selecting names which did not correspond with the name revealed by removal of the master seal received nothing but the privilege of making a selection for the money which they paid. In this manner, the respondent sold and distributed a substantial number of New Monarch Radio receiving sets to members of the general public.

The Commission finds that respondent's merchandise was distributed to the purchasing public wholly by lot or chance, and that the amount which a customer paid for a chance, or whether the same was free of charge, was determined wholly by lot or by chance.

PAR. 3. The Commission finds that the persons to whom respondent furnished his push cards used the same in purchasing, selling, and distributing respondent's merchandise in accordance with the aforesaid sales plan.

Respondent thus supplied 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 Commission further finds that the sale of respondent's merchandise to the purchasing public as hereinabove described involved a game of chance or the sale of a chance to procure respondent's merchandise, and that the use of said lottery method in the distribution of merchandise was and is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and was and is contrary to an established policy of the Government of the United States.

PAR. 4. There are among the competitors of respondent individuals, firms, partnerships, and corporations likewise engaged in the business of selling and distributing in similar commerce like and similar articles of merchandise, who do not sell their merchandise by use of lotteries or games of chance.

Many purchasers of respondent's merchandise were attracted by the element of chance involved in respondent's sales method, and were thereby induced to purchase respondent's merchandise in preference to the same or similar merchandise of respondent's competitors who did not and do not use the same or equivalent methods.

Order

28 F. T. C.

Because of the said preference, the public has purchased a substantial volume of respondent's merchandise with the result that trade has been unfairly diverted to respondent from said competitors.

CONCLUSION

The aforesaid acts and practices of respondent as hereinabove found 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 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 (respondent having filed no answer), testimony and other evidence taken before William C. Reeves, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief filed by counsel for the Commission (counsel for respondent having filed no brief and not having requested oral argument), 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, J. A. Schwartz, individually, and trading as National Sales & Novelty Co., or under any other trade name, his representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of radio receiving sets, or any other merchandise, in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push or pull cards, punchboards, or other lottery devices for the purpose of enabling such persons to dispose of or sell such or similar products by the use thereof.

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

3. Selling or otherwise disposing of such or similar products by the use of push or pull cards, punchboards, or other lottery devices.

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

Syllabus

IN THE MATTER OF
NATIONAL BISCUIT COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 3 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AND AMENDMENTS THERETO

Docket 3607. Complaint, Sept. 24, 1938—Decision, Jan. 17, 1939

Where a corporation which (1) was engaged in manufacture, offer, sale, and distribution in commerce of bakery and packaged food products including, chiefly, biscuits, (2) constituted, by volume of sales, largest concern in the United States in such business, and represented consolidation of several companies previously thus engaged, (3) had factories and plants in 21 of more different States and selling agencies or branches in some 257 cities in and through which it maintained very extensive sales and delivery organization for its products and stocks, and from which sales and deliveries to retailers, chiefly, could be and were made by truck, and, as aforesaid engaged in transporting its said products from its various places of business in various States and in the District of Columbia to purchasers in such and various other States and in said District, in substantial competition with others likewise engaged in sale of similar products among the various States and in said District, and with many smaller concerns which were not able to carry on the same character of deliveries direct to retailers as conducted by it as above described, and could not be, and were not, sufficiently equipped as to localized storage and delivery facilities to their purchasers to be able so to do;

In dealing through agents and representatives with certain jobbers and wholesalers who performed little or no service for it, but whom its said agents and representatives certified as headquarters of retail group buyers located in the territory in which such jobbers and wholesalers sold and distributed their products, notwithstanding fact that they did not represent such buyers nor have any connection therewith—

(a) Entered into understandings, agreements, and combinations with jobbers and wholesalers aforesaid, under which (1) it undertook and agreed to, and did, pay to such jobbers and wholesalers percentage on, or discount upon, aggregate amount of purchases from it by retailers who were on lists allocated by such agents and representatives to each of said jobbers and wholesalers and were located in the territories thereof, and (2) said wholesalers or jobbers, in consideration of payment aforesaid, agreed not to deal in product of a competitor or competitors of it, and thereby paid them such percentages or discounts upon purchases by retailers aforesaid on condition or understanding that they would not deal in products of a competitor or competitors;

With intent and effect of preventing wholesalers and jobbers with whom it dealt, from dealing in products of competitors and of preventing them from rendering to competitors customary or ordinary services of jobbers or wholesalers, and of curtailing greatly services to competitors of jobbers or wholesalers in the marketing of competitors' products pending receipt by said jobbers and wholesalers of compensation from it as industry's largest and dominant factor: