

Syllabus

IN THE MATTER OF
MARTIN BENJAMIN ROTHMAN TRADING AS ESQUIRE
PRODUCTS

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

Docket 3902. Complaint, Sept. 28, 1939—Decision, Dec. 29, 1939

Where an individual engaged in sale and distribution of radios, waffle irons, silverware, and other articles of merchandise to purchasers in various other States; in soliciting sale of and in selling and distributing his said merchandise—

- (a) Furnished various devices and plans of merchandising which involved operation of games of chance, gift enterprises, or lottery schemes for sale and distribution thereof to ultimate consumers wholly by lot or chance and included distribution to purchasing public of certain literature and instructions and push cards, order blanks, and illustrations of goods concerned and circulars explaining his plan of selling his merchandise and allotting it as premiums or prizes to operators of said cards and to purchasing public, in accordance with which and push card's legend person selecting by chance from list of feminine names displayed on card name corresponding with that concealed under card's large master seal received choice of radio, automatic waffle iron, 34-piece Wm. A. Rogers tableware with chest, or table broiler griddle, and those securing by chance certain numbers as set out in legend received premiums or prizes, and amount paid or free chance was dependent upon number disclosed by disc selected on card; and

Supplied thereby to and placed in the hands of others means of conducting lotteries in sale of his merchandise in accordance with aforesaid or similar plan under which fact as to whether purchaser received article of merchandise or nothing for amount of money paid, or article free, and which of said articles, if any, purchaser received was determined wholly by lot or chance, contrary to an established public policy of the United States Government and in violation of the 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 something by a chance, or any other method contrary to public policy and refrain therefrom;

With result that many persons were attracted by said sales plan or method employed by said individual in sale and distribution of his merchandise, and element of chance involved therein and were thereby induced to buy and sell his goods in preference to merchandise offered and sold by competitors who do not use same or equivalent method, and with effect through use of such method and because of said game of chance of unfairly diverting trade in commerce to him from his competitors aforesaid; and

- (b) Represented through prices set out on his push cards and other printed matter circulated through the mails to customers and prospective customers in the various States and in the District of Columbia that his automatic pencils had a retail value in excess of the usual retail selling price thereof and had retail value and selling price of one dollar, facts being their said value and selling price was substantially less than such amount;

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With effect of misleading and deceiving substantial portion of purchasing public into erroneous belief that such representations were true and into purchase of substantial quantities of his said pencils by reason of such belief, and with result that trade in commerce was thereby diverted unfairly to him from his competitors who do not falsely represent the retail value and selling price of their said products; to the substantial injury of competition in commerce: *Held*, That such acts and practices under the circumstances set forth were all to the prejudice and injury of the public and competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Miles J. Furnas*, trial examiner.
Mr. L. P. Allen, Jr. 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 Martin Benjamin Rothman, an individual, trading as Esquire 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 interest of the public, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Martin Benjamin Rothman, is an individual, trading as Esquire Products. His principal office and place of business is located at 216 North Clinton Street, Chicago, Ill. Respondent is now, and for some time last past has been, engaged in the sale and distribution of radios, waffle irons, silverware, coffee tray sets, pencils, griddles, 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 merchandise, when sold, to be transported from his aforesaid place of business in the State of Illinois to purchasers thereof, at their respective points of location, in the various other States of the United States and in the District of Columbia. There is now, and has been for some time last past, a course of trade by 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 partnerships and corporations engaged in the sale and distribution of like or similar 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 in soliciting the sale of and in

selling and distributing his merchandise furnishes and has furnished, various devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes by which said merchandise is sold and distributed to the ultimate consumers thereof wholly by lot or chance. The method or sales plan adopted and used by respondent was and is substantially as follows:

Respondent distributes and has distributed to the purchasing public certain literature and instructions, including, among other things, push cards, order blanks, illustrations of the said merchandise and circulars explaining respondent's plan of selling merchandise and of allotting it as premiums or prizes to the operators of said push cards and to the purchasing and consuming public. One of respondent's push cards bears 64 small, partially perforated discs on the face of which is printed the word "push." Below each of said discs is printed a feminine name with ruled columns on the reverse side of said push card for writing in the name of the customer opposite the feminine name selected. Concealed within each of said discs is a number which is disclosed when the disc is pushed or separated from the card. The said numbers are effectively concealed from purchasers and prospective purchasers until the disc is pushed or separated from the card. The push card also has a large master seal and concealed within the master seal is one of the feminine names appearing below the said discs. The person selecting the feminine name corresponding to the one under the master seal receives a premium or prize. Persons selecting certain designated numbers set out in the legend at the top of said card or the last sale on the card also receive premiums or prizes. The push card bears a legend or instruction as follows:

NAME UNDER SEAL RECEIVES

CHOICE OF

ESQUIRE JR. RADIO

ESQUIRE TWIN AUTOMATIC

WAFFLE IRON

34-piece WM. A. ROGERS

TABLEWARE

(With Tarnishproof Chest)

NESCO TABLE BROILER-GRIDDLE

Numbers 11 to 29 pay what you draw

All numbers over 29 pay 29¢

No Higher

10—FREE NUMBERS—10

1-2-3-4-5-6-7-8-9-10 are FREE

4—ADDITIONAL GIFTS—4

Numbers 9-19-29 and last sale each receive

"1.00 Wahl Eversharp Pencil"

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Sales of respondent's merchandise by means of said push card are made in accordance with the above-described legend or instructions. Said prizes or premiums are allotted to the customers or purchasers in accordance with the above legend or instructions. The fact as to whether a purchaser receives an article of merchandise or nothing for the amount of money paid or an article of merchandise free, and which of said articles of merchandise the purchaser is to receive, if any, is thus determined wholly by lot or chance.

Respondent furnishes and has furnished, various push cards accompanied by said order blanks, instructions, and other printed matter for use in the sale and distribution of his merchandise by means of a game of chance, gift enterprise, or lottery scheme. The sales plan or method involved in connection with the sale of all of said merchandise by means of said push cards is the same as that hereinabove described, varying only in detail.

PAR. 3. The persons to whom respondent furnishes, and has furnished, the said push cards 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 sales plan or method in the sale of his merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plan or method is a practice of a sort which is contrary to an established public policy of the Government of the United States and in violation of the 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 normal retail price thereof. Many persons, firms, and corporations, who 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 said sales plan or method employed by respondent in the sale and distribution of his merchandise and the element of chance involved therein, 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 a tendency and capacity to, and does, unfairly divert trade in commerce between and among the various

States of the United States and in the District of Columbia to respondent from his said competitors who do not use the same or an equivalent method, and as a result thereof substantial injury is being, and has been, done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. By prices set out on his push cards and other printed matter which are circulated through the United States mails to his customers and prospective customers in the various States of the United States and in the District of Columbia, respondent represents and has represented to customers and prospective customers that his automatic pencils have a retail value in excess of the normal retail selling price of said pencils. The respondent represents and has represented his automatic pencils to have a retail value and selling price of \$1.00. In truth and in fact the said pencils have a retail value and selling price of substantially less than \$1.00.

PAR. 6. The use by respondent of the representations set forth in paragraph 5 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 representations are true and into the purchase of substantial quantities of respondent's said automatic pencils as a result of such erroneous belief. As a result thereof, trade in commerce among and between the various States of the United States and in the District of Columbia has been diverted unfairly to respondent from his said competitors who do not falsely represent the retail value and selling price of their respective automatic pencils. As a consequence thereof, substantial injury is being done, and has been done, by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 7. The aforesaid acts and practices of respondent, as herein alleged are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 September 28, 1939, issued and on September 29, 1939, served its complaint in this proceeding upon respondent, Martin Benjamin Rothman, an individual, trading as Esquire Products, charging him with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices

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in commerce in violation of the provisions of said act. On November 28, 1939, 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, Martin Benjamin Rothman, is an individual, trading as Esquire Products. His principal office and place of business is located at 216 North Clinton Street, Chicago, Ill. Respondent is now, and for some time last past has been, engaged in the sale and distribution of radios, waffle irons, silverware, coffee tray sets, pencils, griddles, 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 merchandise, when sold, to be transported from his aforesaid place of business in the State of Illionis to purchasers thereof, at their respective points of location, in the various other States of the United States and in the District of Columbia. There is now, and has been for some time last past, a course of trade by 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 partnerships and corporations engaged in the sale and distribution of like or similar 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, in soliciting the sale of, and in selling and distributing his merchandise, furnishes, and has furnished, various devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes by which said merchandise is sold and distributed to the ultimate consumers thereof wholly by lot or chance. The method or sales plan adopted and used by respondent was, and is, substantially as follows:

Respondent distributes, and has distributed, to the purchasing public certain literature and instructions, including, among other things, push cards, order blanks, illustrations of the said merchandise and

circulars explaining respondent's plan of selling merchandise and of allotting it as premiums or prizes to the operators of said push cards and to the purchasing and consuming public. One of respondent's push cards bears sixty-four small, partially perforated discs on the face of which is printed the word "push." Below each of said discs is printed a feminine name with ruled columns on the reverse side of said push card for writing in the name of the customer opposite the feminine name selected. Concealed within each of said discs is a number which is disclosed when the disc is pushed or separated from the card. The said numbers are effectively concealed from purchasers and prospective purchasers until the disc is pushed or separated from the card. The push card also has a large master seal and concealed within the master seal is one of the feminine names appearing below the said discs. The person selecting the feminine name corresponding to the one under the master seal receives a premium or prize. Persons selecting certain designated numbers set out in the legend at the top of said card or the last sale on the card also receive premiums or prizes. The push card bears a legend or instruction as follows:

"NAME UNDER SEAL RECEIVES

CHOICE OF

ESQUIRE JR. RADIO
ESQUIRE TWIN AUTOMATIC
WAFFLE IRON

34-PIECE WM. A. ROGERS
TABLEWARE
(With Tarnishproof Chest)

NESCO TABLE BROILER-GRIDDLE

Numbers 11 to 29 pay what you draw

All numbers over 29 pay 29¢

No Higher

10—FREE NUMBERS—10

1-2-3-4-5-6-7-8-9-10 are FREE

4 ADDITIONAL GIFTS—4

Numbers 9-19-29 and last sale each receive

"1.00 Wahl Eversharp Pencil"

Sales of respondent's merchandise by means of said push card are made in accordance with the above-described legend or instructions. Said prizes or premiums are allotted to the customers or purchasers in accordance with the above legend or instructions. The fact as to whether a purchaser receives an article of merchandise or nothing for the amount of money paid or an article of mer-

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chandise free, and which of said articles of merchandise the purchaser is to receive, if any, is thus determined wholly by lot or chance.

Respondent furnishes, and has furnished, various push cards accompanied by said order blanks, instructions, and other printed matter for use in the sale and distribution of his merchandise by means of a game of chance, gift enterprise, or lottery scheme. The sales plan or method involved in connection with the sale of all of said merchandise by means of said push cards is the same as that hereinabove described, varying only in detail.

PAR. 3. The persons to whom respondent furnishes, and has furnished, the said push cards 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 sales plan or method in the sale of his merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plan or method is a practice of a sort which is contrary to an established public policy of the Government of the United States and in violation of the 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 normal retail price thereof. Many persons, firms, and corporations, who sell or 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 other method that is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of his merchandise and the element of chance involved therein, 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 a tendency and capacity to, and does, unfairly divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondent from his said competitors who do not use the same or an equivalent method.

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PAR. 5. By prices set out on his push cards and other printed matter which is circulated through the United States mails to his customers and prospective customers in the various States of the United States and in the District of Columbia, respondent represents, and has represented, to customers and prospective customers and prospective customers that his automatic pencils have a retail value in excess of the normal retail selling price of said pencils. The respondent represents, and has represented, his automatic pencils to have a retail value and selling price of \$1.00. In truth and in fact the said pencils have a retail value and selling price of substantially less than \$1.00.

PAR. 6. The use by respondent of the representations set forth in paragraph 5 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 representations are true and into the purchase of substantial quantities of respondent's said automatic pencils as a result of such erroneous belief. As a result thereof, trade in commerce among and between the various States of the United States and in the District of Columbia has been diverted unfairly to respondent from his said competitors who do not falsely represent the retail value and selling price of their respective automatic pencils. As a consequence thereof, substantial injury is being done, and has been done, by respondent to competition in commerce between and among 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 and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 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 conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

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It is ordered, That the respondent, Martin Benjamin Rothman, an individual, trading as Esquire Products or trading under any other name or names, his representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of radios, waffle irons, silverware, coffee tray sets, pencils, griddles, or any other merchandise in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing as the customary or regular price or value of respondent's products prices and values which are in fact fictitious and greatly in excess of the prices at which such products are customarily offered for sale and sold in the normal course of business;
2. Supplying to or placing in the hands of others push or pull cards, punchboards, or other lottery devices, so as to enable such persons to dispose of or sell any merchandise by the use thereof;
3. Mailing, shipping, or transporting to agents or 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 any merchandise by the use thereof;
4. Selling, or otherwise disposing of, any merchandise by the use of push or pull cards, 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.

Syllabus

IN THE MATTER OF

LOUIS G. MEYERS, DOING BUSINESS AS NATIONAL PEN
COMPANY AND PHOENIX 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 3796. Complaint, May 31, 1939—Decision, Jan. 15, 1940*

Where an individual engaged in sale and distribution of specialty merchandise, including fountain pens, pencils, jewelry, and various other products; in statements concerning his said products in various advertising circulars, coupons, and other printed matter and in newspapers and other publications distributed among prospective purchasers thereof in the various States and in the District of Columbia—

- (a) Represented, in connection with offer of his fountain pens, rings and necklaces, that the certificate or coupon referred to in connection with offer of such pens was worth \$4.41, and, together with 59 cents, entitled bearer to one of his "\$5.00 VACUUM FILLER SACKLESS FOUNTAIN PENS," and that coupon referred to in connection with offer of his rings and necklaces was worth similar amount and, with 59 cents, entitled bearer to one of his "regular \$5.00 Facsimile Diamond Rings" or one of his regular \$5.00 "CROSS NECKLACES," facts being the prices referred to as customary retail prices of such products were greatly in excess of those at which they were ordinarily offered and sold in normal course of business, and said certificates or coupons had no such value or any value whatever, as price charged in addition thereto was regular and customary one at which he sold his said products in usual course of business;
- (b) Represented, in such various advertisements, that said pens were tested in every case and guaranteed to be unbreakable for life, and held 200 percent more ink than ordinary fountain pen on market, and required no repairs, and that so-called "facsimile" diamonds in his said rings had practically same blue-white color, same perfect cutting and brilliance as genuine diamonds costing one hundred times as much, and were not mere imitations, but represented utmost skill of modern science, and that each ring carried with it a lifetime guarantee and that guarantee covered tarnish of mountings, loss of stone or brilliancy, facts being such pens did not have greater capacity than ordinary fountain pens, would not last a lifetime or be free from necessity of repair, and jewelry was not guaranteed against tarnish nor stones against loss of brilliancy, said jewelry was a very cheap grade and would tarnish immediately or shortly, and was not set with diamonds or facsimile diamonds having same quality, etc., as above set out, as the genuine stones, and purported stones were of no better grade or quality than ordinary cheap imitations; and said rings, necklaces and other articles of jewelry sold and distributed by him would not last a lifetime and were not guaranteed so to do; and
- (c) Represented, in such various advertisements, that offers there referred to of such products were limited and special or introductory, through such statements as "Limit 3 pens to each Certificate," "Price After Sale \$5.00," "MANUFACTURER'S INTRODUCTORY OFFER," "Limit Two Rings to a Coupon,"