

Syllabus

IN THE MATTER OF

ELIZABETH SCHERER AND SHERRY MOORE SCHERER,
TRADING AS SHERRY-MOORE GIFTS

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

Docket 5400. Complaint, Nov. 5, 1945—Decision, May 20, 1946

Where two individuals engaged in the competitive interstate sale and distribution of luggage, vanity chests, toiletries, novelties, and other articles of merchandise—

- (a) Furnished various plans of merchandising which involved the operation of games of chance, gift enterprises, or lottery schemes in the sale and distribution of said merchandise to the consuming public, and the distribution to operators and to members of the public of push cards, order blanks, and circulars describing and depicting the merchandise and explaining their plan of selling the same and of allotting it as premiums or prizes to the operators of the push cards and the public, under which plan, as typical, a customer who selected by chance from the 76 feminine names displayed on the push card, the name corresponding to that concealed under the card's master seal, received for the amount paid by him—determined by the chance number punched—at his option, a utility case or a musical vanity chest; and thereby—Supplied to and placed in the hands of the operators—who made use of such push cards in accordance with the aforesaid plan, involving a game of chance or sale of a chance to procure an article at much less than its normal retail price—the means of conducting lotteries, contrary to an established public policy of the United States Government, and in competition with many who are unwilling to use a method contrary to public policy and refrain therefrom;

With the result that many purchasers were attracted by said sales plan and were thereby induced to buy and sell said individuals' merchandise in preference to that of said competitors, and with tendency and capacity thereby to unfairly divert substantial trade in commerce to them from such competitors; and

- (b) Falsely represented through statements in their advertising literature "a gift to remember you by," "this item is definitely our proudest gift offer" and "additional surprise gift," that the articles of merchandise sold and distributed by them were free or a gift, when in fact they gave no merchandise away and the so-called gifts were compensation for selling their merchandise; and
- (c) Falsely represented that the retail price of their musical chest was \$15, through statements "List price \$15" in their circulars; when in fact such so-called list price was fictitious;

With effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous belief that said representations were true, and with capacity and tendency thereby to induce its purchase of said merchandise:

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

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

Mr. Louis Lindauer, of Brooklyn, N. Y., for respondents.

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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 Elizabeth Scherer and Sherry Moore Scherer, individuals trading as Sherry-Moore Gifts, 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. Respondents Elizabeth Scherer and Sherry Moore Scherer are individuals trading under the name of Sherry-Moore Gifts, with their office and principal place of business located at Suite 702, 100 West Forty-second Street, New York, N. Y. Respondents are now, and for more than 6 months last past have been, engaged in the sale and distribution of luggage, vanity chests, toiletries, novelties, and other articles of merchandise, and have caused said merchandise when sold to be transported from their place of business in New York, N. Y., to purchasers thereof at their respective points of location in the various States of the United States other than New York, and in the District of Columbia. There is now and has been for more than 6 months 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 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 consuming public. The method or sales plan adopted and used by respondents is substantially as follows:

Respondents distribute and have distributed to operators and to members of the public, certain literature and instructions, including among other things, push cards, order blanks, circulars, including thereon illustrations and descriptions of their said merchandise, and a circular explaining respondents' plan of selling their 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' said push cards bears 76 feminine names with ruled columns on back of said card for writing in the name of the purchaser opposite the name selected. Said push card has 76 small partially perforated disks on the face of which is printed the word "Push." Each of said disks is set under the aforesaid feminine names. Concealed within each disk is a number which is disclosed only when the disk is pushed or separated from the card. The push card also has a large master seal and concealed under 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 number under the master seal receives his choice of a utility case or a musical vanity chest. The push card bears a legend as follow:

Name Under Seal Receives Choice of Offer No. 1—AN ATTRACTIVE UTILITY CASE 6" Wide, 11" Long, 7 $\frac{3}{4}$ " High—The Newest Thing in Luggage, or Offer No. 2—MUSICAL VANITY CHEST Fitted With Toiletries 1¢ to 35¢—No Higher—Nos. 1 to 35, Pay What You Draw—Nos. over 35 Pay Only 35¢.

Sales of respondents' merchandise by means of said push cards are made in accordance with the above-described legend or instructions. Said prizes of utility cases or vanity chests are allotted to the customers or purchasers of pushes from the cards in accordance with the above legend or instructions. The amount of money paid by the purchaser and the fact as to whether the purchaser receives one of the chests or cases or nothing for the amount of money paid 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 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 respondent furnishes, and has 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

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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 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. In literature distributed to the purchasing public by means of United States mails, respondent has published the following representations:

A gift to remember you by.

This item is definitely our proudest gift offer.

Additional surprise gift.

thereby representing that the articles of merchandise sold and distributed by respondents are free or a gift. In truth and in fact respondents give no merchandise away and the so-called gifts are given only as compensation for selling respondents' merchandise.

Respondents, in the circulars advertising their musical chests, have caused to be printed the following statements: "List price, \$16," thereby representating that the retail price of their musical chest is \$15. In truth and in fact, these articles do not have a retail value of \$15, and the so-called list price of \$15 is fictitious.

PAR. 6. The use by the respondents of the foregoing false, misleading, and deceptive statements has a tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and that said articles of merchandise

are given without cost or free, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase said merchandise.

PAR. 7. The aforesaid acts and practices of respondents as herein alleged are all to the prejudice and injury of the public and 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 November 5, 1945, issued and thereafter served its complaint in this proceeding upon the respondents, Elizabeth Scherer and Sherry Moore Scherer, individuals trading as Sherry-Moore Gifts, charging them with the use of unfair methods of competition and unfair acts and practices in commerce in violation of the provisions of said act. On February 21, 1946, the respondents filed their answer in which they admitted all of the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearing as to said facts. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint and the answer thereto, 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 Elizabeth Scherer and Sherry Moore Scherer are individuals trading under the name of Sherry-Moore Gifts, with their office and principal place of business located at Suite 702, 100 West Forty-second Street, New York, N. Y. Respondents are now, and for more than 6 months last past have been, engaged in the sale and distribution of luggage, vanity chests, toiletries, novelties, and other articles of merchandise, and have caused said merchandise when sold to be transported from their place of business in New York, N. Y., to purchasers thereof at their respective points of location in the various States of the United States other than New York, and in the District of Columbia. There is now and has been for more than 6 months last past a course of trade by respondents in such mer-

chandise 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 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 consuming public. The method or sales plan adopted and used by respondents is substantially as follows:

Respondents distribute and have distributed to operators and to members of the public, certain literature and instructions, including among other things, push cards, order blanks, circulars, including thereon illustrations and descriptions of their said merchandise, and a circular explaining respondents' plan of selling their 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' said push cards bears 76 feminine names with ruled columns on back of said card for writing in the name of the purchaser opposite the name selected. Said push card has 76 small partially perforated disks on the face of which is printed the word "Push." Each of said disks is set under the aforesaid feminine names. Concealed within each disk is a number which is disclosed only when the disk is pushed or separated from the card. The push card also has a large master seal and concealed under 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 number under the master seal receives his choice of a utility case or a musical vanity chest. The push card bears a legend as follows:

Name Under Seal Receives Choice of Offer No. 1 AN ATTRACTIVE UTILITY CASE 6" Wide, 11" Long, 7 $\frac{3}{4}$ " High—The Newest Thing in Luggage, or Offer No. 2—MUSICAL VANITY CHEST fitted With Toiletries 1¢ to 35¢—No Higher—Nos. 1 to 35, Pay What You Draw—Nos. over 35 Pay Only 35¢.

Sales of respondents' merchandise by means of said push cards are made in accordance with the above-described legend or instructions.

Findings

Said prizes of utility cases or vanity chests are allotted to the customers or purchasers of pushes from the cards in accordance with the above legend or instructions. The amount of money paid by the purchaser and the fact as to whether the purchaser receives one of the chests or cases or nothing for the amount of money paid 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 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 found, 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 found, 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 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 Co-

lumbia to respondents from their said competitors who do not use the same or an equivalent method.

PAR. 5. In literature distributed to the purchasing public by means of United States mails, respondent has published the following representations:

A gift to remember you by.

This item is definitely our proudest gift offer.

Additional surprise gift.

thereby representing that the articles of merchandise sold and distributed by respondents are free or a gift. In truth and in fact respondents give no merchandise away and the so-called "gifts" are given only as compensation for selling respondents' merchandise.

Respondents, in the circulars advertising their musical chests, have caused to be printed the following statements: "List price \$15," thereby representing that the retail price of their musical chest is \$15. In truth and in fact, these articles do not have a retail value of \$15, and the so-called list price of \$15 is fictitious.

PAR. 6. The use by the respondents of the foregoing false, misleading, and deceptive statements has a tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase said merchandise.

CONCLUSION

The aforesaid acts and practices of respondents as herein found are all to the prejudice and injury of the public and 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 and the answer of respondents, in which answer respondents admit all of the material allegations of fact set forth in said complaint and state that they waive all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents Elizabeth Scherer and Sherry Moore Scherer, individuals trading as Sherry-Moore Gifts, or under any other trade name, their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of luggage, vanity chests, toiletries, novelties, or any other articles 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 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.

(2) Shipping, mailing, or transporting to agents or to distributors or to members of the purchasing public, push cards 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.

(4) Using the term "free" or "gift" or any other term of similar import or meaning to describe, designate, or refer to any merchandise which is furnished as compensation for services rendered or the price of which is included in the price of other merchandise.

(5) Representing as the customary, regular, or list price of respondents' merchandise, any price which is in excess of the price at which said merchandise has been regularly sold by respondents in the usual course of their business.

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.

IN THE MATTER OF
R. B. SEMLER, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 3 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AND SEC. 5 OF
AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 4773.—Complaint, June 16, 1942—Decision, May 21, 1946

Where a corporation which was engaged in the manufacture and competitive interstate sale and distribution of a two-bodied or floating-oil type hair tonic, sold under the trade name "Kreml," to users such as barber shops and beauty parlors and their suppliers, and to distributors and jobbers who resold to barber shops and retailers, and which occupied a dominating position in the industry, and, due to national advertising in magazines and over the radio, enjoyed so great a public demand for said product that barber shops, dealers, and jobbers were required to stock it or sustain a substantial loss of business—

- (a) Sold and delivered its said product on the condition, agreement, and understanding (1) that the direct purchasers or jobbers and distributors thereof would not use, sell, or in any way distribute similar products of any of its competitors, (2) that said jobbers and distributors or others engaged in the resale or distribution of said product refuse to sell or distribute any of said product to any person or concern who used, sold, or otherwise disposed of any similar competitive product and on the further condition, agreement, or understanding (3) that if such purchasers, jobbers, or distributors (a) should use, sell, or distribute any similar competitive product, or (b) should sell or distribute its said product to any person or concern using or selling any other similar product, such violators of said condition would not be further supplied with, or permitted to handle, any of its said product, but would be deprived of the benefit in their said business of the use or sale of its product thereafter; and
- (b) Carried into effect and enforced said conditions, by (1) placing a distinctive number on the bottles of each separate customer for the purpose of identifying them with him; (2) requiring the exchange of an empty bottle for each bottle of "Kreml" purchased, or explanation of a failure to do so; (3) checking up on sales of their users, jobbers, and distributors by having a representative call upon them to purchase hair tonics of competitors; (4) examining delivery trucks; (5) threatening to refuse, and actually refusing, to sell or permit the sale of "Kreml" to violators of aforesaid conditions; and by various other similar methods;

Effect of which conditions or understandings and the enforcement thereof, had been, and might be, to substantially lessen competition in the sale of two-bodied or floating oil hair tonics between it and its competitors in commerce;

Held, That through use of such acts and practices, corporation had violated and was violating section 3 of the Clayton Act; and

Where said corporation, through statements and depictions in advertisements in newspapers and periodicals, and by radio continuities, circulars, leaflets, pamphlets, and other advertising literature—

- (a) Represented falsely that application of "Kreml" on the hair and scalp would