

IN THE MATTER OF
ISIDORE STEIN DOING BUSINESS AS UNIVERSAL TRADING CO., EASTERN DISTRIBUTING CO., EMPIRE DISTRIBUTING CO., AND THE NATIONAL PRODUCTS

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

Docket 3554. Complaint, Aug. 24, 1938—Decision, Jan. 19, 1939

Where an individual engaged in sale and distribution of comb and brush sets, flashlights, jewelry, razor blades, pocketknives, and other articles of merchandise, in commerce among the various States and in the District of Columbia—

- (a) Sold and distributed said articles by means of a game of chance, gift enterprise, or lottery scheme, in accordance with which he distributed or caused to be distributed to representatives, and prospective representatives, advertising literature including a circular listing a number of items and prices thereon and including a pull card, tabs of which various concealed name of one of aforesaid items and price thereof, and under which scheme or plan purchaser received article of merchandise as aforesaid of varying retail value or apparent value in accordance with tab selected by chance, and operator or representative selling such tabs or chances was compensated by receipt of premium after sale of entire number thereof, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of his merchandise in accordance with sales plan above set forth, contrary to an established public policy of the United States Government and in violation of criminal laws and in competition with many who are unwilling to adopt and use said or any method involving game of chance or sale of a chance to win by chance or any method contrary to public policy and refrain therefrom;

With result that many persons were attracted by his said method and by element of chance involved in sale of such merchandise and were thereby induced to buy and sell his said goods in preference to those offered and sold by competitors who did not use such or equivalent method, and with effect by reason of said game of chance of unfairly diverting trade and custom to him from his competitors aforesaid;

- (b) Represented that his merchandise was distributed free or without cost through such statements in his advertising matter as "Gifts for all. No cost to you," "How to get your free gifts," "Special offer. Two extra valuable surprise gifts free," facts being none of so-called premiums or gifts were given away free or without cost to representatives, but were either purchased with labor by them or prices thereof were included in those of other articles which they had to sell or procure sale of before they could procure so-called premiums or gifts, and in case of a number thereof certain sums of money in addition to labor performed or services rendered were required to be paid;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous belief that such statements and representations were true and into purchase of substantial quantities of his products as a result thereof, and of thereby unfairly diverting trade to him from manufacturer

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and distributor competitors of like and similar products who did not make such false, deceptive, and misleading statements and representations concerning the same, to the substantial injury of competitors in commerce:

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

Mr. D. C. Daniel 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 Isidore Stein, individually and trading as Universal Trading Co., Eastern Distributing Co., Empire Distributing Co., and the National Products, hereinafter referred to as respondent, has violated the provisions of 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, Isidore Stein, is an individual trading under the names of Universal Trading Co., Eastern Distributing Co., Empire Distributing Co., and the National Products. Respondent has operated at various addresses, commencing with the National Products at 846 Broadway, New York City, and 547 Howard Avenue, Brooklyn, N. Y. Thereafter, respondent traded as Universal Trading Co., Eastern Distributing Co., and Empire Distributing Co., all at 18 West Seventeenth Street, New York, N. Y. Since using the last-named address, respondent has conducted business through Box 75, Station B, Brooklyn, N. Y., and from his home address, 1453 East New York Avenue, Brooklyn, N. Y. Respondent is now, and for some time last past has been, engaged in the sale and distribution of comb and brush sets, flashlights, pen and pencil sets, cigarette cases and lighters, jewelry, tooth paste, shaving cream, spoons, razor blades, perfume, pocketknives, bill folders, cosmetics, clocks, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia. Respondent causes and has caused said products when sold to be shipped or transported from his places of business aforesaid to purchasers thereof in the various States of the United States and in the District of Columbia at their respective points of location. There is now and has been for some time last past a course of trading by said respondent in such merchandise in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business respondent is and has been in competition with other individuals and with part-

nerships 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 and in the District of Columbia.

PAR. 2. In the course and conduct of his business as described in paragraph 1 hereof, respondent sells and distributes and has sold and distributed said articles of merchandise by means of a game of chance, gift enterprise, or lottery scheme. The respondent distributes or causes to be distributed to representatives and prospective representatives certain advertising literature, including a sales circular. Respondent's merchandise is distributed to the purchasing public in the following manner:

One portion of said sales circular consists of a list on which there is designated a number of items of merchandise and the prices thereon. Adjacent to the list is printed and set out a device commonly called a pull card. Said pull card consists of a number of tabs under each of which is concealed the name of an article of merchandise and the price thereof. The name of the article of merchandise and the price thereof are so concealed that purchasers or prospective purchasers of the tabs or chances are unable to ascertain which article of merchandise they are to receive or the price which they are to pay until after the tab is separated from the card. When a purchaser has detached the tab and learned what article of merchandise he is to receive and the price thereof, his name is written on the list opposite the named article of merchandise. Some of said articles of merchandise have purported and represented retail values and regular prices greater than the prices designated for them but are distributed to the consumer for the price designated on the tab which he pulls. The apparent greater values and regular prices of some of said articles of merchandise as compared to the prices the prospective purchaser will be required to pay in the event he secures one of said articles induces members of the purchasing public to purchase the tabs or chances in the hope that they will receive articles of merchandise of far greater value than the designated prices to be paid for same. The fact as to whether a purchaser of one of said pull card tabs receives an article which has apparent greater value and higher regular price than the price designated for same on such tab, which of said articles of merchandise a purchaser is to receive, and the amount of money which a purchaser is required to pay, are determined wholly by lot or chance.

When the person or representative operating the pull card has succeeded in selling all of the tabs or chances, collected the amounts

called for and remitted the said sums to the respondent, said respondent thereupon ships to said representative the merchandise designated on said card, together with a premium for the representative as compensation for operating the pull card and selling said merchandise. Said operator delivers the merchandise to the purchaser of tabs from said pull card in accordance with the list filled out when the tabs were detached from the pull card.

Respondent sells and distributes, and has sold and distributed, various assortments of said merchandise and furnishes, and has furnished, various pull cards for use in the sale and distribution of such merchandise by means of a game of chance, gift enterprise, or lottery scheme. Such plan or method varies in detail, but the above-described plan or method is illustrative of the principle involved.

PAR. 3. The persons to whom respondent furnishes, and has furnished, the said pull cards, use, and have used, 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 is contrary to an established public policy of the Government of the United States and is in violation of criminal laws.

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 an article of merchandise at a price much less than the apparent normal retail price thereof. Many persons, firms, and corporations, who sell and 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 method which is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by respondent's said method and by the element of chance involved in the sale of such merchandise, 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 capacity and tendency to, and does, unfairly divert trade and custom to respondent from his said competitors who do not use the same or equivalent methods.

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PAR. 5. In the course and conduct of his business as hereinabove related, respondent causes, and has caused, various false, deceptive, and misleading statements to appear in his advertising matter as aforesaid of which the following are examples, but are not all inclusive:

Gifts for all. No cost to you.

How to get your free gifts.

Special offer. Two extra valuable surprise gifts free.

Beautiful, useful household gifts at absolutely no cost to you.

The effect of the foregoing false, deceptive, and misleading statements or representations of respondent in selling and offering for sale such articles of merchandise as hereinabove referred to is to mislead and deceive a substantial part of the purchasing public in the several States of the United States and in the District of Columbia by inducing them to mistakenly believe that respondent gives away certain of his said articles of merchandise without cost to his representatives.

PAR. 6. In truth and in fact none of the so-called premiums or gifts are given away "free" or without cost, but said so-called premiums or gifts, which are represented as being "free" or without cost to said representatives are either purchased with labor by said representatives, or the prices thereof are included in the prices of other articles of merchandise, which said representatives must sell, or procure the sale of, before said so-called premiums or gifts can be procured by them. For a number of so-called premiums or gifts certain sums of money must be paid by said representatives in addition to the labor performed or services rendered.

PAR. 7. The use by respondent of the false, deceptive, and misleading statements and representations set forth herein has had, and now has, the capacity and tendency to mislead and deceive, and has misled and deceived, a substantial portion of the purchasing public into the erroneous belief that such statements and representations are true, and to the purchase of substantial quantities of said respondent's products as the result of such erroneous beliefs. There are among the competitors of respondent as mentioned in paragraph 1 hereof, manufacturers and distributors of like and similar products, who do not make such false, deceptive, and misleading statements and representations concerning their products. By the statements and representations aforesaid trade is unfairly diverted to the respondent from such competitors, and as a result thereof, substantial injury is being done, and has been done, by respondent to competitors in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, are 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on the 24th day of August 1938, issued and subsequently served its complaint, in this proceeding upon respondent, Isidore Stein, individually and trading as Universal Trading Co., Eastern Distributing Co., Empire Distributing Co., and the National Products, charging him with the use of unfair methods of competition in commerce in violation of the provisions of said act. On the 13th day of October 1938, the respondent filed his answer, in which answer he admitted all the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearing as to said facts. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint and the answer thereto, 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, Isidore Stein, is an individual trading under the names of Universal Trading Co., Eastern Distributing Co., Empire Distributing Co., and the National Products. Respondent has operated at various addresses, commencing with the National Products at 846 Broadway, New York City, and 547 Howard Avenue, Brooklyn, N. Y. Thereafter, respondent traded as Universal Trading Co., Eastern Distributing Co., and Empire Distributing Co., all at 18 West Seventeenth Street, New York, N. Y. Since using the last-named address, respondent has conducted business through Box 75, Station B, Brooklyn, N. Y., and from his home address, 1453 East New York Avenue, Brooklyn, N. Y. Respondent is now, and for some time last past has been engaged in the sale and distribution of comb and brush sets, flashlights, pen and pencil sets, cigarette cases and lighters, jewelry, tooth paste, shaving cream, spoons, razor blades, perfume, pocketknives, bill folders, cosmetics, clocks, and other articles of merchandise in commerce between and among the various States of the United States and in the District

of Columbia. Respondent causes and has caused said products when sold to be shipped or transported from his places of business aforesaid to purchasers thereof in the various States of the United States and in the District of Columbia at their respective points of location. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in commerce in said merchandise among and between the various States of the United States and in the District of Columbia. In the course and conduct of said business respondent is and has been 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 and in the District of Columbia.

PAR. 2. In the course and conduct of his business as described in paragraph 1, respondent sells and distributes and has sold and distributed said articles of merchandise by means of a game of chance, gift enterprise, or lottery scheme. The respondent distributes or causes to be distributed to representatives and prospective representatives certain advertising literature including a sales circular. Respondent's merchandise is distributed to the purchasing public in the following manner:

One portion of said sales circular consists of a list on which there is designated a number of items of merchandise and the prices thereon. Adjacent to the list is printed and set out a device commonly called a pull card. Said pull card consists of a number of tabs under each of which is concealed the name of an article of merchandise and the price thereof. The name of the article of merchandise and the price thereof are so concealed that purchasers or prospective purchasers of the tabs or chances are unable to ascertain which article of merchandise they are to receive or the price which they are to pay until after the tab is separated from the card. When a purchaser has detached the tab and learned what article of merchandise he is to receive and the price thereof, his name is written on the list opposite the named article of merchandise. Some of said articles of merchandise have purported and represented retail values and regular prices greater than the prices designated for them but are distributed to the consumer for the price designated on the tab which he pulls. The apparent greater values and regular prices of some of said articles of merchandise as compared to the prices the prospective purchaser will be required to pay in the event he secures one of said articles induces members of the purchasing public to purchase the tabs or chances in the hope that they will receive articles of merchandise of far greater value

than the designated prices to be paid for same. The fact as to whether a purchaser of one of said pull-card tabs receives an article which has apparent greater value and higher regular price than the price designated for same on such tab, which of said articles of merchandise a purchaser is to receive, and the amount of money which a purchaser is required to pay, are determined wholly by lot or chance.

When the person or representative operating the pull card has succeeded in selling all of the tabs or chances, collected the amounts called for and remitted the said sums to the respondent, said respondent thereupon ships to said representative the merchandise designated on said card, together with a premium for the representative as compensation for operating the pull card and selling said merchandise. Said operator delivers the merchandise to the purchaser of tabs from said pull card in accordance with the list filled out when the tabs were detached from the pull card.

Respondent sells and distributes, and has sold and distributed, various assortments of said merchandise and furnishes, and has furnished various pull cards for use in the sale and distribution of such merchandise by means of a game of chance, gift enterprise, or lottery scheme. Such plan or method varies in detail, but the above-described plan or method is illustrative of the principle involved.

PAR. 3. The persons to whom respondent furnishes, and has furnished, the said pull cards, use, and have used, 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 is contrary to an established public policy of the Government of the United States and is in violation of criminal laws.

PAR. 4. The sale of merchandise to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure an article of merchandise at a price much less than the apparent normal retail price thereof. Many persons, firms, and corporations, who sell and distribute merchandise in competition with the respondent as above found, 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 method which is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by respondent's said method and by the element

of chance involved in the sale of such merchandise, 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 capacity and tendency to, and does, unfairly divert trade and custom to respondent from his said competitors who do not use the same or equivalent methods.

PAR. 5. In the course and conduct of his business as hereinabove described, respondent causes, and has caused, various false, deceptive, and misleading statements to appear in his advertising matter as aforesaid of which the following are examples, but are not all inclusive:

Gifts for all. No cost to you.

How to get your free gifts.

Special offer. Two extra valuable surprise gifts free.

Beautiful, useful household gifts at absolutely no cost to you.

The effect of the foregoing false, deceptive, and misleading statements or representations of respondent in selling and offering for sale such articles of merchandise as hereinabove referred to is to mislead and deceive a substantial part of the purchasing public in the several States of the United States and in the District of Columbia by inducing them to mistakenly believe that respondent gives away certain of his articles of merchandise without cost to his representatives.

PAR. 6. In truth and in fact none of the so-called premiums or gifts are given away "free" or without cost, but said so-called premiums or gifts, which are represented as being "free" or without cost to said representatives are either purchased with labor by said representatives, or the prices thereof are included in the prices of other articles of merchandise, which said representatives must sell, or procure the sale of, before said so-called premiums or gifts can be procured by them. For a number of so-called premiums or gifts certain sums of money must be paid by said representatives in addition to the labor performed or services rendered.

PAR. 7. The use by respondent of the false, deceptive, and misleading statements and representations set forth herein has had, and now has, the capacity and tendency to mislead and deceive, and has misled and deceived, a substantial portion of the purchasing public into the erroneous belief that such statements and representations are true, and to the purchase of substantial quantities of said respondent's products as the result of such erroneous beliefs. There are among the competitors of respondent as mentioned in paragraph 1 hereof, manufacturers and distributors of like and similar products, who do not make

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such false, deceptive, and misleading statements and representations concerning their products. By the statements and representations aforesaid trade is unfairly diverted to the respondent from such competitors, and as a result thereof, substantial injury is being done, and has been done, by respondent to competitors in commerce among and between the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, are 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 answer of the respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that he waives all intervening procedure and further hearing as to said facts, 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, Isidore Stein, individually and trading as Universal Trading Co., Eastern Distributing Co., Empire Distributing Co., and the National Products, or trading under any other name, his representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of comb and brush sets, flashlights, pen and pencil sets, cigarette cases and lighters, jewelry, toothpaste, shaving cream, spoons, razor blades, perfumes, pocket-knives, billfolds, cosmetics and clocks, or any other articles of 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 pull cards or circulars having pull tabs thereon, or other lottery devices, for the purpose of enabling such persons to dispose of or sell such merchandise by the use thereof.

2. Mailing, shipping, or transporting to his agents or to distributors or to members of the public pull cards or circulars having pull tabs thereon or other lottery 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 such merchandise by the use of

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pull cards or circulars having pull tabs thereon or any other lottery device.

4. Representing, directly or indirectly, that his merchandise is distributed free or without cost when such is not the fact.

It is further ordered, That the 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.

Syllabus

IN THE MATTER OF
AMERICAN OPTICAL COMPANY ET AL.

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

Docket 3232. Complaint, Sept. 30, 1937—Decision, Jan. 21, 1939

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (a)—CUMULATIVE QUANTITY DISCOUNTS—LARGE CUSTOMER DIFFERENTIALS—WHERE NOT SUCH AS MAKE ONLY DUE ALLOWANCE FOR DIFFERENCES IN COST OF SALE OR DELIVERY OF STOCK RESULTING FROM DIFFERING QUANTITIES IN WHICH SALE AND DELIVERY MADE TO DIFFERENT CUSTOMERS.

A 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, which savings were not reflected in the price at which the buyer purchased, and which are reserved for the purpose of refunding at the end of a period of time, and it does not follow that purchasers of large annual amounts also buy in larger individual shipments than do buyers whose purchases do not amount to so large a sum. Large buyers also place numerous small orders, the average size of which is frequently less than the average size of orders placed by buyers whose periodical annual purchases are less in volume. Thus it may cost seller more per dollar of sales to serve a customer who places a large number of small orders sufficient in the aggregate to earn the discount, than to serve a customer who places a few large orders whose total is not sufficient for such purpose. *H. C. Brill Co., Inc.*, Docket 3239, 26 F. T. C. 666.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (a)—QUANTITY DISCOUNTS—QUANTITY ORDER BASIS—DEALER PURCHASE RANGE—WHERE IN REACH OF AVERAGE—SAVING SALE AND DELIVERY CRITERIA.

Discount schedule under which Nation-wide producer-wholesaler seller of ophthalmic products provided for such quantity bases for discounts from list as one-order purchases of 2, 5, 10, 25, or 50 units without further concessions was not found to have effect of substantially lessening or injuring competition, either with said seller or with its customers, in the absence of evidence that quantity differentials in question were beyond the range of the purchases of the average retailer and thereby resulted in discrimination in favor of certain large dealers, and in view of possible justification, in whole or in part, by differences in cost of sale and delivery resulting from difference in size of individual orders, large orders ordinarily being obtained, assembled, packed, billed, and delivered at a lower cost per dollar of sales than small orders.