

Syllabus

IN THE MATTER OF

S. M. FRANK & CO., INC., AND WM. DEMUTH & CO., INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 4393. Complaint, Nov. 30, 1940—Decision, Jan. 21, 1941*

Where a corporation and a second concern, subsidiary thereof, with common officers and same place of business, engaged in interstate sale and distribution of pipes and other articles of merchandise in competition with others engaged in sale and distribution of like and similar articles of merchandise in commerce, as aforesaid, and acting in conjunction and cooperation with each other in carrying out acts and practices below set forth; in soliciting sale of and in selling and distributing their merchandise to wholesalers, jobbers, and retailers—

Furnished various devices and plans of merchandising which involved operation of games of chance, gift enterprises, or lottery schemes in sale or distribution of their said products to ultimate consumer, and shipped or transported punchboards designed to be and used with their said merchandise, to aforesaid purchasers, by whom said boards and products were assembled into various assortments and by them sold to their trade, and including among other such assortments, as illustrative, (1) number of pipes and board, for sale and distribution of said articles to consuming public, under a plan and in accordance with board's explanatory legend, by which purchaser securing by chance, for 5 cents paid, certain numbers, or making last punch in each of the sections into which board was divided, received one of said pipes, value of each of which was in excess of amount referred to, and purchaser who did not qualify as aforesaid received nothing for his money other than privilege of punching number from board, and (2) various other assortments and punchboards involving lot or chance feature similar to that hereinabove described and varying therefrom in detail only; and

Supplied thereby to and placed in hands of others means of conducting lotteries in sale of their merchandise, in accordance with sales plan as above set forth, by retail dealers who, as direct or indirect purchasers of their said merchandise, exposed and sold same to purchasing public in accordance with aforesaid sales plan, 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 method or any method involving game of chance or sale of a chance to win something by chance, or any other method contrary to public policy, and refrain therefrom;

With the result that many were attracted by said sales plan or method employed by them in sale and distribution of their merchandise and element of chance involved therein, and were thereby induced to buy and sell their said merchandise in preference to that offered and sold by said competitors who do not use same or equivalent methods, and that use of said method, because of said game of chance, had tendency and capacity to

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and did unfairly divert trade in commerce to them from their said competitors who did not use same or equivalent methods; 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 public and competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

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 S. M. Frank & Co., Inc., a corporation, and Wm. Demuth & Co., a corporation, hereinafter referred to as respondents, have 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 S. M. Frank & Co., Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 133 Fifth Avenue, New York, N. Y. Respondent Wm. Demuth & Co., Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 133 Fifth Avenue, New York, N. Y. Both corporate respondents have the same individuals for their officers. The respondent Wm. Demuth & Co., Inc., is a subsidiary of the respondent S. M. Frank & Co., Inc., and the said respondents have acted in conjunction and cooperation with each other in carrying out the acts and practices hereinafter alleged. Respondents are now, and for more than 3 years last past have been, engaged in the sale and distribution of pipes and other articles of merchandise in commerce between and among various States of the United States and in the District of Columbia. Respondents cause and have caused said products, when sold, to be transported from their aforesaid place of business in New York 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 for more than 3 years last past has been, a course of trade by respondents 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 businesses, respondents are and have been in competition with other corporations and with partnerships and individuals 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 their businesses, as described in paragraph 1 hereof, respondents, in soliciting the sale of and in selling and distributing their merchandise to wholesale dealers, jobbers, and retail dealers, furnish and have furnished various devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes when used to sell or distribute said merchandise to the ultimate consumer thereof. Respondents also cause, and have caused, punch boards, which are designed to be, and are, used with the said merchandise, to be shipped or transported to the aforesaid wholesale dealers, jobbers and retail dealers. The wholesale dealers, jobbers, and retail dealers, in turn, assemble the punchboards and merchandise into one assortment and sell the same to their trade. Respondents distribute and have distributed various punchboards for use, or which are used, in the sale and distribution of their pipes and other merchandise to the consuming public by means of a game of chance, gift enterprise, or lottery scheme. One of said assortments is hereinafter described for the purpose of showing the method used by respondents.

This assortment consists of a number of pipes, together with a device commonly called a punchboard. Said pipes are distributed to the consuming public by means of said punchboard in the following manner:

The sales are 5 cents each, and when a punch is made from the board a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears a statement or statements informing prospective purchasers as to which numbers entitle the purchaser thereof to receive a pipe. The punches on the board are arranged in three sections, and the purchaser of the last punch in each section receives a pipe. A purchaser who does not qualify by obtaining one of the numbers calling for one of the pipes or by punching the last number in one of the sections, receives nothing for his money other than the privilege of punching a number from the board. The pipes are worth more than 5 cents each, and a purchaser who obtains one of the numbers calling for a pipe or makes the last punch in one of the sections receives a pipe for the price of 5 cents. The numbers are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the number punched or separated from the board. The pipes are thus distributed to purchasers of punches from the board wholly by lot or chance.

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Respondents sell and distribute and have sold and distributed various assortments of pipes along with punchboards, as hereinabove described, involving a lot or chance feature. Such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who directly or indirectly purchase respondents' said merchandise expose and sell the same to the purchasing public in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plan or method in the sale of their 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 respondents, 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 by 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 respondents in the sale and distribution of their merchandise and the element of chance involved therein, and are thereby induced to buy and sell respondents' merchandise in preference to merchandise offered for sale and sold by said competitors of respondents who do not use the same or equivalent methods. The use of said method by respondents, 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 respondents from their said competitors who do not use the same or equivalent methods and as a result thereof substantial injury is being and has been done by respondents to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in com-

merce 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 November 30, 1940, issued, and on December 2, 1940, served, its complaint in this proceeding upon respondents, S. M. Frank & Co., Inc., a corporation, and Wm. Demuth & Co., Inc., a corporation, charging them with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. On December 19, 1940, the respondents filed their answer, in which answer they 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 upon the said complaint and the answer thereto, and the Commission having duly considered the matter and being 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 conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent S. M. Frank & Co., Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 133 Fifth Avenue, New York, N. Y. Respondent Wm. Demuth & Co., Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 133 Fifth Avenue, New York, N. Y. Both corporate respondents have the same individuals for their officers. The respondent Wm. Demuth & Co., Inc., is a subsidiary of the respondent S. M. Frank & Co., Inc., and the said respondents have acted in conjunction and cooperation with each other in carrying out the acts and practices hereinafter found. Respondents are now, and for more than three years last past have been, engaged in the sale and distribution of pipes and other articles of merchandise in commerce between and among various States of the United States and in the District of Columbia. Respondents cause and have caused said products, when sold, to be transported from their aforesaid place of business in New York 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 for more than three

years last past has been, a course of trade by respondents 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 businesses, respondents are and have been in competition with other corporations and with partnerships and individuals 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 their businesses, as described in paragraph 1 hereof, respondents, in soliciting the sale of and in selling and distributing their merchandise to wholesale dealers, jobbers and retail dealers, furnish and have furnished various devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes when used to sell or distribute said merchandise to the ultimate consumer thereof. Respondents also cause and have caused punchboards, which are designed to be, and are, used with the said merchandise, to be shipped or transported to the aforesaid wholesale dealers, jobbers and retail dealers. The wholesale dealers, jobbers, and retail dealers, in turn, assemble the punchboards and merchandise into one assortment and sell the same to their trade. Respondents distribute and have distributed various punchboards for use, or which are used, in the sale and distribution of their pipes and other merchandise to the consuming public by means of a game of chance, gift enterprise, or lottery scheme. One of said assortments is hereinafter described for the purpose of showing the method used by respondents.

This assortment consists of a number of pipes, together with a device commonly called a punchboard. Said pipes are distributed to the consuming public by means of said punchboard in the following manner:

The sales are 5 cents each, and when a punch is made from the board a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears a statement or statements informing prospective purchasers as to which numbers entitle the purchaser thereof to receive a pipe. The punches on the board are arranged in three sections, and the purchaser of the last punch in each section receives a pipe. A purchaser who does not qualify by obtaining one of the numbers calling for one of the pipes or by punching the last number in one of the sections, receives nothing for his money other than the privilege of punching a number from the board. The pipes are worth more than 5 cents each, and a purchaser who obtains one of the numbers calling for

a pipe or makes the last punch in one of the sections receives a pipe for the price of 5 cents. The numbers are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the number punched or separated from the board. The pipes are thus distributed to purchasers of punches from the board wholly by lot or chance.

Respondents sell and distribute, and have sold and distributed, various assortments of pipes along with punchboards, as hereinabove described, involving a lot or chance feature. Such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who directly or indirectly purchase respondents' said merchandise expose and sell the same to the purchasing public in accordance with the aforesaid sales plan. Respondents thus supply to, and place in the hands of, others the means of conducting lotteries in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plan or method in the sale of their 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 respondents, 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 respondents in the sale and distribution of their merchandise and the element of chance involved therein, and are thereby induced to buy and sell respondents' merchandise in preference to merchandise offered for sale and sold by said competitors of respondents who do not use the same or equivalent methods. The use of said method by respondents, 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 respondents from their said competitors who do not use the same or equivalent methods, and as a result thereof substantial injury is being and has been done by respondents to competition in commerce

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between and among the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of respondents as herein found are all to the prejudice and injury of the public and of respondents' 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 respondents, in which answer respondents admit all the material allegations of fact set forth in said complaint and state that they waive 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 respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, S. M. Frank & Co., Inc., a corporation, and Wm. Demuth & Co., Inc., a corporation, their respective officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of smoking pipes or any other merchandise in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling and distributing pipes or any other merchandise so packed and assembled that sales of such pipes or other merchandise to the general public are to be made, or may be made, by means of a game of chance, gift enterprise, or lottery scheme.

2. Supplying to, or placing in the hands of, others push or pull cards, pull tabs, punchboards or other lottery devices either with assortments of merchandise or separately, which said push or pull cards, pull tabs, punchboards or other lottery devices are to be used, or may be used, in selling or distributing said pipes or other merchandise to the public.

3. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

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

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IN THE MATTER OF

FRANK SPORS, TRADING AS SPORS COMPANY AND
QUALITY PRODUCTS COMPANY

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

Docket 4397. Complaint, Dec. 3, 1940—Decision, Jan. 21, 1941

Where an individual engaged in interstate sale and distribution of his "Corn-Go" medicinal preparation for corns, calluses, and bunions in advertisements of his said product which he disseminated and caused to be disseminated through the mails and by various other means in commerce, and otherwise, and including advertisements in circulars, leaflets, catalogs, pamphlets, and other advertising literature, and which were intended and likely to induce purchase of his said product—

Represented, directly or by implication, that use of said preparation would remove corns, calluses, and bunions and prevent recurrence of such conditions, through such typical statements as "CORN-go Corn & Callous Remover * * * No more sore and aching Corns and Callouses * * * Safely and cleanly removes soft and hard corns, callouses and Bunions," and "LIQUID CORN-go * * * a painless, safe antiseptic corn and callous remover. Safely and cleanly removes soft and hard corns, callouses and Bunions * * *," facts being product in question was wholly incapable of removing bunions, and, while it would effect temporary removal of corns and calluses, it would not prevent recurrence of such conditions, and said preparation had no effect upon the underlying cause of corns and calluses;

With result, through use of aforesaid false, deceptive, and misleading statements, representations and advertisements, disseminated as above set forth, of misleading and deceiving substantial number of members of purchasing public into erroneous and mistaken belief that such false statements, representations, and advertisements were true, and of inducing substantial portion of said public, because of such erroneous and mistaken belief, to purchase his said product:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

Mr. Donovan R. Divet 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 Frank Spors, an individual, trading as Spors Co., and as Quality Products Co., hereinafter referred to as respondent, has violated the provisions of the