

Complaint

IN THE MATTER OF

KERSH A. SMITH, TRADING AS TEETERBABE COMPANY
OF COLORADO

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

Docket 3709. Complaint, Feb. 14, 1939—Decision, Aug. 31, 1942

Where an individual engaged in competitive interstate sale and distribution of electric irons, toasters, cameras, fans, and other articles—

Made use of certain devices and plans of merchandising which involved the operation of games of chance, gift enterprises or lottery schemes, through supplying a pull card for use in sale and distribution of articles concerned under a plan by which the person selecting the feminine name found to correspond with that concealed under card's master seal received choice of "Six useful, attractive household items," as thereon displayed, the amount paid for a chance was determined by the number disclosed under the pull tab selected, and operator was compensated, after sale of articles concerned, by having forwarded to him, along with the particular item of merchandise selected by the winning customer, a "Teeterbabe jumper seat"; and thereby supplied to and placed the means of conducting lotteries in the sale of his merchandise in the hands of operators who made use of aforesaid sales plan, involving chance to obtain article at less than normal retail price thereof; contrary to an established public policy of the United States Government, and in competition with many who, unwilling to use such or other method contrary to public policy, refrain therefrom;

With result that many persons were attracted by said sales plan and the element of chance involved therein, and were thereby induced to buy and sell said merchandise in preference to that offered by said competitors; whereby trade was diverted unfairly from them to him:

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 and unfair acts and practices therein.

Before *Mr. William C. Reeves* and *Mr. Miles J. Furnas*, trial examiners.

Mr. L. P. Allen, Jr. and *Mr. J. V. Mishou* for the Commission.

Mr. Robert T. Kingsley, of Denver, Colo., for respondent.

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 Kersh A. Smith, individually, and trading as Teeterbabe Co. of Colorado, 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

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thereof would be in the interest of the public, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Kersh A. Smith, is an individual, trading as Teeterbabe Co. of Colorado, with his principal office and place of business located at 4714 Clay Street, Denver, Colo. Respondent is now, and for some time last past has been, engaged in the sale and distribution of electric irons, electric toasters, cameras, electric fans, hot plates, electric mixers, "Teeterbabe Jumper Seats," kiddie chairs, and other articles of merchandise, in commerce between and among the various States of the United States and in the District of Columbia. Respondent causes, and has caused, said products when sold to be transported from his aforesaid place of business in Colorado to purchasers thereof 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 respondent in such merchandise in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business, respondent is, and has been, in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of like or similar articles or merchandise in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business, as described in paragraph 1 hereof, respondent in soliciting the sale of and in selling and distributing his merchandise in commerce, as hereinabove described, furnishes, and has furnished, various devices and plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes by which said merchandise is sold and distributed to the ultimate consumers thereof wholly by lot or chance. The method or sales plan adopted and used by respondent was and is substantially as follows:

Respondent distributes and has distributed to the purchasing public through the United States mail certain literature and instructions including, among other things, pull cards, order blanks, illustrations of his said merchandise, and circulars explaining respondent's plan of selling merchandise and of allotting it as premiums or prizes to the operators of said pull cards. One of respondent's pull cards bears twenty-four (24) feminine names with ruled columns on the reverse side thereof for writing in the name of the customer opposite the feminine name selected. Said pull card has twenty-four (24) small, partially perforated tabs on the face of which is printed the word "pull." Concealed within each tab is a number which is disclosed when the tab is pulled or separated from the card. The pull card

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also has a large master seal, and concealed within the master seal is one of the feminine names appearing on the reverse side of said card. The pull card bears legends or instructions as follows:

DELUXE Six Star SPECIAL

6 Useful Attractive Household Items

Select your favorite girl's name and receive your choice and selection of either an

ELECTRIC MIXER—ELECTRIC IRON
ELECTRIC HOT PLATE—ELECTRIC TOASTER
8" ELECTRIC FAN—UNIVEX CAMERA

Numbers Under 29 Pay What You Draw

[SEAL]

Numbers Over 29 Pay Only 29¢

NO HIGHER

Do Not Break Seal Until All Collections Are Made

Write Your Name Opposite Name You Select on Reverse Side

Sales of respondent's merchandise by means of said pull cards are made in accordance with the above-described legends and instructions. Said prizes or premiums are allotted to the customers or purchasers in accordance with the above legends and instructions. The fact as to whether a purchaser receives an article of merchandise or nothing for the amount of money paid or whether a person receives an article of merchandise without cost, is thus determined wholly by lot or chance.

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

PAR. 3. The persons to whom respondent furnishes the said pull cards use the same in purchasing, selling, and distributing respondent's merchandise, in accordance with the aforesaid sales plan. Respondent thus supplies to, and places in the hands of, others the means of conducting lotteries in the sale of his merchandise in accordance with the sales plan hereinabove set forth. The use by respondent of

said sales plan or method in the sale of his merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plan or method is a practice of a sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws.

PAR. 4. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure an article of merchandise at a price much less than the normal retail price thereof. Many persons, firms, and corporations, who sell or distribute merchandise in competition with the respondent, as above alleged, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance, or any other method that is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of his merchandise and the element of chance involved therein, and are thereby induced to buy and sell respondent's merchandise in preference to merchandise offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method. The use of said method by respondent, because of said game of chance, has a tendency and capacity to, and does, unfairly divert trade to respondent from his said competitors who do not use the same or an equivalent method, and as a result thereof substantial injury is being, and has been, done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. 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 February 14, 1939, issued and subsequently served its complaint in this proceeding upon the respondent, Kersh A. Smith, individually, and trading as Teeterbabe Co. of Colorado, 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 that act. After the filing of respondent's answer, testimony and other evidence in sup-

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port of the allegations of the complaint were introduced by the attorney for the Commission, and in opposition thereto by the attorney for the respondent, before trial examiners of the Commission theretofore duly designated by it, and such 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 examiners upon the evidence, and brief in support of the complaint (no brief having been filed by respondent and oral argument not having been requested); 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. The respondent, Kersh A. Smith, is an individual, trading as Teeterbabe Co. of Colorado, with his office and place of business located at 4714 Clay Street, Denver, Colo. Since June 1938, respondent has been engaged in the sale and distribution of various articles of merchandise, including, among others, electric irons, electric toasters, cameras, electric fans, hot plates, electric mixers, children's jumper seats known as "Teeterbabe Jumper Seats," and kiddie chairs.

PAR. 2. In the course and conduct of his business respondent causes and has caused his products, when sold, to be transported from his place of business in the State of Col. to purchasers thereof located in various other States of the United States. Respondent maintains, and since June 1938, has maintained, a course of trade in his merchandise in commerce among and between various States of the United States.

PAR. 3. In the sale and distribution of his merchandise respondent is, and has been, in substantial competition with other individuals and with partnerships and corporations engaged in the sale and distribution of similar articles of merchandise in commerce among and between the various States of the United States.

PAR. 4. In selling and distributing his merchandise respondent uses certain devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes, by which such merchandise is sold and distributed to the ultimate consumers thereof wholly by lot or chance. The method or sales plan used by respondent is substantially as follows:

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Respondent distributes among various members of the purchasing public certain sales literature, including letters of instruction, circulars illustrating certain items of merchandise, and order blanks. Along with and as a part of this sales equipment, respondent supplies to such members of the public a device commonly known as a pull card. This pull card has 24 small, partially perforated tabs, on the face of each of which appears a feminine name, together with the word "Pull." Concealed under each tab is a number, which is not disclosed until the tab is pulled or separated from the card. The card also bears a large master seal, under which is concealed a feminine name corresponding to one of the names appearing on the face of the pull tabs. On the reverse side of the card are blank spaces in which may be written the names of the persons pulling the various tabs. The card also bears the following instructions:

DELUXE Six Star SPECIAL
6 Useful Attractive Household Items
Select your favorite girl's name and receive your choice and selection of
either an
ELECTRIC MIXER—ELECTRIC IRON
ELECTRIC HOT PLATE—ELECTRIC TOASTER
8" ELECTRIC FAN—UNIVEX CAMERA
Numbers Under 29 Pay What you Draw
NUMBERS OVER 29 Pay Only 29¢
NO HIGHER
Do Not Break Seal Until All Collections Are Made

Sales of respondent's merchandise by means of the pull card are made in accordance with these instructions. Persons pulling the tabs pay to the operator of the card the number of cents corresponding to the figure concealed under the particular tab pulled, except that persons pulling tabs indicating numbers in excess of 29 pay only 29 cents. The purchaser selecting the tab which bears thereon the feminine name corresponding to the name concealed beneath the master seal receives one of the six articles of merchandise listed above, each of which has a normal retail value in excess of 29 cents. The persons pulling the other tabs on the card receive nothing for their money. Whether the persons pulling the tabs receive an article of merchandise or nothing for the amount of money paid is thus determined wholly by lot or chance, as is also the specific amount paid for the merchandise by the person pulling the lucky tab.

Upon completing the sale of all of the tabs on the card the operator of the card remits to respondent the total amount paid by the various purchasers, and respondent thereupon forwards to the operator a Teeterbabe Jumper Seat, together with the article of merchandise selected by the person pulling the lucky tab. The jumper seat is

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retained by the operator of the card, while the other article of merchandise is delivered by the operator to the purchaser.

PAR. 5. The persons to whom respondent supplies his pull cards use such cards in selling and distributing respondent's merchandise in accordance with the sales plan described above. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of his merchandise. The use by respondent of this sales plan or method in the sale of his merchandise and the sale of such merchandise to the consuming public by and through the use of this plan or method are practices of a sort which is contrary to an established public policy of the Government of the United States.

PAR. 6. The sale of merchandise to the purchasing public in the manner herein described involves a game of chance or the sale of a chance to obtain an article of merchandise at a price less than the normal retail price thereof. Among the individuals, firms, and corporations who sell and distribute merchandise in competition with respondent are those who are unwilling to adopt and use such method or any other method which is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by the sales plan or method employed by respondent and by the element of chance involved therein, and are thereby induced to buy and sell respondent's merchandise in preference to merchandise offered for sale by those competitors of respondent who do not use such methods. Because of such game of chance, the use of this method by respondent has the tendency and capacity to divert and has diverted trade unfairly to respondent from his competitors who do not use such methods.

CONCLUSION

The acts and practices of respondent as herein found are all to the prejudice of the public and of respondent's 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 and in opposition to the allegations of the complaint taken before trial examiners of the Commission theretofore duly designated by it, report of the

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trial examiners upon the evidence, and brief in support of the complaint (no brief having been filed by respondent and oral argument not having been requested), and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Kersh A. Smith, individually, and trading as Teeterbabe Co. of Colorado, or trading under any other name, and his 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 electric irons, electric toasters, cameras, electric fans, hot plates, electric mixers, and children's chairs and jumper seats, or any other merchandise, do forthwith cease and desist from:

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

2. 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 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

CAPITOL PAINT & VARNISH WORKS, INC.

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

Docket 4536. Complaint, July 9, 1941—Decision, Aug. 31, 1942

Where a corporation, engaged in the manufacture and interstate sale and distribution of a general line of paints and varnishes under the trade name "Capco House Paint," in competition with many who do not misrepresent their products—

(a) Represented and implied, through use of words "Pure Lead—Pure Zinc—Pure Oil" in advertisements and labels referring to the ingredients in said products, and which it featured as to place, type, and lettering as compared with matter purportedly giving the actual composition, that such paints were composed wholly of lead, zinc, and oil, and did not contain additional ingredients other than a normal percentage of drier; notwithstanding the fact that its said products contained excessive amounts of drier and ingredients other than those mentioned, and, in the case of some, contained no lead or zinc at all; and

(b) Set forth on labels statements purportedly showing the actual percentage of the various ingredients used in paint concerned, which were not always accurate in that the percentage of lead, zinc, and oil present was much less than stated, and in some instances less than 50 percent of quantity stated; With effect of misleading and deceiving a substantial portion of the purchasing public into the mistaken belief that said representations were true, thereby causing it to purchase paints in question; whereby trade was unfairly diverted from competitors to it:

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 and unfair and deceptive acts and practices therein.

Mr. S. F. Rose for the Commission.

Mr. Frank E. Gittleman and *Mr. A. Schwarzbach*, of Chicago, Ill., for respondent.

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 Capitol Paint & Varnish Works, Inc., 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 public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Capitol Paint & Varnish Works, Inc., is a corporation, organized, existing, and doing business under and by