

IN THE MATTER OF
FRED W. HERRSCHNER, JR., INDIVIDUALLY, AND TRADING AS 20TH CENTURY SALES CO.

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

Docket 3251. Complaint, Oct. 25, 1937—Decision, Mar. 15, 1939

Where an individual, engaged in sale and distribution of cameras, vibro shavers, clocks, and pen and pencil sets; in soliciting sale of and in selling his said articles—

Furnished to purchasers and prospective purchasers of his said merchandise various devices and plans and methods of merchandising which involved operation of games of chance, gift enterprises or lottery schemes by which said merchandise was to be distributed to members of public wholly by lot or chance through use of push cards, under plan and in accordance with said cards' explanatory legends and instructions for use thereof by which amount paid by customer for chance or, in case of some, receipt of free chance was dependent upon particular number selected by chance, and customer's receipt of article being thus disposed of was dependent upon success or failure in selecting from list of girls' names displayed on card name corresponding to that concealed under card's master seal and under which, failing such contingencies, customer received nothing; and

Supplied thereby and placed in the hands of others means by which lotteries were conducted in the sale and distribution of articles of merchandise sold by said individual and under which distribution of such articles and amount, if any, which member of public was required to pay for chance to obtain such an article was determined wholly by lot or chance, and involving game of chance or sale of a chance to procure articles for sum less than price at which such or similar articles were being sold in usual course of retail trade, contrary to an established public policy of the United States Government and in violation of the laws of several States, and in competition with those engaged in the sale and distribution of like and similar articles and who do not make use of any game of chance, gift enterprise, lottery scheme, or other similar device or devices in sale of their products;

With result that many purchasers of articles sold by said individual were attracted by element of chance in sales plan and method used by him and thereby induced to purchase his articles in preference to like or similar products offered and sold by competitors who did not use same or similar sales plans and methods, and public, by reason of such preference, purchased substantial volume of merchandise from him, and trade was diverted unfairly to him from competitors:

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.

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 Fred W. Herrschner, Jr., individually and trading as 20th Century 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 20th Century Sales Co., with his principal office and place of business located at 329 South Wood Street, Chicago, Ill. 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, clocks, automatic razors, cameras, and pen and pencil sets, 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

Complaint

28 F. T. C.

purchasers select one of the names and remove the same disclosing the number thereunder. Persons selecting numbers from 1 to 29 pay in cents the amount of such number, and persons selecting numbers over 29 pay 29¢ 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 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 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 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 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 method 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 thereafter served its complaint in this proceeding upon the respondent, Fred W. Herrschner, Jr., individually, and trading as 20th Century 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 (respondent not having filed answer), testimony and other evidence in support of the allegations of said 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 the respondent, in person (respondent not being represented by counsel), before William C. Reeves, an examiner of the Commission theretofore duly designated by it, and 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, and brief in support of the complaint (respondent not having filed an answer or 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. The respondent, Fred W. Herrschner, Jr., is an individual doing business under the name and style of 20th Century Sales Co., with its principal place of business at 329 South Wood Street, Chicago, Ill. Since about April 1, 1937, respondent has been engaged in the business of selling and distributing cameras, vibro shavers, clocks, and pen and pencil sets. Since about April 1, 1938, respondent also has carried on business under the name and style of Princess Garment Co., and under that name and style has sold and distributed articles of wearing apparel for men and women. Respondent has caused the articles of merchandise sold by him to be transported from his place of business in the State of Illinois, to the respective purchasers thereof located in various States of the United States other than the State of Illinois. In the course and conduct of his said business respondent at all times mentioned herein has been, and is now in substantial competition with various partnerships and corporations, and other persons, also engaged in the sale and distribution of like or similar articles of merchandise in commerce between and among various States of the United States.

PAR. 2. In carrying on his business, as described in paragraph 1 hereof, respondent, in soliciting the sale of articles of merchandise and in the sale and distribution of same, has furnished to purchasers of such merchandise and to prospective purchasers various devices, and plans and methods of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes by which said merchandise was to be distributed to members of the public wholly by lot or chance, which plans and methods were to be carried on by the use of devices commonly known as "push cards," which cards had printed thereon an explanation of the purposes for which such cards were intended, and detailed instructions to be followed in the use and operation of such cards in the sale and distribution of the articles of merchandise offered for sale and sold by respondent. Also additional detailed instructions concerning the use and operation of the cards were contained in printed matter accompanying such cards. Each of the cards had printed thereon a number of girls' names arranged in alphabetical order, and opposite each name was a space in which the name of the member of the public who had selected that name on the card should be written. Each of the cards had a corresponding number of disks with the word "Push" printed thereon, each immediately below one of the names printed elsewhere on the card, and each disk concealed a number which was disclosed when the disk was separated from the card. Also upon each of the cards was

a larger disk in the form of a seal which concealed one of the names printed on the card. When a member of the public selected one of the names he was required to pay the number of cents corresponding with the number concealed by the disk immediately below the name so selected, and when all of the names had been selected the larger disk was removed and the name concealed thereby disclosed, and the person who had selected the name on the card, which was the same as the name concealed by the seal, was given the article of merchandise involved in that particular lottery scheme without further charge. On some of the cards so furnished by respondent, certain of the disks concealed numbers which were designated as free, and selectors of those numbers paid nothing, and in the operation of other cards so furnished by respondent, selectors of numbers higher than 19 paid only 19 cents, and with still other such cards, selectors of numbers higher than 29 paid only 29 cents. Customers who selected names other than that concealed by the seal received nothing. From April 1937, to May 1938, respondent furnished push cards to purchasers of 2,400 cameras, 200 vibro shavers, and a smaller number of clocks. The price obtained by respondent for two of the cameras was \$7.59, and for two of the vibro shavers \$6.95.

The Commission finds that the articles of merchandise sold by respondent were distributed to the purchasing public wholly by lot or chance, and that the amount which a member of the public was required to pay for a chance to obtain such an article of merchandise, or whether such chance would cost nothing, was determined wholly by lot or chance.

PAR. 3. The Commission finds that the persons to whom respondent furnished push cards, as set out in paragraph 2 hereof, used same in purchasing, selling, and distributing articles of merchandise sold by respondent in accordance with the methods and plans described in said paragraph 2. Respondent in this manner has supplied to others, and placed in their hands, the means by which lotteries have been conducted in the resale and distribution of articles of merchandise sold by respondent; that the sale of such merchandise to the purchasing public by the use of such cards involved a game of chance or the sale of a chance to procure articles of merchandise for a sum less than the price at which such articles or like or similar articles were being sold in the usual course of retail trade; that the use by respondent of such methods in the sale and distribution of merchandise has the capacity and tendency to induce, and has induced numerous customers of respondent to purchase the articles of merchandise sold by respondent in preference to like or similar articles of merchandise sold by competitors of respondent who do not use, and have

Order

28 F. T. C.

not used, like or similar sales plans or methods in the sale and distribution of articles of merchandise sold by them; that the use of such sales plans and methods is a practice of a sort which is contrary to an established public policy of the Government of the United States, and is in violation of the laws of several States of the United States.

PAR. 4. There are among the competitors of respondent, persons, partnerships, and corporations engaged in the sale and distribution of like and similar articles of merchandise to those sold by respondent, in commerce between and among various States of the United States, which persons, partnerships and corporations do not make use of any game of chance, gift enterprise, lottery scheme, or other similar device or devices in the sale of such merchandise. Many purchasers of articles of merchandise sold by respondent were attracted by the element of chance in the sales plans and methods used by respondent, and as a result were induced to purchase articles of merchandise sold by respondent in preference to like or similar articles of merchandise offered for sale and sold by competitors of respondent who did not use the same or similar sales plans and methods. Because of this preference the public has purchased a substantial volume of merchandise from respondent with the result that trade has been diverted unfairly to respondent from his competitors.

CONCLUSION

The aforesaid acts and practices of respondent as hereinbefore 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 not having filed an 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 the attorney for the Commission (respondent having filed no brief and oral argument not having been requested), 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, Fred W. Herrschner, Jr., individually and trading as 20th Century Sales Co., or trading under

1112

Order

any other name, his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of cameras, vibro shavers, clocks, pen and pencil sets, or any other merchandise, in commerce, as commerce is defined in the Federal Trade Commission Act, to 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 any merchandise by the use thereof.

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

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

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

IN THE MATTER OF

E. J. BRACH & SONS, AND EMIL J. BRACH, EDWARD M. KERWIN, EDWIN O. BLOMQUIST, THEODORE STEMPEL, AND EMIL J. GUTGSELL, INDIVIDUALLY, AND AS OFFICERS OF E. J. BRACH & SONS

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

Docket 3307. Complaint, Jan. 19, 1938—Decision, Mar. 15, 1939

Where a corporation and three individuals, officers thereof, engaged in manufacture and sale of candy, and as thus engaged in—

(1) Selling its "Betsy Ross" all-metal baskets, with asserted value of \$1, and containing 25 pounds of candy, 50 cellophane bags, and push card for sale and distribution of said items under a plan by which purchasers, for 10 cents, of said half-pound cellophane bags of candy, secured right to select one of number of girls' names displayed on said card and received or failed to receive said basket in accordance with success or failure in selecting name corresponding to that concealed under card's master seal; and in—

(2) Furnishing to customers, with plans of merchandising which involved operation of games of chance, gift enterprise, or lottery schemes, 400-hole, 8-section punchboards, for sale and distribution of candy under plan by which two of numbers concealed in said board entitled chance purchasers to 2-pound boxes of candy, for nickel paid, 4 other numbers entitled each of chance selectors to 1-pound box of chocolates, 24 other numbers entitled each of selectors to 1-pound box of chocolates of another type, and makers of last sale in each of aforesaid sections were similarly entitled to pound boxes of such candy, and purchasers thus received, in event of those making selections as aforesaid, prizes greatly exceeding cost of chance and received, in event of selection of 362 other numbers on board, nothing; and in—

(3) Furnishing various other types of punchboards, together with their candies, for distribution by use of such boards to customers in various States in substantially same manner as above described and varying therefrom in detail only—

Sold to wholesalers and jobbers candy manufactured by it and accompanied by punchboards and push cards for use in sale and distribution of said candy by retail dealer-purchasers thereof, who sold and distributed same to purchasing public in accordance with aforesaid sales plan, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale and distribution of such candy, involving game of chance or sale of a chance to procure quantities of candy at prices much less than prevailing price for like or similar candy in usual course of retail trade, contrary to an established public policy of the United States Government and in violation of the laws of the States and in competition with many who sell and distribute like or similar candy and are unwilling to offer or sell their said candy by any method or sales plan which involves game of chance, gift enterprise, lottery scheme, or other method or plan contrary to public policy and refrain from use thereof;