

Complaint

IN THE MATTER OF

DOMESART CORPORATION AND JOSEPH ZWEIGENTHAL
AND WILLIAM M. SAFRIN, INDIVIDUALLY AND AS
OFFICERS OF DOMESART CORPORATIONCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3620. Complaint, Oct. 3, 1938—Decision, Sept. 17, 1941*

Where a corporation, and the two individuals who were its only officers and directors, and represented the ownership of its capital stock, engaged in competitive interstate sale and distribution of candy through agents or operators whose names and addresses it obtained from mailing list brokers—

Made use of sales method which involved the mailing to prospective agents of catalogs describing its product, its list of premiums, and its sales plan, involving use of pull cards in sale and distribution of its said candy, under which the amount paid by the purchaser was dependent upon the number disclosed beneath the feminine name he selected from those displayed on the tabs, the purchaser pulling a certain tab received in addition to the candy the pen and pencil set described in the catalog, and the agent or operator had choice of certain premiums for his services or alternative privilege of retaining \$2 of the amount collected for said candies, customarily sold at retail for considerably less than the price listed; and Placed in the hands of others thereby plans, methods, and devices which involved games of chance, gift enterprise, or lottery schemes for use in the sale and distribution of its product, notwithstanding "Notice to Purchasers" in the catalog advising purchaser of privilege of buying a box of candy at the price listed which, as far as appeared, was never shown to any purchaser of a pull;

With the result that many persons were attracted by said sales method and the element of chance involved therein, and were thereby induced to purchase its merchandise in preference to that of its competitors, including those who do not use such or a similar method and are unwilling so to do, and from whom, as a result, trade was thereby unfairly diverted to it:

Held, That such acts and practices were all to the prejudice and injury of the public and competitors and contrary to an established public policy of the United States Government, and constituted unfair methods of competition in commerce.

Before *Mr. Randolph Preston*, trial examiner.

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 Domesart Corpora-

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tion, a corporation, and Joseph Zweigenthal and William M. Safrin, individually and as officers of Domesart Corporation, hereinafter referred to as respondents, have violated the provisions of the 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, Domesart Corporation, 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 130 West Seventeenth Street, New York, N. Y. Individual respondents, Joseph Zweigenthal and William M. Safrin, are the sole stockholders in, directors of, and president and secretary-treasurer respectively of corporate respondent, and have their offices at the same address as said corporation. Respondents Zweigenthal and Safrin formulate, control, and direct the practices and policies of respondent Domesart Corporation. All of said respondents act together and in cooperation with each other in doing the acts and things hereinafter alleged. Respondents are now, and for some time last past have been, engaged in the sale and distribution of candy in commerce between and among the various States of the United States, and in the District of Columbia. Respondents cause, and have caused, said products, when sold, to be shipped or transported from their aforesaid place of business in the State of New York to purchasers thereof located in the various other 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 trade by said 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 business respondents are, and have been, in competition with 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 their business as described in paragraph 1 hereof, respondents sell and distribute, and have sold and distributed, said candy by means of a game of chance, gift enterprise, or lottery scheme. Respondents distribute to purchasers and prospective purchasers certain advertising literature including, among other things, a catalog. One of respondents' assortments of candy consists of a number of boxes of candy and a fountain pen and pencil set, which said fountain pen and pencil set is to be given as a prize to the purchaser of one of said boxes of candy. Said assortment of candy is sold and distributed to the purchasing public

in the following manner: On one page of said catalog is printed and set out a list of the boxes of candy and the prices thereof. On the opposite page 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 a box of candy and the price thereof. The name of the box of candy and the price thereof are so concealed that purchasers and prospective purchasers of the tabs or chances are unable to ascertain which box of candy they are to receive or the price which they are to pay until after the tab is separated or removed from the card. When a purchaser has detached a tab and learned what box of candy he is to receive, and the price thereof, his name is written on the list opposite the named box of candy. The purchaser securing a tab calling for a certain box of candy is entitled to receive, and is given without charge, said pen and pencil set. Some of said boxes of candy 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 buys. The manner in which said pen and pencil set is distributed and the apparent greater values and regular prices of some of said boxes of candy as compared to the price the prospective purchaser would be required to pay in the event he secures one of said boxes of candy, induce the members of the purchasing public to purchase the tabs or chances in the hope that they will receive a box of candy and said pen and pencil set, or a box of candy of far greater value than the designated price to be paid for same. The facts as to whether the purchaser of one of said pull card tabs receives a box of candy and said pen and pencil set or receives a box of candy which has apparent greater value and regular price than the price designated for same on such tab, which of said boxes of candy 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 dealer operating the above-described card has succeeded in selling all of the tabs or chances, collected the amounts called for, and remitted the sums to the respondents, the said respondents thereupon ship to said dealers the boxes of candy designated on said card, and the pen and pencil set to be given as a prize, as aforesaid, together with a premium for the dealer as compensation for operating the pull card and selling the said merchandise. Said dealer delivers the boxes of candy to the purchasers of tabs from said pull card in accordance with the list filled out when the tabs were detached from the pull card.

Respondents sell and distribute, and have sold and distributed, various assortments of boxes of candy and furnish, and have fur-

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nished, various pull cards for use in the sale and distribution thereof by means of a game of chance, gift enterprise, or lottery scheme. Respondents' sales plans or methods vary in detail, but the above-described plan or method is illustrative of the principle involved.

PAR. 3. The dealers to whom respondents furnish, and have furnished, the said pull cards use, and and have used, the same in purchasing, selling, and distributing respondents' merchandise 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 candy in accordance with the sales plan hereinabove set forth. The use by respondents of said methods in the sale of their candy and the sale of such candy by and through the use thereof, and by the aid of said methods, is a practice of the sort which is contrary to an established public policy of the Government of the United States, and in violation of criminal laws.

PAR. 4. The sale of candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure an additional article of merchandise without cost or a box of candy at a price much less than the apparent normal retail price thereof. Many persons, firms, and corporations who sell and distribute candy in competition with the respondents, as above alleged, are unwilling to adopt and use said methods or any other methods 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 respondents' said methods and by the element of chance involved in the sale of such candy in the manner above described, and are thereby induced to buy and sell respondents' candy in preference to candy offered for sale and sold by 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 the tendency and capacity to, and does, unfairly divert trade and custom to the respondents from their said competitors who do not use the same or equivalent methods, and as a result thereof, substantial injury is being done, 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 of the public and of respondents' competitors, and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Findings

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on October 3, 1938, issued and thereafter served its complaint, in this proceeding upon the respondents, Domesart Corporation, a corporation, and Joseph Zweigenthal and William M. Safrin, individually and as officers of the respondent corporation, charging them with unfair methods of competition in commerce in violation of the provisions of said act.

After the issuance of the complaint and filing of respondents' answer thereto, testimony and other evidence in support of the allegations of the complaint were introduced by attorneys for the Commission before duly appointed trial examiners of the Commission designated by it to serve in this proceeding, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceedings regularly came on for final hearing before the Commission on the complaint, the answer thereto, the testimony and other evidence, the trial examiner's report thereon, and brief in support of the complaint; 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, Domesart Corporation, is a corporation organized in the year 1928 under the laws of the State of New York, with its principal place of business located at 130 West Seventeenth Street, in the city and State of New York. Respondents, Joseph Zweigenthal and William M. Safrin, are directors, and president and secretary and treasurer, respectively, of the corporate respondent, and share the offices of the corporate respondent. The individual respondents, since 1933, have formulated, controlled, and directed the practices of the corporate respondent. All of the capital stock of the respondent corporation is owned by William M. Safrin and Adele Zweigenthal, the mother of respondent Joseph Zweigenthal. Respondents, William M. Safrin and Joseph Zweigenthal, are the only officers and directors of respondent corporation.

PAR. 2. Respondent, Domesart Corporation, since the year 1928, has been engaged in the sale and distribution of candy, and causes its product, when sold, to be shipped from its principal place of business to purchasers thereof located in various States of the United States.

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PAR. 3. Respondent, Domesart Corporation, in the conduct of its business as set forth in paragraph 2 hereof, has been and now is in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of candy in commerce between and among various States of the United States.

PAR. 4. Respondent, Domesart Corporation, sells and distributes its candy through agents located in various States of the United States whose names and addresses it obtains through mailing-list brokers. Catalogs describing its product, sales method including pull card, and its list of premiums, are mailed to prospective agents.

PAR. 5. The pull cards included in the catalogs bear 16 seals or pull-tabs, each of which has a slit across the top to facilitate its removal from the card. On the face of each tab is printed a feminine name, and on the reverse thereof is a number which is not disclosed until the tab has been detached and which indicates the price to be paid to the agent by the person pulling the tab. The catalog contains a list of respondent's candies and a statement indicating the amounts to be paid, therefor, which amounts correspond with the numbers appearing on the reverse of the tabs, one of these being for 10 cents, another for 39 cents, and the remaining 14 ranging from 44 to 49 cents. The purchaser pulling the 49-cent tab receives, in addition to the candy and without further charge, the pen and pencil set described in the catalog. The agent records the name of each customer and the number revealed by the detached pull-tab, which the customer retains as his receipt when he has paid the amount indicated thereon. After all the pulls have been sold, the agent remits the amount collected, \$6.99, to respondent corporation, whereupon, the 16 boxes of candy described in the catalog, together with the pen and pencil set and the premiums selected by the agent as compensation for his services are mailed to the agent. If he so desires, the agent may retain, in lieu of the premiums, \$2 of the amount collected, and remit the balance, \$4.99, to the respondent. The pen and pencil set given as a prize to the person pulling the tab bearing the figure 49 cents is sold at wholesale for 16 cents. The candies sold by respondent are customarily sold at retail for considerably less than the price listed.

PAR. 6. The sheet of pull tabs is pasted on the upper half of page 19 of the catalog, and immediately thereunder appears a notice which reads:

Notice to purchasers—On the back of each slip is printed the price of a box of candy. If after deliberation you decide that you want to buy the box of candy, pay the holder of this book the price shown on the slip. If you don't want the box of candy you need not buy it.

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There is no testimony that any purchaser of a pull was ever shown this notice. One of the respondent's agents testified that every purchaser of a pull paid the price indicated on the tab.

PAR. 7. Respondent, Domesart Corporation, by its sales methods hereinbefore described, has placed and now places in the hands of others, plans, methods, and devices which involve games of chance, gift enterprises, or lottery schemes to be used in the distribution of its merchandise, and by the use of such plans, methods, and devices such merchandise is distributed to the ultimate consumer wholly by lot or chance.

PAR. 8. Many persons have been and are attracted by the sales method employed by respondent corporation in the sale and distribution of its candy and by the element of chance involved therein, and have been thereby induced to purchase respondent's merchandise in preference to merchandise offered for sale by respondent's competitors who do not use the same or a similar method.

PAR. 9. During all of the time herein mentioned, the corporate respondent has been in competition with other corporations and with individuals and partnerships engaged in the sale and distribution in commerce of candy similar to that sold by respondent in commerce between and among various States of the United States, who are unwilling to use and do not use, in the sale and distribution of their candy, any method involving a game of chance, gift enterprise, or lottery scheme, and as a result, trade has been unfairly diverted from such competitors to the corporate respondent.

CONCLUSION

The aforesaid acts and practices of the respondents are all to the prejudice and injury of the public and of respondents' competitors, are contrary to the established public policy of the Government of the United States of America, 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, the answer of respondents, the testimony, and other evidence introduced before duly appointed trial examiners of the Commission designated by it to serve in this proceeding in support of the allegations of the complaint, the trial examiner's report thereon, and brief filed on behalf of the Commission; and the Commission having made its findings as to the facts

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and its conclusion that respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondent Domesart Corporation, a corporation, its officers, directors, representatives, agents, and employees, directly or through any corporate or other device, and respondents, Joseph Zweigenthal and William M. Safrin, individually and as officers of said respondent corporation, in connection with the offering for sale, sale, and distribution of candy or any other merchandise in commerce as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or distributing candy or any other merchandise so packed or assembled that sales of such candy or other merchandise to the 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, punchboards, or other lottery devices, either with assortments of candy or other merchandise or separately, which said push or pull cards, punchboards, or other lottery devices are to be used, or may be used, in selling and distributing said candy or other merchandise to the public.

3. Selling or otherwise disposing of such 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.

Syllabus

IN THE MATTER OF

EARL ARONBERG, TRADING AS POSITIVE PRODUCTS
COMPANY AND REX PRODUCTS COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3856. Complaint, July 20, 1939—Decision, Sept. 17, 1941*

Where an individual engaged in interstate sale and distribution of his medicinal preparations intended for use in the treatment of delayed menstruation, designated as "Triple X Relief Compound," and "Perio Pills," known also as "Reliable Perio Compound" and "Perio Relief Compound"; by means of advertisements disseminated through the mails and in newspapers and periodicals, directly or by implication—

- (a) Represented that his said products constituted competent and effective remedies and treatments for delayed menstruation, and that they were harmless and safe for use, facts being that, while they possessed emmenagogue properties, they did not constitute competent and effective remedies or treatments for delayed menstruation, nor were they harmless or safe for use, but contained aloes, extract of cotton root and oil of savin in sufficient quantities, even where used in dosage prescribed, to cause such harmful results as gastro-intestinal disturbances and excessive purgation, and, by reason of their ergotin content, as well as the quinine sulphate in said "Triple X" preparation, might also cause severe toxix and circulatory conditions particularly hazardous in the case of pregnancy; and danger inherent in said preparations was further augmented by their indiscriminate sale to the lay public for use without medical supervision, and the taking by many users, because of ignorance or alarm, of excessive and too frequent doses; and
- (b) Failed to reveal in said advertisement that prescribed use of said preparations might result in serious injury to health, and failed sufficiently to disclose harmful potentialities of such products in statements which appeared only on their labels, which, as a result of change made following the initiation of the Commission's investigation, read: "Not to be taken in pregnancy as it may cause discomfort. If in doubt consult a physician. If the pills cause excessive bowel action, they should be stopped temporarily. This medicine is a laxative and may irritate piles. Laxatives should never be used in cases of nausea, vomiting, abdominal pain or other possible sign of appendicitis," and which the many purchasers by mail had no opportunity to observe until after they had received said products;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that his preparations possessed therapeutic values which they did not in fact possess, and that they were safe for use, when such was not the fact, and to cause such public to purchase substantial quantities of his preparations because of such belief: