

Syllabus

IN THE MATTER OF

JOHN F. ERDLEY, DOING BUSINESS AS ERDLEY HATCHERIES, AND MONTGOMERY WARD & COMPANY

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

Docket 4696. Complaint, Feb. 4, 1942—Decision, Mar. 27, 1943

Where an individual, engaged in hatching and interstate sale and distribution of baby chicks; through advertisements in circulars and other printed matter, directly or by implication—

- (a) Represented by such statements as "Members of—The Colorado U. S. Poultry Improvement Ass'n.," that he was a member of such an organization, and that baby chicks offered and sold by him were hatched in a hatchery approved by the United States Government;

The facts being there was no such association; the Colorado Poultry Improvement Association, of which he was a member, was not a State agency and had no official connection with the "National Poultry Improvement Plan" of the U. S. Department of Agriculture, administered in the State concerned by the Colorado Poultry Improvement Board; use of letters "U. S." in connection with aforesaid words induced false belief that he was a member of the Board referred to and was participating in the National Poultry Improvement Plan; and his hatchery was not approved by the Government;

- (b) Falsely represented that his said baby chicks were hatched from eggs produced by a flock approved by the Government; that his chicks were "check tested," and that chicks from each parent flock were brooder tested for health and livability; and

Where a corporation engaged in interstate sale and distribution of various lines of merchandise, including baby chicks purchased by it from various hatcheries, including those of aforesaid individual; through advertising folders, pamphlets, catalogs, and otherwise, including certificates which it distributed through the various hatcheries with which it held contracts—

- (c) Represented that its baby chicks were from flocks approved by the United States Government and were hatched in hatcheries approved by the United States Government;

The facts being that such representations, insofar as they applied to baby chicks distributed for the corporation by aforesaid individual, upon whom it relied for information, were false and misleading;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to said baby chicks, thereby inducing its purchase thereof, because of such mistaken belief:

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

Before *Mr. Lewis C. Russell*, trial examiner.

Mr. Jesse D. Kash for the Commission.

Complaint

30 F. T. C.

Mr. L. E. Oliphant and Mr. Francis Pitman Keiper, of Chicago, Ill., for respondents.

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 John F. Erdley, an individual, trading as Erdley Hatcheries, and Montgomery Ward & Co., a corporation, hereinafter referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, John F. Erdley, is an individual, trading and doing business as Erdley Hatcheries, with his office and principal place of business located at Wray, Colo.

Respondent, Montgomery Ward & Co., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located in Chicago, Ill.

PAR. 2. Respondent, John F. Erdley, trading as Erdley Hatcheries, is now and for more than 2 years last past has been engaged in the business of hatching and selling baby chicks. Respondent causes said baby chicks when sold by him to be transported from his aforesaid place of business in the State of Colorado to purchasers located in the various other States of the United States and in the District of Columbia.

PAR. 3. Respondent, Montgomery Ward & Co., is now and for more than 2 years last past has been engaged in the sale and distribution of various lines of merchandise, including baby chicks. Respondent, Montgomery Ward & Co., in connection with the operation of its aforesaid business, makes contracts with hatcheries located in various States of the United States for the purchase of baby chicks and the shipment of the same for the account of Montgomery Ward & Co. to its customers located in various States of the United States other than the States from which the shipments are made. Among such hatcheries with which said respondent had contracts was that of respondent, John F. Erdley.

The respondents maintain and at all times mentioned herein have maintained a course of trade in their said baby chicks in commerce among and between the various States of the United States and in the District of Columbia.

The respondents, Montgomery Ward & Co., and John F. Erdley, have acted in conjunction and cooperation each with the other in carrying out the acts and practices hereinafter set forth.

PAR. 4. In the course and conduct of his aforesaid business and for the purpose of inducing the purchase of his baby chicks, the respondent, John F. Erdley, circulated and is now circulating among prospective purchasers throughout the United States by United States mails, advertisements, in newspapers and trade journals, by means of advertising folders, pamphlets, circular letters, and by other advertising material, all of general circulation, many false statements and representations concerning his said baby chicks. Among and typical of such false statements and representations are the following:

THE ERDLEY HATCHERIES, *Wray, Colorado.*

Members of THE COLORADO U. S. POULTRY IMPROVEMENT ASS'N.

This is to certify that ----- AAA Chicks Shipped * * *
Were hatched in a U. S. APPROVED HATCHERY from eggs of a U. S. APPROVED FLOCK, Our Flock No. ----- that Males mated with this flock are wing-banded males from RECORD OF PERFORMANCE FLOCKS and from Dams with records of 200 or more eggs per year.

WHITE LEGHORNS

Our ROYAL "AAA" chicks are from well selected high producing hens, mated with wing-banded PEDIGREED ROY cockerels of 256 to 285 egg production records.

Check Testing

As a check test of the field work, samples of chicks from each flock are regularly tested and observed for from two to four weeks. Sample chicks from each parent flock brooder tested for health and livability.

Through the statements and representations hereinabove set forth and others similar thereto not specifically set out herein, respondent, John F. Erdley, has represented directly or by implication that he is a member of the Colorado United States Poultry Improvement Association; that he is a United States record of performance poultry breeder, or that he operates a poultry plant or hatchery under the supervision of an official from the State agency supervising United States record of performance work in Colorado; that baby chicks offered for sale and sold by him are hatched in a hatchery inspected or approved by the United States Government from eggs produced by a flock inspected or approved by the United States Government; that eggs from which the said chicks were hatched were produced by a flock or flocks of chickens, the males of which consisted wholly of wing-banded males from record of performance flocks of 256 to 285

egg-production records; that his chicks have been "check-tested" and that chicks from each brooder flock were brooder tested for health and livability.

The Colorado United States Poultry Improvement Association was the designation of the official State agency for administering the United States Poultry Improvement Plan in Colorado, but such designation was changed in 1938 to the Colorado Poultry Improvement Board, which is now the official State agency administering such work in Colorado.

PAR. 5. The foregoing representations are grossly exaggerated, false, and misleading. In truth and in fact, the respondent, John F. Erdley, is not and has not been a member of the Colorado United States Poultry Association; is not and has not been a United States record of performance poultry breeder and does not operate and has not operated a poultry breeding plant or hatchery under the supervision of an official for the State agency supervising United States record of performance work in Colorado. Baby chicks offered for sale and sold by him were not hatched in a hatchery approved by the United States Government or from eggs produced by a flock approved by the United States Government. Eggs from which the said chicks were hatched were not produced by a flock or flocks, the males of which consisted wholly of "wing-banded males from record of performance flocks." Respondent's said chicks were not adequately "check-tested" and sample chicks from each brooder flock were not brooder tested for health and livability.

PAR. 6. A United States record of performance breeder or hatchery is understood by members of the poultry industry to be and is one operating a poultry breeding plant or hatchery under the National Poultry Improvement Plan sponsored by the Bureau of Animal Industry of the United States Department of Agriculture, under a designated official State agency and conforming to standards established by the United States Department of Agriculture to improve poultry.

The term "United States Record of Performance" is used to designate, describe, and refer to poultry products produced under and conforming to the standards established by the United States Department of Agriculture under said National Poultry Improvement Plan.

PAR. 7. In the course and conduct of its business and for the purpose of inducing the purchase of its baby chicks, respondent, Montgomery Ward & Co., a corporation, has circulated and is now circulating among prospective customers throughout the United States, by United States mails and by means of advertising folders, pamphlets, catalogs, and other advertising matter, all of general circula-

tion, many false statements and representations concerning its said product, baby chicks. Among and typical of such false statements and representations are the following:

AAA QUALITY—R. O. P. Sired Chicks

From U. S. Approved Flocks—Carefully Selected and Leg-Banded.

From Flocks Mated with Cockerels from Record of Performance Dams.

Hatched in Special Numbered Trays in U. S. Approved Hatcheries.

Breeding Certificate Issued by Hatchery with all Orders for AAA Chicks.

Through the statements and representations hereinabove set forth and others similar thereto but not specifically set forth herein, respondent, Montgomery Ward & Co., has represented directly or by implication that baby chicks sold by it were United States record of performance sired chicks, from flocks approved by the United States Government and from flocks mated with cockerels from record of performance dams; that they were hatched in hatcheries approved by the United States Government.

PAR. 8. The foregoing representations are false and misleading. In truth and in fact, certain of said baby chicks sold by the respondent, Montgomery Ward & Co., were not United States record of performance sired chicks and were not from flocks approved by the United States Government or from flocks mated with cockerels from record of performance dams; they were not hatched in a hatchery approved by the United States Government.

Further, in the course and conduct of its aforesaid business and for the purpose of inducing the purchase of its baby chicks, the respondent, Montgomery Ward & Co., a corporation, has issued and distributed a so-called "Ward's Certificate of Breeding" distributed to and among various hatcheries located throughout the United States with which it holds contracts to furnish baby chicks, which certificate is as follows:

CERTIFICATE OF BREEDING

This is to certify that-----

Quantity and brand

chicks shipped to----- on -----1942

Customer

were hatched in a U. S. APPROVED HATCHERY from eggs of a U. S. APPROVED FLOCK OR FLOCKS. Our No.----- That males mated with this flock were Wing banded males from RECORD OF PERFORMANCE FLOCKS and from dams with records of 200 or more eggs per year.

Signed-----

A hatchery man for Montgomery Ward.

The respondent, Montgomery Ward & Co., issued and distributed said certificates to respondent, John F. Erdley, who filled out the

quantity and brand of chickens and name of the purchaser to whom chickens were shipped on account of Montgomery Ward & Co.

The chicks sold and shipped by respondent, John F. Erdley, on orders of respondent, Montgomery Ward & Co. were not hatched in a hatchery approved by the United States Government from eggs of a flock or flocks approved by the United States Government; males mated with said flock or flocks were not wing-banded males from record of performance flocks and from dams with records of 200 or more eggs per year.

PAR. 9. The use by the respondents of the foregoing false and misleading advertising disseminated as aforesaid has a tendency and capacity to and did and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such sales advertisements are and were true and does and did induce the purchasing public to buy substantial quantities of respondent's baby chicks as a result of such erroneous belief so engendered.

PAR. 10. The aforesaid acts and practices of respondents as herein alleged are all to the injury and prejudice of the public and constitute unfair and deceptive acts and practices, contrary to 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 4, 1942, issued and subsequently served its complaint in this proceeding upon the respondents, John F. Erdley, an individual trading as Erdley Hatcheries, and Montgomery Ward & Co., a corporation, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. After the filing of an answer by respondent, John F. Erdley (no answer was filed by respondent, Montgomery Ward & Co.), testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner 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 examiner upon the evidence, and brief in support of the complaint (no brief having been filed by respondents 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. Respondent, John F. Erdley, is an individual, trading and doing business as Erdley Hatcheries, with his office and principal place of business located at Wray, Colo. Respondent, Montgomery Ward & Co., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located in Chicago, Ill.

PAR. 2. Respondent, John F. Erdley, is now and for a number of years last past, has been engaged in the business of hatching and selling baby chicks. He causes and has caused his baby chicks, when sold, to be transported from his place of business in the State of Colorado to purchasers thereof located in various other States of the United States.

Respondent, Montgomery Ward & Co., is now and for a number of years last past, has been engaged in the sale and distribution of various lines of merchandise, including baby chicks. In connection with the operation of its business, Montgomery Ward & Co. enters into contracts with hatcheries located in various sections of the United States, such contracts providing for the purchase by it of baby chicks from the various hatcheries and for the shipment by the hatcheries of the baby chicks to the customers of Montgomery Ward & Co. for its account. Such customers are frequently located in States of the United States other than the State in which the shipment originates. Among the hatcheries with which Montgomery Ward & Co. has had such contracts was that of respondent, John F. Erdley.

Both of the respondents maintain and have maintained a course of trade in baby chicks in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of his business respondent, John F. Erdley, has advertised his baby chicks in various ways, including the distribution among prospective purchasers of advertising circulars and other printed material. Among and typical of the various statements and representations which have appeared in such advertisements are the following:

Members of THE COLORADO U. S. POULTRY IMPROVEMENT ASS'N.

Check Testing

As a check test of the field work, samples of chicks from each flock are regularly tested and observed for from two to four weeks. Sample chicks from each parent flock brooder tested for health and livability.

Respondent, Erdley, has also issued and delivered to certain purchasers of his baby chicks a "Certificate of Breeding," which reads in part as follows:

This is to certify that (number and description) AAA Chicks Shipped to (name of purchaser) were hatched in a U. S. APPROVED HATCHERY from eggs of a U. S. APPROVED FLOCK, Our Flock No. (number).

Through the use of these statements and representations, and others of a similar nature, respondent, Erdley, represented, directly or by implication, that he was a member of the "Colorado U. S. Poultry Improvement Association"; that baby chicks offered for sale and sold by him were hatched in a hatchery approved by the United States Government, and that such baby chicks were hatched from eggs produced by a flock approved by the United States Government; that his chicks were "check tested," and that chicks from each parent flock were brooder tested for health and livability.

PAR. 4. For a number of years, a program known as the "National Poultry Improvement Plan" has been sponsored by the Bureau of Animal Industry of the United States Department of Agriculture, such program having as its objectives the improvement of the breeding and production qualities of poultry and the reduction of losses from certain diseases. The program is administered by official State agencies in the various States, the official agency in Colorado being the Colorado Poultry Improvement Board. While there exists in Colorado a trade association known as the "Colorado Poultry Improvement Association" (of which respondent Erdley is a member), this association is not a State agency and has no official connection with the administering of the National Poultry Improvement Plan. There is no such organization as the "Colorado U. S. Poultry Improvement Association" referred to in respondent Erdley's advertising. The use by respondent Erdley of the Letters "U. S." in connection with the words "Colorado Poultry Improvement Association" induced the belief among poultrymen that respondent was a member of the Colorado Poultry Improvement Board and was participating in the National Poultry Improvement Plan.

PAR. 5. The Commission finds that respondent Erdley's representations were misleading and deceptive. While respondent, Erdley, subsequently became a member of the Colorado Poultry Improvement Board, he was not a member of such organization at the time the foregoing representations were made and was not participating in the National Poultry Improvement Plan. His hatchery was not approved by the United States Government, nor were his baby chicks hatched from eggs produced by a flock approved by the United States Government. His chicks were not adequately "check tested," nor were sample chicks from each parent flock brooder tested for health and livability.

PAR. 6. Respondent, Montgomery Ward & Co., in the course and conduct of its business, and for the purpose of inducing the purchase of its baby chicks, has circulated among prospective purchasers advertising folders, pamphlets, catalogs, and other statements and representations, the following:

From U. S. Approved Flocks.

Hatched in Special Numbered Trays in U. S.

Approved Hatcheries.

The company also issued and distributed, through the various hatcheries with which it held contracts, a certificate designated "Ward's Certificate of Breeding." This certificate represented, among other things, that the baby chicks therein referred to "were hatched in a U. S. Approved Hatchery from eggs of a U. S. Approved Flock."

Through the use of these statements and representations, and others of a similar nature, respondent, Montgomery Ward & Co., represented that its baby chicks were from flocks approved by the United States Government and were hatched in hatcheries approved by the United States Government. As heretofore pointed out, these representations were misleading and deceptive insofar as they applied to baby chicks distributed for the company by respondent, Erdley.

The evidence shows that in making these representations Montgomery Ward & Co. was relying upon information supplied to it by respondent, Erdley, and that after the Commission's investigation was instituted and the company ascertained that its information was incorrect, it discontinued the purchase of baby chicks from respondent, Erdley.

PAR. 7. The use by the respondents of the misleading and deceptive representations set forth herein had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to respondents' baby chicks, and the tendency and capacity to cause such portion of the public to purchase substantial quantities of respondents' baby chicks as a result of the erroneous and mistaken belief so engendered.

CONCLUSION

The acts and practices of the respondents as herein found are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent,

Order

36 F. T. C.

John F. Erdley (no answer having been filed by respondent, Montgomery Ward & Co.), testimony and other evidence in support of and in opposition to the allegations of the complaint taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence, and brief in support of the complaint (no brief having been filed by respondents and 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 respondent, John F. Erdley, individually, and trading as Erdley Hatcheries, 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 of respondent's baby chicks in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That respondent is a member of the Colorado Poultry Improvement Board, or is participating in the National Poultry Improvement Plan, when such is not the fact.

2. That respondent's hatchery is approved by the United States Government, or that respondent's baby chicks are hatched from eggs produced by a flock approved by the United States Government, when such is not the fact.

3. That respondent's baby chicks are "check tested," unless adequate check tests are in fact made.

4. That chicks from each of respondent's parent flocks are brooder tested for health and livability, when such is not the fact.

It is further ordered, That respondent, Montgomery Ward & Co., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of respondent's baby chicks in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

That respondent's baby chicks are from flocks approved by the United States Government, or that they are hatched in hatcheries approved by the United States Government, which such is not the fact.

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
WALTER KIDDE & COMPANY, INC.

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

Docket 3866. Complaint, Aug. 7, 1939—Decision, Mar. 29, 1943

Where a corporation, engaged in the manufacture and competitive interstate sale and distribution of its "Lux" carbon dioxide fire-extinguishing apparatus, among other fire-fighting equipment—

- (a) Falsely represented in advertisements and sales promotion literature that it originated and pioneered the carbon dioxide method of fire-extinguishing, that every important development of carbon dioxide equipment and technique had been accomplished by its engineers, and that every basic improvement in every fire-extinguisher involving carbon dioxide on the market was a development of it;

The facts being that while its senior vice-president, as chief engineer, in 1924, conceived two major improvements in the original "Lux" system, said system involved a 1920 Swedish patent directed to one of the most difficult problems in the mechanics concerned with the use of carbon dioxide as a fire extinguisher, right to use of which, along with trade name "Lux" it acquired under license arrangements with Swedish company owner in 1923; and it acquired in 1929 and 1930, following declarations of interference by the Patent Office—and notwithstanding earlier work by it or by its employee, having to do with pressure operated fluid release devices, and a discharge to produce a denser and wider coverage and concentration, without knowledge, as contended, of competitor's patents or developments—patent rights and applications relating thereto through licensing agreements and through acquisition of all the assets and business of a company to which particular invention had been assigned;

- (b) Represented that its carbon dioxide fire extinguishers had "108 extra values or features" which could not be obtained in its competitors' fire extinguishers, through distributing booklets which contained illustrations and representations relative to its said "Lux" extinguisher, and on the cover of which appeared the statement "108 Extra Values";

The facts being that by virtue of license agreements with certain competitors, the inventions covered by the patents referred to were used by them; and the majority of the features referred to in said booklet were not exceptional to its product but were to be found also in those of its competitors;

- (c) Represented, as typical exclusive features of its said "Lux" extinguisher, that its cylinders were drawn from plates instead of billets so that flow lines of the grain follow the contour of the cylinders; were made with spherical bottoms and domes, thus providing the greatest strength with the least weight; and were subjected to controlled heat treatment and tempering to produce uniform strength;

The facts being that fire-extinguishing apparatus of competitors were also drawn from plates and made with spherical bottoms and domes, and all manufacturers subjected such apparatus to controlled heat treatment and