

Syllabus

IN THE MATTER OF

EWEN CAMERON, TRADING AS MERCHANDISE SALES
SYNDICATECOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4417. Complaint, Dec. 14, 1940—Decision, Nov. 14, 1941*

Where an individual engaged in competitive interstate sale and distribution of billfolds, cameras, cosmetics, fountain pens, jewelry, smoking pipes, wearing apparel, and other articles, including assortments thereof which consisted of a large carton enclosing 80 or 81 small boxes, each holding an article of merchandise costing said individual from less than 1 to 6 cents each, and customarily retailing for from 2 to 25 cents each; with front of said carton constituting a pull card for use in sale and distribution of said small boxes under a plan by which the ultimate purchaser, for the 10 cents paid, secured that box, number of which corresponded to that secured by chance from card, and depicting thereon articles usually retailing at more than 10 cents each, purportedly contained therein,—

Sold such assortments, through brokers, to distributors or wholesalers, retail purchasers from whom exposed and sold them to the purchasing public in accordance with aforesaid sales plan, involving a game of chance, in that the facts as to which of a number of different articles purchaser would receive and whether or not the article secured was of less or greater value than the purchase price, were determined wholly by lot or chance, notwithstanding legend "Box may be opened and contents examined before purchasing," printed at the bottom of one side of the large carton in type so small and inconspicuously placed as to be visible and legible only upon the most minute examination, and which, it was evident, was not intended to, and did not, come to the attention of the purchasing public; said dealer thereby supplying to and placing in the hands of others the means of conducting lotteries in the sale of merchandise in accordance with aforesaid plan or method, in competition with others who, unwilling to adopt and use such or other sales method contrary to public policy, refrain therefrom;

With the result that many dealers in and ultimate consumers of such merchandise were attracted by said sales plan and the element of chance involved therein, and were thereby induced to buy his said merchandise in preference to that of his said competitors, and with effect of unfairly diverting trade to him from them; to the substantial injury of competition in commerce;

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

Before *Mr. W. W. Sheppard*, trial examiner.

Mr. D. C. Daniel for the Commission.

Mr. Abram Z. Zietlein, of Chicago, Ill., for respondent

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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 Ewen Cameron, individually, and trading as Merchandise Sales Syndicate, 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, Ewen Cameron, is an individual trading under the name of Merchandise Sales Syndicate, with his principal office and place of business located at 2738 North Sheffield Avenue, Chicago, Ill. Respondent is now and for more than three years last past has been engaged in the sale and distribution of smoking pipes, jewelry, fountain pens, billfolds, knives, cosmetics, cameras, wearing apparel, and other articles of merchandise to dealers. 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 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 said respondent in such merchandise in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of his 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 merchandise in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business, as described in paragraph 1 hereof, respondent sells and has sold to dealers certain assortments of said merchandise so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when said merchandise is sold and distributed to the consumers thereof. One of said assortments is, and has been, sold and distributed to the purchasing public in substantially the following manner:

This assortment consists of a large cardboard carton in which is contained a number of smaller cartons, each of which smaller cartons contains an article of merchandise and on the end of each of said smaller cartons there appears a number. One end of said large carton is so constructed as to constitute a device commonly known as a pull card. Such pull card contains a number of partially per-

forated pull tabs and on the reverse side of each of said tabs there appears a number which corresponds to the number appearing on the end of one of said smaller cartons. Sales are 10 cents each and each purchaser pulls one of said tabs from the pull card. The purchaser is entitled to and receives the smaller carton bearing the number which corresponds to the number appearing on the reverse side of the tab pulled by such purchaser. The numbers on the reverse sides of said tabs are effectively concealed from purchasers and the prospective purchasers until selections have been made and the tabs have been separated or removed from the said card. Many of the said articles of merchandise contained in this assortment have a normal retail value greater than 10 cents. The fact as to which of said articles of merchandise a purchaser is to receive and whether or not he receives an article of merchandise of greater retail value than the amount to be paid therefor are thus determined wholly by lot or chance.

Respondent sells and distributes, and has sold and distributed, various assortments of his merchandise, together with devices for use in the sale or distribution of such merchandise, to the purchasing public by means of a game of chance, gift enterprise, or lottery scheme but the sales plans or methods employed in connection with each of said assortments are substantially the same as the sales plans or methods hereinabove described, varying only in detail.

PAR. 3. Retail dealers who purchase respondent's said assortments of merchandise, either directly or indirectly, expose for sale and sell the same to the purchasing public in accordance with the aforesaid sales plans or methods. Respondent thus supplies to, and places in the hands of, others the means of conducting lotteries in the sale and distribution of his merchandise in accordance with the sales plans or methods hereinabove described. The use by respondent of said sales plans 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 plans or methods, 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 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 and distribute merchandise in competition with respondent, as above alleged, are unwilling to adopt and use said sales plans or methods or any sales plans or methods involving a game of chance or the sale of a chance to win something by chance or any

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other sales plans or methods that are contrary to public policy and such competitors refrain therefrom. Many dealers in and ultimate consumers of said merchandise are attracted by said sales plans or methods employed by respondent in the sale and distribution of his merchandise and the element of chance involved therein and are thereby induced to buy respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent who do not use the same or equivalent sales plans or methods. The use of said sales plans or methods by respondent because of said game of chance has a tendency and capacity to and does unfairly divert trade to respondent from his said competitors who do not use the same or equivalent sales plans or methods 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. 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 December 14, 1940, issued and subsequently served its complaint in this proceeding upon respondent Ewen Cameron, individually and trading as Merchandise Sales Syndicate, charging him 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. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of the complaint were introduced by an attorney for the Commission and in opposition to the allegations of the complaint by attorneys for the respondent before 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 said complaint, the answer thereto, testimony and other evidence, report of the trial examiner and exceptions thereto, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel; 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, Ewen Cameron, is an individual trading under the name Merchandise Sales Syndicate, with his principal office and place of business located at 2738 North Sheffield Avenue, Chicago, Ill. Respondent is now and has been since about 1936, engaged in the sale and distribution of billfolds, cameras, cosmetics, fountain pens, jewelry, smoking pipes, wearing apparel, and other articles of merchandise.

PAR. 2. In the course and conduct of his business as aforesaid respondent causes, and has caused, said merchandise, when sold, to be transported from his place of business in the State of Illinois to purchasers thereof at their respective points of location in various States of the United States and in the District of Columbia. There is now, and for several years last past has been, a course of trade by said respondent in such merchandise in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. Respondent sells and distributes assortments of merchandise consisting of novelties and notions such as those mentioned in paragraph 1 hereof. He sells his assortments of merchandise through brokers to distributors or wholesale dealers who resell to retail dealers who, in turn, sell to consumers. During the approximately 4 years in which he has been engaged in his present business his volume of sales has increased from about \$20,000 the first year to about \$70,000 in the last year. The contents of the assortments of merchandise sold vary somewhat from time to time, but the method of sale of all such assortments is substantially the same and is as follows: The assortment consists of a large carton containing a number of small boxes in each of which is packed an article of merchandise. The front of the large carton is so constructed as to constitute a device commonly known as a pull card. This pull card has a number of partially perforated pull tabs and on the back of each such tab a number appears which corresponds to a number appearing on one of the smaller boxes contained in the large carton. Sales are 10 cents each, and a purchaser detaches one of the partially perforated tabs from the pull card and receives the small box bearing the number corresponding to the number appearing on the reverse side of the tab pulled by such purchaser. This number on the reverse side

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of the tab is effectively concealed from view until the tab is separated and removed from the pull card.

Each assortment of merchandise usually consists of 80 or 81 articles, and in case the assortments have 81 articles the purchaser who pulls the last of the 80 tabs on the pull card receives, in addition to the article of merchandise called for by the number on the reverse side of that tab, one additional article of merchandise without further charge. Respondent occasionally purchases job lots of merchandise and the individual items packed in assortments vary according to the merchandise he has available at any given time. The cost to respondent of the individual articles in said assortments also varies from time to time. As of July 1940 the cost of the individual items in one such assortment ranged from slightly less than 1 cent each to 6 cents each. The usual and customary retail prices of the articles included in assortments sold by the respondent range from 2 or 3 cents each to approximately 25 cents each.

PAR. 4. Retail dealers who purchase respondent's assortments of merchandise expose for sale and sell the same to the purchasing public in accordance with the aforesaid sales plan or method.

Respondent testified that any purchaser is free to examine the merchandise drawn and decline to accept and pay for it if he so desires, and that the retail dealer is informed that unsold merchandise may be returned. However, the only notice to the purchasing public is the legend "Box may be opened and contents examined before purchasing" printed at the bottom of one side of the large carton in type so small and so inconspicuously placed as to be visible and legible only upon the most careful and minute examination. The conclusion is drawn from the size and placing of this notice that it is not intended to, and does not, come to the attention of the purchasing public.

The large carton has on its front beside the pull card pictures of articles of merchandise which usually and customarily retail at more than 10 cents each and which are purportedly contained in the assortment. Among the articles so pictured are a pipe, a necktie, a billfold, a razor, and a cigarette lighter. These pictorial representations have the capacity and tendency, when taken in connection with the method of sale used, to create in the minds of members of the purchasing public the belief that among the articles of merchandise in the assortment there are some of a value greater than 10 cents.

The sale of merchandise to the purchasing public in the aforesaid manner involves a game of chance in that the fact as to which of a number of different articles of merchandise the purchaser will

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receive, and whether or not he receives an article of merchandise of less or greater value than the purchase price, is determined wholly by lot or chance. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of merchandise in accordance with the aforesaid plan or method.

PAR. 5. In the conduct of his business respondent is in competition with other sellers of like articles of merchandise who do not use, and are unwilling to adopt and use, any sales plan or method involving a game of chance or any other sales plan or method contrary to public policy, and such competitors refrain therefrom. Many dealers in and ultimate consumers of such merchandise are attracted by the 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 respondent's merchandise in preference to merchandise offered for sale by said competitors of respondent who do not use the same or equivalent sales plans or methods. The use of said sales plan or method by respondent, because of said game of chance, has a tendency and capacity to, and does, unfairly divert trade to respondent from competitors who do not use the same or equivalent methods of sale, and as a result thereof substantial injury is being done, and has been done, by respondent to competition in commerce between and among the various States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair 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, the answer of respondent, testimony and other evidence in support of the allegations of said complaint and in opposition thereto taken before an examiner of the Commission theretofore duly designated by it, report of the trial examiner and exceptions thereto, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel, 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:

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It is ordered, That the respondent Ewen Cameron, an individual, trading as Merchandise Sales Syndicate, or under 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 novelties and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

1. Selling or distributing novelties, or any merchandise, so packed or assembled that sales of such novelties 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 novelties 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 or distributing said novelties or other merchandise to the public.

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

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.

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IN THE MATTER OF

MINERAL WELLS CRYSTAL PRODUCERS, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 4512. Complaint, May 29, 1941—Decision, Nov. 14, 1941

Where a corporation engaged in the processing and in the competitive interstate sale and distribution of mineral crystals for the treatment of certain ailments; in statements and legends on leaflets, letterheads, billheads, sales invoices, display cards and other advertising material, and on the labels and outer wrappings of the product's containers, directly or by implication—

- (a) Represented through inclusion of words "Mineral Wells" as a part of its corporate name and through such use of them in aforesaid statements as "Mineral Wells Crystals," "Made in Mineral Wells, Tex.," and "Made from Texas mineral water," that its mineral crystals were produced exclusively from mineral water obtained in its natural state from the earth at or in the vicinity of Mineral Wells, Tex.;

The facts being its said product was not processed from mineral water thus obtained at or in the vicinity of said city,—which for a long period had been well and favorably known for its mineral water containing certain constituents, and name of which had long been associated by a substantial portion of the purchasing public with the wells located in its vicinity—and was not made directly from any natural mineral water, but was prepared through mixing ordinary water from the mains of aforesaid city with commercial chemicals purchased by said corporation from chemical companies obtaining their raw materials hundreds of miles distant, and thereafter heating and processing the solution; and

- (b) Represented that its said product had been endorsed or tested as to quality and fitness by some governmental, scientific or other recognized agency empowered and qualified to certify as to the attributes thereof, through use of such words and legends as "CERTIFIED Mineral Wells Crystals," "Use Certified Mineral Crystals," and "Certified Mineral Crystals";

The facts being its said product was not properly described as "Certified" inasmuch as it had never been endorsed or tested as to quality or fitness by any recognized agency whatever;

With effect of misleading and deceiving a substantial portion of the purchasing public as to its product and the place of origin thereof, and of thereby inducing it to purchase substantial quantities of said product whereby trade was diverted unfairly to it from its competitors, including many who do not misrepresent their products or the places of origin thereof; 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.

Mr. J. V. Buffington for the Commission.

Mr. A. E. Brooks, of Fort Worth, Tex., for respondent.