

Syllabus

IN THE MATTER OF

EMPIRE MERCHANDISE CORPORATION AND SOPHIE RUBMAN

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 3357. Complaint, Mar. 14, 1938—Decision, Aug. 4, 1942

Where a corporation and its president, who owned virtually all of its stock and controlled its policies and practices, engaged in the competitive interstate sale and distribution of novelty merchandise such as flashlights, jewelry, watches, chinaware, and silverware—

(a) Distributed through the mails to prospective sales representatives throughout the United States advertising circulars which depicted and described certain articles offered as compensation for the sale of merchandise, also depicted, and which contained also a pull card for use in sale of articles listed and priced, under a scheme in accordance with which the particular article to be received, and the price to be paid, were disclosed after removal from the card of the tab selected by the customer, and the operator was compensated, at his option, by cash or merchandise premium; and

Thereby supplied and placed the means of conducting lotteries in the hands of such operators who, notwithstanding notice purportedly offering customer the right to buy any article involved at price shown on back of slip, made use of their said pull-card device in selling their merchandise in accordance with aforesaid 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, unwilling to use a method involving chance or contrary to public policy, refrain therefrom;

With the result that many persons were attracted by said sales method and the element of chance involved therein, and were thereby induced to buy and sell said merchandise in preference to that offered and sold by competitors who do not use such methods, thereby diverting trade unfairly from said competitors to them; and

(b) Represented that the articles offered to their sales representatives were free and without cost to them through use on their circulars of such statements as "Free gifts for all" and "Wonderful gifts for all";

When in fact none of the articles thus designated were given away free, but all were supplied to their representatives only for services rendered in sale of merchandise in question, and price thereof was included in that of the other articles which the representative was required to sell;

With effect of misleading and deceiving a substantial number of persons into the mistaken belief that such articles of merchandise were given to representatives free, thereby causing them to undertake the sale of said products in preference to those of competitors; whereby trade was diverted from their competitors to them;

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

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As respects the insistence of those charged with the operation of a lottery scheme in connection with the sale of their merchandise through persons whom they supplied with pull-card devices for use in selling by chance to members of the public, goods, the prices and values of some of which were in excess of those shown therefor on such cards, that the lottery or chance element was removed from the scheme by a notice purportedly offering any customer the right to buy any article at price shown for it on the back of its slip: such notice was inconsistent with the sale of the various articles called for under the plan by the operator, who, after sale of all chances, was to remit to sellers and receive from them said goods for distribution to various purchasers as shown on card and who was compensated, at his option, by deduction of cash premium or receipt of merchandise premium along with aforesaid other goods; was inconsistent with the instructions to the operator which made no provision for any such contingency; was inconsistent with the effective working of the plan, and was, it appeared, taken advantage of only in exceptional and isolated cases; and, as a practical matter, had no substantial effect upon the operation of the plan and did not serve to remove the lottery element from seller's sales method.

Before *Mr. Randolph Preston*, trial examiner.

Mr. D. C. Daniel and *Mr. J. W. Brookfield, Jr.* for the Commission.
Nash & Donnelly, of Washington, D. C., for respondents.

COMPLAINT

Pursuant to the provisions of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Empire Merchandise Corporation, a corporation, and Sophie Rubman, individually, and as an officer of Empire Merchandise Corporation, hereinafter referred to as respondents, have been, and are now, using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Empire Merchandise Corporation, is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business located at 414 Broadway, New York, N. Y. Respondent, Sophie Rubman, is the president and a director of, and the principal stockholder in, the respondent, Empire Merchandise Corporation, and formulates, controls and directs its policies and practices. Respondent, Sophie Rubman, has her offices at the same address as that of the corporate respondent. 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 razor blades, flashlights, jewelry, watches, china and silverware, clocks, cosmetics, cigaret lighters and cases, bedding, kitchenware, and other articles of merchandise, 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 place of business in the State of New York to purchasers thereof in the State of New York and in 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 in commerce by said respondents in such merchandise 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 in competition with other corporations and individuals and with partnerships 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 said articles of merchandise by means of a game of chance, gift enterprise, or lottery scheme. Respondents insert advertisements in magazines of interstate circulation and distribute, or cause to be distributed, to representatives and prospective representatives certain advertising literature, including a sales circular. Respondents' merchandise is distributed to the purchasers thereof in the following manner:

A portion of said sales circular consists of a list on which there are designated a number of items of merchandise and the prices thereof. Adjacent to the list 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 an article of merchandise and the price thereof. The name of the article of merchandise and the price thereof are so concealed that purchasers or prospective purchasers of the tabs or chances are unable to ascertain which article of merchandise they are to receive or the price which they are to pay until after the tab is separated from the card. When a purchaser has detached the tab and learned what article of merchandise he is to receive and the price thereof, his name is written on the list opposite the named article of merchandise. Some of said articles of merchandise have purported and represented retail values greater than the prices designated for them, but are distributed to the consumer for the price designated on the tab which he pulls. The apparent greater values of some of said articles of merchandise, as compared to the price the prospective purchaser will be required to pay in the event he secures one of said articles, in-

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duces members of the purchasing public to purchase the tabs or chances in the hope that they will receive articles of merchandise of far greater value than the designated prices to be paid for same. The fact as to whether a purchaser of one of said pull-card tabs receives an article of greater value than the price designated for same on such tab, which of said articles of merchandise 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 representative operating the pull card has succeeded in selling all of the tabs or chances, collected the amounts called for, and remitted the said sums to the respondents, the said respondents thereupon ship to said representative the merchandise designated on said card, together with a premium for the representative as compensation for operating the pull card and selling the said merchandise. Said operator delivers the merchandise to the purchasers of tabs from said pull cards in accordance with the list filled out when the tabs were detached from the pull card.

Respondents sell and distribute various assortments of said merchandise and furnish various pull cards for use in the sale and distribution of such merchandise by means of a game of chance, gift enterprise or lottery scheme. Such plan or method varies in detail, but the above described plan or method is illustrative of the principle involved.

PAR. 3. The persons to whom respondents furnish the said pull cards use 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 merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said method in the sale of their merchandise and the sale of such merchandise by and through the use thereof and by the aid of said method is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy and is contrary to an established public policy of the Government of the United States.

PAR. 4. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure an article of merchandise at a price much less than the apparent normal retail price thereof. Many persons, firms, and corporations who sell or distribute merchandise in commerce 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 any method which is contrary to public policy, and such competitors refrain therefrom.

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Many persons are attracted by respondents' said method and by the element of chance involved in the sale of said products in the manner above described, 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 an equivalent method. The use of said method by respondents, because of said game of chance, has the capacity and tendency to, and does, unfairly divert trade and custom to respondents from their said competitors who do not use the same or an equivalent method.

PAR. 5. In the course and conduct of their business, as hereinabove related, respondents have caused various false, deceptive and misleading statements and representations to appear in their advertising matter as aforesaid, of which the following are examples, but are not all-inclusive:

Free gifts for all
Free Ladies' 4 Jewel Wristwatch
Free 8 piece bed set
All charges prepaid by us

The effect of the foregoing false, deceptive, and misleading statements and representations of the respondents in selling and offering for sale such items of merchandise as hereinabove referred to is to mislead and deceive a substantial part of the purchasing public in the several States of the United States and in the District of Columbia by inducing them to mistakenly believe (1) that respondents give away certain of their said articles of merchandise without cost to their said representatives, and (2) that respondents prepay all charges on all of their said articles of merchandise.

PAR. 6. In truth and in fact, none of respondents' premiums or so-called gifts are given away "free" or without cost, but said premiums or so-called gifts, which are represented as being "free" to said representatives, are either purchased with labor by them or the price of said premiums or so-called gifts is included in the price of other articles of merchandise which the representatives must sell or procure the sale of before said premiums or so-called gifts can be procured by them. For a number of premiums or so-called gifts certain sums of money must be paid by said representatives in addition to the labor performed or services rendered. Respondents do not prepay all of the charges on their said products, but said representatives are required to pay certain specified sums of money as shipping charges on a number of respondents' said articles of merchandise.

PAR. 7. The use by respondents of the false, deceptive, and misleading statements and representations set forth 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 statements and representations are true, and into the purchase of substantial quantities of said respondents' products as the result of such erroneous belief. There are, among the competitors of respondents as mentioned in paragraph 1 hereof, manufacturers and distributors of like or similar products who do not make such false, deceptive and misleading statements and representations concerning the method of sale and distribution of their products. By the statements and representations aforesaid, trade is unfairly diverted to respondents from such competitors and, as a result thereof, substantial injury is being done, and has been done, by respondents to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 8. The aforesaid methods, acts and practices of respondents are all to the injury and prejudice of the public and of respondents' competitors, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on March 14, 1938, issued and subsequently served its complaint in this proceeding upon the respondents, Empire Merchandise Corporation, a corporation, and Sophie Rubman, individually and as an officer of Empire Merchandise Corporation, charging them with the use of unfair methods of competition in commerce in violation of the provisions of that act. After the filing of respondents' answer, testimony and other evidence in support of the allegations of the complaint were introduced by the attorneys for the Commission, and in opposition thereto by the attorneys for the respondents, before a trial examiner of the Commission theretofore duly designated by it, which testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the complaint, the answer thereto, testimony and other evidence, report of the trial examiner upon the evidence and the exceptions to such report, and briefs in support of and in opposition to the complaint (oral argument not having been requested);

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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 fact and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Empire Merchandise Corporation, is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 414 Broadway, New York, N. Y.

Respondent, Sophie Rubman, an individual, is president of the corporate respondent. She is the owner of virtually all of the capital stock of the corporation and formulates, directs, and controls all of the policies, acts, and practices of the corporation.

PAR. 2. Respondents are now, and since 1932 have been, engaged in the sale and distribution of merchandise generally designated as novelty merchandise and including such articles as flashlights, jewelry, watches, chinaware, silverware, clocks, cosmetics, cigarette lighters, bedding, and kitchenware. Respondents cause and have caused their products, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in their products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of their business respondents are, and have been, in competition with other corporations and individuals and with partnerships engaged in the sale and distribution of similar articles of merchandise in commerce among and between the various States of the United States, and in the District of Columbia.

PAR. 4. In promoting the sale of their products respondents distribute advertising or sales circulars through the United States mails to prospective sales representatives located at various points throughout the United States. The circulars contain pictorial representations and descriptive matter with respect to certain articles of merchandise offered by respondents as compensation for the sale of their merchandise, and also pictorial representations and descriptive matter as to certain of the articles of merchandise which respondents offer for sale.

Each of these circulars also contains what is commonly known as a pull-card device. This pull-card device consists of a number of

tabs, under each of which is concealed the name of one of the articles of merchandise offered for sale by respondents and the price thereof. Neither the name of the article nor the price thereof is disclosed to the purchaser or prospective purchaser until after the tab has been separated or removed from the card. Adjacent to the pull tabs is a list of all of the articles of merchandise offered for sale and the price thereof, which corresponds to the articles and prices concealed under the various pull tabs. When a purchaser has detached a tab and there is thus disclosed which article he is to receive and the price to be paid for it, his name is written on the list opposite the particular article of merchandise.

Some of the articles of merchandise offered for sale have retail values greater than the prices so designated for them, but all of the articles are distributed to the purchasers at the prices on the tabs. The fact that some of such articles of merchandise have values in excess of the designated prices induces members of the purchasing or consuming public to pull the tabs in the hope that they will obtain such articles. Moreover, some of the articles offered for sale are represented through pictures and reading matter in the matter in the circular as having values greater than their actual value, which serves as a further inducement to prospective purchasers to pull the tabs in an effort to obtain such articles. The specific article which the purchaser receives, the amount of money he is required to pay for such article, and the question whether the purchaser will receive an article having an actual or apparent value greater than the price designated therefor are thus determined wholly by lot or chance.

When the individual operating the pull card has succeeded in selling all of the articles of merchandise listed under the tabs and has collected the respective amounts charged therefor, the total of such amounts is remitted to respondents. Upon receipt of such total amount, respondents ship to their representative the merchandise sold, together with a premium for the representative as compensation for operating the device and selling and distributing the merchandise, such premium having been selected by the representative from articles pictured in the circular. If the representative so desires, he may deduct a cash premium in lieu of the merchandise premium. Upon receipt of the merchandise from respondents, the representative delivers the various articles to the purchasers in accordance with the list prepared when the tabs were pulled.

PAR. 5. In connection with the pull-tab device the following reading matter appears:

NOTICE TO PURCHASERS.—On the back of each slip is printed the price of an article. If after deliberation you decide that you want to buy the article

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pay the holder of this book the price shown on slip. If you do not want the article, you need not buy it.

Respondents insist that the insertion of this notice has the effect of removing the lottery or chance element from their sales method. The Commission finds, however, that despite this notice, the articles of merchandise are in fact sold and distributed by means of the pull-card device in accordance with the sales plan or method hereinbefore described. The successful operation of respondents' sales plan is dependent upon the ability of the operator to sell all of the articles listed, so as to permit remittance of the required amount to respondents in order to obtain the merchandise purchased, and in order for the operator to obtain the premium for the sale of the merchandise. The operation of the plan strictly in accordance with the so-called "Notice to Purchasers" would not tend to net the operator a return sufficient to warrant completion of the plan, and as a result the plan would, from a practical viewpoint, become inoperative.

The record discloses that it is only in exceptional and isolated cases that persons who pull a tab from the device refuse to accept and pay for the merchandise designated on the tab. Moreover, in respondents' instructions to their representatives, which appear on the circular, there is no direction as to what shall be done in the event all of the articles of merchandise are not sold. The circular likewise fails to contain any information as to the premium or compensation which can be obtained by the representative in the event that some of the purchasers refuse to accept the article listed on the particular tab pulled. On the contrary, it is apparent from the instructions that the plan contemplates that all of the articles listed are to be sold. For example, the instructions contain the following:

Let your friends select a purchase receipt from the next page and pay you the amount printed on the back. Write their name opposite the purchase price, and let them keep the receipt. When you have sold all the 22 articles you will have collected \$7.62.

Fill out the order blank which is on the middle page of this folder, cut it out and send it to us with a money order for \$7.62, using the enclosed envelope, and we will immediately ship you the 22 articles and the AWARD that you have selected. We will also include a special gift if you send a money order with your order. ALL CHARGES ARE PREPAID BY US.

The order blank referred to in these instructions reads in part as follows:

After you have sold the 22 articles and collected \$7.62, fill out this ORDER BLANK and mail it to us and we will send you the Articles and the Award that you have selected.

Gentlemen:

Please send me one Assortment of 22 useful articles and Award No. _____ which I earned for selling the 22 useful articles amounting to \$7.62.

The Commission therefore finds that, as a practical matter, the so-called notice has no substantial effect upon the operation of the sales plan, that it does not serve to remove the lottery element from respondents' sales method.

PAR. 6. The persons to whom respondents furnish their pull-card device use such device in selling and distributing respondents' merchandise in accordance with the sales plan or method herein described. Respondents thus supply to and place in the hands of others a means of conducting lotteries in the sale and distribution of their merchandise in accordance with such sales plan or method. Such merchandise is thus sold or distributed by means of a game of chance, gift enterprise, or lottery scheme, and respondents reap the benefits therefrom. The use by respondents of such sales plan or method in the sale of their merchandise, and the sale of such merchandise by and through the use thereof and by the aid of such 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. 7. Many persons, firms, and corporations who sell or distribute merchandise in competition with respondents, as set forth in paragraph 3 hereof, are unwilling to adopt and use such method or any method involving a game of chance or the sale of a chance to win something by chance, or any other method which is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by respondents' sales method and by 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 those competitors of respondents who do not use the same or any equivalent method. The use of such method by respondents has the tendency and capacity to, and does, divert trade unfairly to respondents from such competitors.

PAR. 8. In addition to the foregoing acts and practices, the respondents represent, through the use on their circulars of such legends as "FREE GIFTS FOR ALL" and "WONDERFUL GIFTS FOR ALL," that the articles of merchandise offered to their sales representatives are free and without cost to such representatives. These representations on the part of respondents are deceptive and misleading. None of the articles of merchandise so designated is in fact given away free by respondents, but all of such articles are supplied to respondents' representatives only as compensation for services rendered in the sale of respondents' merchandise, and the price of such articles is included in the price of the other articles of merchandise which the representative must sell.

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PAR. 9. The use by respondents of the deceptive and misleading statements and representations set forth above has had and now has the tendency and capacity to, and does, mislead and deceive a substantial number of members of the public into the erroneous and mistaken belief that such articles of merchandise are given by respondents to their representatives free and without cost, and the tendency and capacity to cause such members of the public to undertake the sale of respondents' products in preference to the products of respondents' competitors. In consequence thereof, substantial trade has been diverted to respondents from their competitors.

CONCLUSION

The acts and practices of the respondents as herein found 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.

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, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, in support of the allegations of the complaint and in opposition thereto, report of the trial examiner upon the evidence and the exceptions to such report, and briefs in support of and in opposition to the complaint (oral argument not having been requested), and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, Empire Merchandise Corporation, a corporation, its officers, and Sophie Rubman, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of flashlights, jewelry, watches, chinaware, silverware, clocks, cosmetics, cigarette lighters, bedding, and kitchenware, or any other merchandise, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others pull cards or other devices which are to be used, or may be used, in the sale or distribution of respondents' merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

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2. Shipping, mailing, or transporting to agents or distributors, or to members of the public, pull cards or other devices which are to be used, or may be used, in the sale or distribution of respondents' merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

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

4. Using the word "Free," or any other word of similar import, to designate, describe, or refer to any merchandise which is furnished as compensation for services rendered.

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

POPULAR PRODUCTS CORPORATION, MITCHELL
CINADER, AND ESTHER CINADER

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

Docket 3479. Complaint, July 9, 1938—Decision, Aug. 4, 1942

Where a corporation and its president, who owned virtually all of its stock and controlled its policies and practices, engaged in the competitive interstate sale and distribution of novelty merchandise such as pen and pencil sets, cigarette lighters, electric lamps, chinaware, silverware, and cameras—

(a) Distributed through the mails to prospective sales representatives throughout the United States advertising circulars which depicted and described certain articles offered as compensation for the sale of merchandise, also depicted, and which contained also a pull card for use in sale of articles listed and priced thereon, under a scheme in accordance with which the particular article to be received and the price to be paid therefor were disclosed after removal from the card of the tab selected by the customer, and the operator, after sale of all articles listed, was compensated by his choice of a premium or cash; and

Thereby supplied and placed means of conducting lotteries in the hands of such operators who, notwithstanding notice purportedly offering customer right to buy any article involved at price shown on back of slip, made use of said pull card in sale of their merchandise; contrary to an established public policy of the United States Government and in violation of the criminal laws; and in competition with many who, unwilling to use a method involving chance or contrary to public policy, refrain therefrom; With the result that many persons were attracted by said sales method and the element of chance involved therein, and were thereby induced to buy and sell said merchandise in preference to that offered and sold by competitors who did not use such methods, whereby trade was diverted unfairly from said competitors to them; and

(b) Represented that the articles offered to sales representatives were free and without cost to them through such statements on their circulars as "Free gifts for all" and "Beautiful, useful household gifts at absolutely no cost";

When in fact the articles thus designated were supplied to representatives only for services rendered in sale of merchandise in question, and price thereof was included in that of the other articles which they were required to sell; With effect of misleading and deceiving a substantial number of members of the public and causing them to undertake the sale of said corporation's and individual's products in preference to those of competitors, whereby trade was diverted from competitors to them:

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