

Complaint

IN THE MATTER OF

FRED GREENBERG AND ROSE GREENBERG, TRADING AS
NATIONAL MERCHANDISING COMPANY, AND MAX H.
GREEN

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

Docket 4936. Complaint, Mar. 29, 1943—Decision, Oct. 2, 1944

Where two individuals engaged in the competitive interstate sale and distribution of various articles of merchandise, including jackets, fishing tackle, silverware, radios, rifles, wallets and pen and pencil sets—

Furnished devices and plans of merchandising involving the operation of games of chance, gift enterprises or lottery schemes, through distributing to members of the public sales literature and a 50 disk push card for use in the sale of the merchandise under a plan, as there explained, by which the amount paid for a chance was determined by the number revealed by punching the disk over the feminine name selected from those displayed on the card, the person selecting the name corresponding to that under the card's master seal received as a prize his choice of certain articles, including fishing tackle, a set of silverware, a rifle, a radio and a clock, and persons pushing numbers 20, 30, 40 and the last disk on the card each received a pair of small copper drinking cups, others receiving nothing for their money; and thereby

Supplied to and placed in the hands of others the means of conducting lotteries in the sale of their merchandise, in accordance with aforesaid plans under which the amounts paid by persons, and whether they would receive an article or nothing for their money were determined wholly by luck or chance, contrary to an established public policy of the United States Government and in competition with those who do not use any such sales plan;

With result that many persons were attracted by their 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 substantial trade was diverted unfairly from said 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 and unfair acts and practices therein.

Before *Mr. J. Earl Cox*, trial examiner.

Mr. J. W. Brookfield, Jr. for the Commission.

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 Fred Greenberg and Rose Greenberg, individuals, trading as National Merchandising Co., and Max H. Greenberg, hereinafter referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in

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

PARAGRAPH 1. Respondents, Fred Greenberg and Rose Greenberg, are individuals, trading under the name of National Merchandising Co., and respondent, Max H. Greenberg, is an individual. All respondents have their office and principal place of business located at 326 Erie Building in the city of Cleveland, Ohio. All of said respondents act together and in cooperation with each other in doing the acts and things herein alleged. Respondents are now and have been for more than one year last past engaged in the sale and distribution of jackets, fishing tackle, silverware, radios, rifles, wallets, pen and pencil sets, sporting goods and other merchandise, and they have caused said merchandise when sold to be transported from their place of business in Cleveland, Ohio, to purchasers thereof at their respective points of location in the various States of the United States other than Ohio and in the District of Columbia. There is now, and has been for several years last past, a course of trade by respondents 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 their business, respondents are and have been in substantial competition with other individuals and with partnerships and corporations engaged in the sale and distribution of like or similar 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, in soliciting the sale of and in selling and distributing their merchandise, furnish and have furnished various devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes, when said merchandise is sold and distributed to the ultimate consumers thereof. The method or sales plan adopted and used by respondents is substantially as follows:

Respondents distribute and have distributed to operators and the purchasing public certain literature and instructions, including among other things, push cards, order blanks, illustrations of their said merchandise and circulars explaining respondents' plan of selling merchandise and of allotting it as premiums or prizes to the operators of said push cards and to the purchasing and consuming public. One of respondents' push cards bears 60 feminine names with ruled columns on the face thereof for writing in the name of the customer opposite the feminine name selected. Said push card has 60 partly perforated discs, on the face of each of which is printed the word "push." Each of said discs is set over one of the aforesaid feminine names. Concealed within each disc is a number which is disclosed only when the disc is pushed or separated from the card. The push card also has a large master seal and concealed within the master seal is one of the feminine names appearing on the face of said card. The person selecting the feminine name corresponding to the one under the master seal receives his choice of fishing tackle, silverware, a rifle or a radio. The push card bears the following legend or instructions:

[SEAL]

EXTRA PRIZES

Nos. 20, 30, 40

AND LAST SALE

Each Receive

A Pair (2) of

Solid Copper

"NIP CUPS"

*Two Items Given*Seller and party selecting girl's name
under seal each receive choice of

FISHING TACKLE

Bait Casting—Fly Casting

or Salt Water Fishing

RADIO

Portable Model

Wilson GOLF BALLS

A Dozen Hol-Hi Brand

CHIME CLOCK

Chimes Every Hour and Half Hour

REPEATING RIFLE

8 Shot—Clip Type—Bolt Action

34 Pc. SILVERWARE SET

Knives have hollow handles in
new "Viande" style

As Listed on Back of this Card.

Nos. 11 to 29 pay
what you draw.Nos. over 29 pay
only 29¢.

Sales of respondents' merchandise by means of said push cards are made in accordance with the above-described legends or instructions. Said prizes of premiums are allotted to the customers or purchasers in accordance with the above-described legends or instructions. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and the amount to be paid for any merchandise received, are thus determined wholly by lot or chance.

Respondents furnish and have furnished various other push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of their merchandise by means of a game of chance, gift enterprise or lottery scheme. The sales plan or method involved in the sale of all of said merchandise by means of said other push cards is the same as that hereinabove described, varying only in detail.

PAR. 3. The persons to whom respondents furnish, and have furnished, the said push 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 sales plan or method in the sale of their 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.

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 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 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 respondents in the sale and distribution of their merchandise and the element of chance involved therein, and thereby are 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 a tendency and capacity to unfairly divert substantial trade in commerce between and among the various States of the United States and in the District of Columbia to respondents from their said competitors who do not use the same or an equivalent method.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on March 29, 1943, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair methods of competition in commerce and unfair acts and practices in commerce in violation of the provisions of that act. After the filing of respondents' answers, 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 answers 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. Respondents, Fred Greenberg and Rose Greenberg, are individuals, trading under the name National Merchandising Co., with

their office and principal place of business located at 326 Erie Building, Cleveland, Ohio. They are now and for a number of years last past have been engaged in the sale and distribution of various articles of merchandise, including, among others, jackets, fishing tackle, silverware, radios, rifles, wallets, and pen and pencil sets.

Respondent, Max H. Green, (referred to in the complaint as Max H. Greenberg) is an individual whose mailing address is 5869 Forbes Street, Pittsburgh, Pa.

The Commission having concluded that the evidence is sufficient to show that respondent, Max H. Green, participated in the acts and practices hereinafter described, the term "respondents" as used hereinafter will include only respondents Fred Greenberg and Rose Greenberg unless the contrary is indicated.

PAR. 2. Respondents cause and have caused their merchandise, when sold, to be transported from their place of business in the State of Ohio to purchasers thereof located in various other States of the United States. Respondents maintain and have maintained a course of trade in their merchandise in commerce among and between the various States of the United States.

PAR. 3. Respondents are and have been in substantial competition with other individuals and with corporations and partnerships engaged in the sale and distribution of similar merchandise in commerce among and between the various States of the United States.

PAR. 4. In the sale and distribution of some of their merchandise, respondents have furnished to others certain devices and plans of merchandising which involved the operation of games of chance, gift enterprises, or lottery schemes when such merchandise was sold and distributed to the ultimate consumers thereof. The sales plan or method adopted and used by respondents was substantially as follows:

Respondents distributed to members of the public certain sales literature and instructions, together with a device commonly known as a push card. The push card bore fifty feminine names, with ruled columns in which could be written the names of the customers selecting the various names. The card had fifty partially perforated discs, on each of which was printed the word "Push," each of such discs being placed above one of the feminine names. Concealed within each disc was a number, which was disclosed only when the disc was pushed or separated from the card. The amount paid by each person pushing the card was determined by the number concealed under the particular disc pushed. For example, one pushing a disc revealing the number eleven would pay eleven cents, while one pushing a disc revealing the number twenty-nine would pay twenty-nine cents. Those pushing numbers higher than twenty-nine paid only twenty-nine cents. The card also had a large master seal under which was concealed a feminine name corresponding to one of those appearing on the face of the card. The person who happened to select the name corresponding to that under the master seal received as a prize his choice of certain articles of merchandise, including fishing tackle, a set of silverware, a rifle, a radio, and a clock. The other persons playing the card received nothing, except that those pushing numbers twenty, thirty, forty, and the last disc on the card each received a pair of small copper drinking cups. The card bore the following legends and instructions:

Findings

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(Seal)
Do not
remove seal
until entire
card is
sold

EXTRA PRIZES
Nos. 20, 30, 40
AND LAST SALE
Each Receive
A Pair (2) Of
Solid Copper
"NIP CUPS"

TWO ITEMS GIVEN
Seller And Party Selecting Girl's Name
Under Seal Each Receive Choice Of

FISHING TACKLE
Bait Casting—Fly Casting
Or Salt Water Fishing

RADIO
Portable Model

Wilson GOLF BALLS
A Dozen Hol-Hi Brand

CHIME CLOCK
Chimes Every Hour And Half Hour

REPEATING RIFLE
8 Shot—Clip Type—Bolt Action

34 PC. SILVERWARE SET
Knives Have Hollow Handles In
New "Viande" Style

As Listed On Back Of This Card

Nos. 11 to 29 Pay
What You Draw.
Nos. Over 29
Pay Only 29¢.

Order by Item Number
and description

Sales of respondents' merchandise were made to the public in accordance with these instructions. The amounts paid by persons pushing the card and whether such persons would receive an article of merchandise or nothing for the amount paid were thus determined wholly by lot or chance.

PAR. 5. Respondents thus supplied to and placed in the hands of others the means of conducting lotteries in the sale of their merchandise. The use by respondents of this sales plan or method in the sale of their merchandise and the sale of the merchandise to the public through the use and with the aid of such sales plan or method is a practice which is contrary to an established public policy of the Government of the United States.

PAR. 6. Among the competitors of respondents referred to in paragraph 3 hereof are those who do not use in the sale of their merchandise any plan or method involving a lottery or game of chance. Many persons were attracted by the sales plan or method employed by respondents and by the element of chance involved therein, and were thereby induced to buy and sell respondents' merchandise in preference to that offered for sale and sold by those competitors of respondents who do not use such sales plan or method. The use by respondents of such sales plan or method therefore had the tendency and capacity to divert and did divert substantial trade unfairly 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 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 answers of respondents, testimony and other evidence 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 respondents Fred Greenberg and Rose Greenberg have violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondents, Fred Greenberg and Rose Greenberg, individually, and trading as National Merchandising Co., or trading under any other name, and their agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others, push cards, punchboards, or other lottery devices, either with merchandise or separately, 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.

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 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.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to respondent, Max H. Green.

IN THE MATTER OF
ELIZABETH ARDEN, INCORPORATED, ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUB-SECS. (a) AND (e) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936, AND OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3183. Complaint, May 9, 1939,¹—Decision, Oct. 3, 1944

Under the provisions of sub-section (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act—which make it unlawful for any person to discriminate in favor of one purchaser against another, etc., of a commodity bought for resale, etc., by contracting to furnish or furnishing, etc., any services or facilities connected with the processing etc., of such commodity upon terms not accorded to all purchasers on proportionally equal terms—the seller is afforded a free election in the first instance as to the services or facilities, if any, he will provide to purchasers of his products; but, having elected to furnish a particular service or facility to a particular purchaser or purchasers, he thereby assumes the obligation of according similar service to all competing purchasers to the extent required by the statute, and the furnishing of a service or facility which cannot be proportionalized for the benefit of competing purchasers or, in the alternative, the failure or refusal to proportionalize the terms upon which services or facilities are granted, so as to make it reasonably possible for competing purchasers to avail themselves of such services or facilities if they desire to do so, constitutes a failure to accord such services or facilities upon proportionally equal terms, the proportionalization of the terms contemplated in the phrase concerned necessarily including the proportionalization of the service or facility, as well, and the statute does not permit a seller so to tailor his terms as to favor a particular customer or group of customers and exclude all the rest.

Where two corporations and an individual—owner, respectively, of ninety percent and all of their outstanding capital stock, and active head of both—engaged in the manufacture and interstate sale and distribution of their “prestige” line of cosmetics and toilet preparations—totaling about one thousand different items—to customers selected with a view to maintaining and enhancing such “prestige,” and including some 725 department stores, 25 specialty shops and 2,250 drug stores;

In furnishing so-called “demonstrators”—i.e., retail sales employees, who, trained to that end, by them, were skilled in presenting to the public the use and advantages of their product in the manner desired by them and in keeping with their “prestige” policy, and whose salary or compensation, in whole or in part, they directly or indirectly bore, or contributed to customers on the basis of individual negotiation by them with each, in which connection they (1) had no definite fixed requirement; but (2) sought assurance as to such various matters as maintenance of a “representative” stock of their products, considering the type of the particular store, its location, etc.; prominently located display counters devoted exclusively to their products; the advertising of their products at least once or twice a month, a portion of the cost of which they bore in varying degrees;

¹ Amended and supplemental complaint.