

Complaint

IN THE MATTER OF

SAMUEL MICKELBERG TRADING AS EXHIBIT SALES
COMPANY

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

Docket 4024. Complaint, Feb. 7, 1940—Decision, Feb. 23, 1944

Where an individual engaged in competitive interstate sale and distribution of radios and other merchandise together with push cards and other devices designed for use by retailers in resale thereof to the public by means of a game of chance, gift enterprise or lottery scheme, and also of assortments so packed and assembled as to involve the use of such games of chance by ultimate purchasers—typical combination consisting of a radio and a 3,000 hole punch board equipped with ten red and five gold seal pull tabs, on which ten lucky punches received choice of the red tabs, entitling particular purchaser, as case might be, to \$5, \$1, 50¢, or choice of the gold tabs and prize of \$10, \$5, \$2.50 or the radio, while purchaser of the last punch became entitled to all of the remaining seals, others receiving nothing further for the 5 cents charged—

Sold such combinations and assortments to wholesalers, jobbers and retailers by whom, as direct or indirect purchasers, they were exposed and sold to the public in accordance with aforesaid sales plan, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of merchandise in accordance with such plan, involving sale of a chance to procure one of the articles involved at much less than its normal retail price, contrary to an established public policy of the United States government and in violation of the criminal laws, and in competition with many who refrain from use of any such method;

With the 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 of aforesaid competitors, whereby trade was unfairly diverted to him from them:

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 and unfair acts and practices therein.

Before *Mr. John W. Addison*, *Mr. W. W. Sheppard* and *Mr. Andrew B. Duval*, trial examiners.

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

Mr. James Russell Murphy, of Washington, D. C., and *Mr. Gordon L. Bazelon*, 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 Samuel Mickelberg, an individual, trading as Exhibit Sales Company, 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

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public, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Samuel Mickelberg, is an individual, trading as Exhibit Sales Company, with his office and principal place of business located at 423 Market Street, Philadelphia, Pa. Respondent is now and has been for more than one year last past engaged in the sale and distribution of radios 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 merchandise when sold to be transported from his aforesaid place of business in Philadelphia, Pennsylvania, to purchasers thereof, at their respective points of location, in the various States of the United States other than Pennsylvania, and in the District of Columbia. There is now and has been for more than one year 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 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 wholesale dealers, jobbers and retail dealers certain assortments of merchandise so packed and assembled as to involve the use of games of chance, gift enterprises or lottery schemes when sold and distributed to the consumers thereof. One of said assortments is hereinafter described for the purpose of showing the method used by respondent and is as follows:

This assortment consists of a radio, together with a device commonly called a punch board. The said radio is distributed to the consuming public by means of said punch board in the following manner: The sales are 5¢ each and when a punch is made from the board a number is disclosed. The numbers begin with one and continue to the number of punches there are on the board but the numbers are not arranged in numerical sequence. The said board contains 3,000 punches, 10 red seal pull tabs, and 5 gold seal pull tabs. The board bears the statement or statements informing prospective purchasers that certain specific numbers when punched from the said board entitle the purchasers thereof to a choice of the red seal pull tabs. The red seal tabs conceal slips of paper on each of which is printed a statement informing the purchaser that he is the winner of \$5, \$1, 50¢, or that he has a choice of the gold seal pull tabs. The gold seal pull tabs, in turn, conceal slips of paper on each of which is printed a statement informing the purchaser thereof that he is the winner of \$10, \$5, \$2.50 or the said radio. The last punch on the board entitles the purchaser thereof to all of the seals remaining thereon. A purchaser who does not qualify by obtaining one of the winning numbers receives nothing for his money other than the privilege of punching a number from the board. The said numbers within the punches and said statements within the pull tabs are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the particular punch, or pull tab has been separated from the board. The retail value of said radio is greatly in excess of the designated price of said punches. The radio is thus distributed to the purchasers of punches from said board wholly by lot or chance.

Respondent sells and distributes, and has sold and distributed, various assortments of merchandise along with punch boards involving a lot or chance feature but such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's said merchandise, directly or indirectly, expose and sell the same to the purchasing public in accordance with the sales plan aforesaid. 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 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 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 one of the said articles 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 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 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 in commerce between and among the various States of the United States and in the District of Columbia, to respondent from his said competitors who do not use the same or an equivalent method. 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 7, 1940, issued and subsequently served its complaint in this proceeding on the respondent, Samuel Mickelberg, an individual, trading as Exhibit Sales Company, 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 and in opposition to the allegations of said complaint were introduced before trial examiners 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, this proceeding regularly came on for final hearing before the Commission upon said complaint, testimony and other evidence, report of Trial Examiners Andrew B. Duvall and John W. Addison upon the evidence and exceptions filed thereto, briefs filed in support of the complaint and in opposition thereto, and oral argument 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, Samuel Mickelberg, is an individual, trading as Exhibit Sales Company, with his office and principal place of business located at 423 Market Street, Philadelphia, Pa. Respondent is now, and for several years last past has been, engaged in the sale and distribution of radios 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 merchandise, when sold, to be transported from his place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in such merchandise in commerce among and between the various States of the United States.

PAR. 2. In the course and conduct of his 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 merchandise in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of his said business, respondent sells, and has sold, to wholesale dealers, jobbers, and retail dealers, radios and other articles of merchandise, together with punchboards and other devices which are designed for use by retail dealers in the sale and distribution of said merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme. In some instances the respondent has sold certain assortments of merchandise so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to the ultimate purchasers thereof. Typical of the methods used by the respondent is the following:

One of respondent's combinations consists of a radio and a device commonly called a punchboard. The said radio is distributed to the purchasing public by means of said punchboard in the following manner: The sales are 5 cents each, and when a punch is made from the board a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The said board contains 3,000 punches, 10 red seal pull tabs, and 5 gold seal pull tabs. The board bears the statement or statements informing prospective purchasers that certain specific numbers, when purchased from the said board, entitle the purchasers thereof to a choice of the red seal pull tabs. The red seal tabs conceal slips of paper, on each of which is printed a statement informing the purchaser that he is the winner of \$5, \$1, 50 cents, or that he has a choice of the gold

seal pull tabs. The gold seal pull tabs, in turn, conceal slips of paper, on each of which is printed a statement informing the purchaser thereof that he is the winner of \$10, \$5, \$2.50, or the said radio. The last purchase on the board entitles the purchaser thereof to all of the seals remaining thereon. A purchaser who does not qualify by obtaining one of the winning numbers receives nothing for his money other than the privilege of punching a number from the board. The said numbers within the punches and said statements within the pull tabs are effectively concealed from the purchasers and prospective purchasers until a punch or sale has been made and the particular punch or pull tab has been separated from the board. The radio is thus distributed to the purchasers of the punches from said board wholly by lot or chance.

Respondent sells and distributes, and has sold and distributed, various assortments of merchandise along with punchboards involving a lot or chance feature, but such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 4. Retail dealers who purchase respondent's said merchandise directly or indirectly, expose and sell the same to the public in accordance with the sales plan aforesaid. 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 the respondent of said 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 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. 5. 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 one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons, firms, and corporations that sell or distribute merchandise in competition with respondent 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 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 said 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 in commerce between and among the various States of the United States to respondent from his said competitors who do not use the same or an equivalent method.

CONCLUSION

The aforesaid acts and practices of the respondent as herein found 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 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, answer of the respondent, testimony and other evidence taken before trial examiners of the Commission theretofore duly designated by it in support of the allegations of the said complaint and in opposition thereto, report of Trial Examiners Andrew B. Duvall and John W. Addison upon the evidence and exceptions filed thereto, briefs filed in support of the complaint and in opposition thereto, and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that said respondent, Samuel Mickelberg, an individual trading as Exhibit Sales Company, has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Samuel Mickelberg, an individual, trading as Exhibit Sales Company or trading under any other name or names, his representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale, and distribution of radios and other articles of merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

2. Shipping, mailing, or transporting to wholesale dealers, jobbers, or retail dealers, punchboards or other devices which are to be used or may be used in the sale and distribution of said 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.

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.

Syllabus

IN THE MATTER OF

NATIONAL BISCUIT COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY SEC. 1 OF AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 5013. Complaint, July 20, 1943—Decision, Feb. 23, 1944

Where the largest producer and distributor of packaged bakery products in the United States, baking products in some 46 plants in 25 states and the District of Columbia, operating 252 branch sales offices and selling its products both direct and through such sales offices or agencies to corporate chain retail grocery stores, voluntary and cooperative chain retail grocery stores, independent grocery retailers, and independent wholesale grocery jobbers in substantial competition with other similar concerns;

In selling its said bakery products to its customers—many of whom were competitively engaged with each other and with customers of its competitors in the resale of such products—subject to (1) a regular trade discount of 5% from invoice price plus a cash discount of 1% for payment within a specified time; and (2) an additional so-called "headquarters quantity discount" schedule under which it granted two series of graduated discounts, governed, respectively, by the customer's total purchases per month, and his average monthly purchases per retail store: under the former schedule granting an additional discount of (a) 1% to those making monthly purchases of \$750 to \$5,000, (b) 2% on purchases from \$5,000 to \$10,000, (c) 3% on those from \$10,000 to \$150,000, and (d) 3½% on purchases of \$150,000 a month or more; and, under the second series, granting additional discounts in aforesaid brackets pursuant to which customers in (a) bracket received ½% additional if their individual store purchases averaged from \$15 to \$25 a month, 1% on such purchases from \$25 to \$35, and 1½% on purchases of \$35 or over; in (b) received ½% additional if their individual monthly store purchases averaged from \$25 to \$35, and 1% additional for average purchases of \$35 or more; in (c) received ½% additional on such purchases between \$30 and \$40 a month, 1% between \$40 and \$50, and 1½% on \$50 or over; and in (d) received ½% additional on such purchases of from \$30 to \$40, and 1% on those of \$40 and above—

Discriminated in price by selling its said products to some of its customers at higher prices than it sold products of like grade and quality to their competitors, through use of aforesaid "headquarters discount schedule," under which it made lower prices to some customers based upon the total quantity sold to all of their separate outlets, although separate delivery was made to the several branches, when such total amounted to certain required minima during a single month, without regard to the volume delivered to the respective branches or outlets;

Effect of which discrimination had been or might be substantially to lessen competition in the line of commerce concerned, and to injure, destroy or prevent competition between purchasers receiving the benefit of said discriminatory prices and those to whom they were denied, and also to tend to create a monopoly in those purchasers receiving the benefit of said discriminatory prices in the trade areas where they and their disfavored competitors were engaged in business:

Held, That under facts and circumstances set forth, corporation in question had discriminated in price in the sale of its bakery packaged food products between different purchasers in violation of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.