

Syllabus

IN THE MATTER OF

BEN BRAUDE TRADING AS SALES STIMULATORS

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

Docket 4982. Complaint, June 21, 1943—Decision, Nov. 18, 1948

Where the words "Lady Esther" had been used continuously since 1915 by a company thus named and by its predecessor in interest as a trade-mark for cosmetic and related products made and sold by it; said words had been registered for such purpose in 1921 and said company had spent \$18,000,000 in advertising its products between January 1, 1922, and June 1944; products bearing said trade-mark "Lady Esther" had been known and described for many years as the products of the company above referred to; and said products, distributed over the entire United States, enjoyed a wide and favorable reputation among the members of the purchasing public and were recognized as products of superior quality and performance; and

Thereafter an individual engaged since 1916 in the wholesale jewelry business, and since about 1927 in the interstate sale and distribution of its "Sales Stimulator Plan," which consisted of advertising circulars, display cards, other literature, and punch cards, and sets of tableware for use as premium merchandise in connection with the operation of the plan, which he sold to jobbers and retailers, including, principally, grocers, gasoline filling station operators, and similar small-business men, and under which their respective customers became entitled, after purchases aggregating \$5, as evidenced by the punch cards given them, to receive a six-piece set of said individual's tableware:

- (a) Made use, since 1935, of the words "Lady Esther"—which he later registered—as a brand name or trade-mark for his said tableware, causing the words "Lady Esther silverplate" to be stamped on the individual articles thereof from 1935 to 1940, and, in 1940 and 1941, making use of the words "Lady Esther Design Silverplate" and
- (b) Made use of the aforesaid words in his circulars and other advertising literature distributed among the purchasing public and the jobbers, wholesalers, and retailers for distribution by them to the public through such statements as "FREE FAMOUS LADY ESTHER SILVERWARE GUARANTEED FOR 15 YEARS. Ask us how to get it." LADY ESTHER SILVERWARE CAMPAIGN GUARANTEE LADY ESTHER SILVERWARE PLATE. Each Silverware Piece Stamped LADY ESTHER is hereby GUARANTEED to Give Satisfactory Service * * * Get this Beautiful LADY ESTHER Design SILVERWARE SET GUARANTEED", etc.;

Notwithstanding the fact neither said plan nor tableware were the plan or the product of said company; said ware was neither made nor guaranteed by it; there was no connection whatever between said individual or his business and that of said company; his tableware was not of the quality and did not give the performance which the purchasing public ordinarily expected to

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receive in buying products made and sold by said company; and implication they were of such quality and would give such performance arising out of his use of said trade-mark was false and deceptive;

With the result that the purchasing public was confused and misled as to the origin, value, and quality thereof; and many of the public, by reason of its long familiarity with said trade-mark, and its association thereof with such company, were caused to believe that said products were made by and were those of the aforesaid company, and were vouched for and backed by its guarantee and were of superior quality and performance; and with the effect of placing in the hands of unscrupulous dealers the means whereby they might further mislead and deceive purchasers into the belief that his products were those of aforesaid company:

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

Before *Mr. John L. Hornor* and *Mr. Arthur F. Thomas*, trial examiners.

Mr. John M. Russell for the Commission.

Mr. Henry Junge, 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 Ben Braude, an individual trading as Sales Stimulators, hereinafter referred to as respondent, has violated the provisions of said act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Ben Braude, is an individual trading as Sales Stimulators, having his principal office at 337 West Madison Street, in the city of Chicago, State of Illinois.

PAR. 2. Respondent is now and for many years last past has been engaged in the sale and distribution of a sales stimulator plan and device, including among other things, circulars, display cards, so-called guarantees and other advertising material, and in the sale and distribution of tableware and other products which are used as premium merchandise in connection with the operation of said sales plan. Respondent sells his said sales plan, and merchandise to retail and wholesale dealers and other purchasers. Respondent causes said sales plan and merchandise, when sold, to be transported from his said place of business and the factories in which said merchandise is manufac-

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tured at Wallingford, Conn., and Lambertville, N. J., to the purchasers thereof, many of whom are located in various States of the United States other than the State of origin of said shipments. Respondent maintains and at all times mentioned herein has maintained a course of trade in said sales plan and merchandise sold and distributed in connection therewith, as aforesaid in commerce among and between the various States of the United States and the District of Columbia.

PAR. 3. The said sales stimulator plan which is sold and distributed by respondent as aforesaid includes, among other things, a number of punch cards which are placed by respondent directly or through his salesmen and agents in the hands of retail and wholesale dealers for distribution and which are distributed by them to their customers and prospective customers who are members of the purchasing public. Said cards have printed thereon "5," "10," "25," "50," etc., and as merchandise is purchased by their holders, said dealers punch in said cards the figure representing the price of the merchandise so purchased. The figures on said cards aggregate the sum of \$5 or other sums and when the dealer's customer has purchased merchandise in said amount the customer is entitled, upon paying an additional 60 cents, to receive a six-piece set of respondent's said tableware.

PAR. 4. Respondent, commencing in about 1935 and constantly for more than 2 years last past, has been engaged in carrying out a scheme to confuse and deceive the purchasing public, said salesmen and dealers and caused them to believe his said sales plan, tableware, and other merchandise are the products of Lady Esther, Ltd., a corporation long established and well and favorably known to the purchasing public and whose products designated by the name, mark, or brand "Lady Esther" are generally known by the purchasing public to be of superior quality, workmanship, and performance.

In furtherance of said scheme respondent has issued false and fictitious guarantees of his said merchandise and adopted and used the name Lady Esther as a trade name, mark, and brand for his said merchandise to designate the source and origin of manufacture thereof.

In the course and conduct of his aforesaid business for the purpose of carrying out said scheme and of inducing directly and indirectly the purchase of his said products respondent has caused the words "Lady Esther Silver Plate" to be stamped or branded on certain articles of his said merchandise and the words "Lady Esther Design Silver Plate" to be similarly impressed on certain other articles thereof and has published, circulated, and distributed among the purchasing public and to dealers for distribution by them to the purchasing

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public throughout the several States of the United States and in the District of Columbia, advertisements on display cards, punch cards, and in circulars in which said name and false and fictitious guarantees are featured.

Among and typical of the false statements and representations contained in said advertisements disseminated, and cause to be disseminated as aforesaid, are the following:

FAMOUS LADY ESTHER SILVERWARE

Genuine Silver Plate
Guaranteed for 15 years

**LADY ESTHER SILVERWARE CAMPAIGN
GUARANTEE****LADY ESTHER PATTERN SILVER PLATE**
Each Silverware piece stamped

LADY ESTHER is hereby GUARANTEED to
give satisfactory service in ordinary
table use for a period of 15 years.

Get this Beautiful LADY ESTHER
design SILVERWARE SET

PAR. 5. Through the said statements and representations and other statements and representations similar thereto not set out herein made by the respondent and others at his instance and direction all of which purport to be descriptive of the source, origin, and value of respondent's said merchandise and of the quality of the materials and workmanship entering into its construction and of its performance, durability and life, and of said so-called guarantee and of the reputation and responsibility of the concern selling and guaranteeing same, respondent represents directly or by implication that said merchandise is manufactured, owned, and offered for sale by Lady Esther, Ltd.; that it has authorized and consented to its said trade name Lady Esther being used in selling said sales plan and merchandise; that Lady Esther, Ltd., guarantees to indemnify any purchaser of said merchandise if it fails to meet any of the expressed or implied representations made by respondent concerning same; that said merchandise is of superior quality, workmanship, and performance; that said sets of table silverware are worth far more than 60 cents.

PAR. 6. The foregoing statements and representations are false, deceptive, and misleading. The said sales plan and merchandise sold in connection therewith are not the plan or product of Lady Esther, Ltd., or manufactured or sold by it; the respondent's use of the name

Lady Esther is without the authorization or consent of said legal owner and user thereof. Lady Esther, Ltd., does not in any way guarantee any of said merchandise; said merchandise is of inferior quality, workmanship, and performance; said six-piece sets of table silverware are not worth more than 60 cents each but are shoddy and cost the respondent only about 45 cents a set.

PAR. 7. The true facts are the name Lady Esther is part of the corporate name and as stated is the trade name of Lady Esther, Ltd., a Chicago concern, which manufactures and sells cosmetic preparations. Lady Esther, Ltd. was incorporated in Illinois in 1917 and registered the name Lady Esther under the Trade-Marks Act in the United States Patent Office in 1917 and has ever since continuously used said name as a mark or brand or trade name to designate its products which it has extensively advertised, sold, and distributed throughout the United States. Products bearing the name Lady Esther and known and described as Lady Esther products for many years last past have enjoyed a wide and favorable reputation among the purchasing public for their superior quality, workmanship, and performance and the name Lady Esther has a great monetary goodwill value to the manufacturer of said products.

PAR. 8. The use by the respondent of the name Lady Esther as aforesaid deceives and misleads the public into the belief that respondent's said products originate with the well-known and prominent concern identified in the public mind with the name Lady Esther and gives to respondent's said merchandise a prestige and fictitious value in the minds of the purchasing public, said dealers and salesmen which it does not merit and would not otherwise have. Purchasers buy respondent's said sales-plan tableware and other merchandise so marked and branded with the name Lady Esther under the mistaken and erroneous belief that they are buying the products of said well-known and long-established concern whose reputation for quality, workmanship, and performance they rely upon and to whom such purchasers look for satisfaction in the event of failure of performance or defect of quality or workmanship of the products so purchased. Many persons have purchased respondent's aforesaid products under the mistaken and erroneous belief induced by respondent's said use of said name Lady Esther that the products so purchased are the products manufactured and sold by the well-known and long-established owner and user of said name as a mark or brand to designate the products manufactured and sold by it. There is a preference among the purchasing public for products manufactured and sold by well and favorably known and long-established concerns whose

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products are well-known to the public for their superior quality, workmanship, and performance and especially for the product bearing the name, mark, and brand Lady Esther adopted and used by the respondent as aforesaid. The appropriation and use by the respondent of the reputation and good will of said name, mark, and brand as aforesaid impairs and whittles down the value and effectiveness thereof and is at the expense and to the detriment of said concern which has created same.

PAR. 9. The use by the respondent of said name Lady Esther in the manner aforesaid as a trade name, mark, or brand to designate its sales plan tableware and other merchandise is deceptive and misleading and has had and now has the capacity and tendency to and does deceive and mislead members of the purchasing public into the mistaken and erroneous belief that all of the respondent's said statements and representations are true. The respondent by the use of said name Lady Esther and said alleged guarantees as aforesaid has placed in the hands of others who deal in his said products a means and instrumentality whereby sellers may mislead and deceive purchasers into the aforementioned mistaken and erroneous beliefs. As a result of the erroneous and mistaken beliefs induced by the respondent's said acts, practices, and representations as herein alleged, the purchasing public and said dealers have purchased a substantial quantity of respondent's said products in said commerce. As a consequence thereof substantial injury has been done and is now being done by respondent to the purchasing public and to the reputation and good will of said concern in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 10. The aforesaid acts, practices, and methods of the respondent as herein alleged are all to the prejudice and injury of the public and of said concern and constitute 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 June 21, 1943, issued and subsequently served its complaint in this proceeding upon the respondent Ben Braude, an individual, trading as Sales Stimulators, charging said respondent with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. After the filing of the respondent's answer to the complaint, testimony and

other evidence in support of and in opposition to the allegations of the complaint were introduced before trial examiners of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the respondent's answer, testimony, and other evidence, the trial examiners' recommended decision and exceptions thereto filed by counsel for the respondent, briefs in support of and in opposition to the allegations of the complaint, 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. The respondent, Ben Braude, is an individual trading under the name Sales Stimulators, with his office and principal place of business located at 327 West Madison Street, in the city of Chicago, State of Illinois.

PAR. 2. The respondent, since 1916, has been engaged in the wholesale jewelry business, and since about 1927 in the sale and distribution of a plan for the promotion of retail sales termed by the respondent as a "sales stimulator plan." The material for this plan, including merchandise sold and used in connection therewith, when sold, is transported from the respondent's place of business in Chicago, Ill., and from the factories in which the merchandise is manufactured in Connecticut and New Jersey to the purchasers thereof, many of whom are located in States other than Illinois, Connecticut, and New Jersey. The respondent from 1927 to 1941, inclusive, has maintained a course of trade in said sales plan and merchandise sold and used in connection therewith in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. The respondent's sales stimulator plan consists, among other things, of advertising circulars, display cards, and other literature, punch cards and sets of tableware, which are used as premium merchandise in connection with the operation of the plan. Said plan is sold to jobbers and retail dealers, principally grocers, gasoline filling station operations, and similar small-business men. The display cards and other advertising literature are displayed in the dealers' places of business and the punch cards, which have printed thereon the figures "5," "10," "25," and "50" to a total of \$5, are assigned by the dealers to

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individual customers and are used by the dealers to keep records of such individual customers' purchases. When a customer has purchased from the dealer merchandise sufficient in amount to have all the numbers on his card punched out (\$5 of purchases) he is entitled, upon paying an additional 59 cents, to receive a six-piece set of the respondent's tableware.

PAR. 4. The respondent, since 1935, has used as a brand name or trade-mark for his tableware the words "Lady Esther," and in 1938 he caused these words to be registered in the United States Patent Office. From 1935 to 1940 he used in his circulars and other advertising literature, and caused to be stamped on the individual articles of his tableware, the words "Lady Esther Silver Plate." In 1940 and 1941 the words so used were "Lady Esther Design Silver Plate."

In promoting the sale of his tableware, through the sales stimulator plan, the respondent caused to be published, circulated, and distributed among the purchasing public and to jobbers and wholesale and retail dealers, for distribution by them to the public, through the United States mails, advertisements of which the following are typical:

FREE
FAMOUS LADY ESTHER SILVERWARE
Genuine Silver Plate
Guaranteed for fifteen years
Ask us how to get it.

LADY ESTHER SILVERWARE
CAMPAIGN
GUARANTEE
LADY ESTHER PATTERN' SILVER PLATE

Each Silverware Piece Stamped
LADY ESTHER is hereby GUARANTEED
to Give Satisfactory Service in
Ordinary Table Use for a Period
of Fifteen years.

Get this Beautiful LADY ESTHER
Design SILVERWARE SET
Guaranteed for fifteen years
ONLY 59¢
Ask us how to get it.

PAR. 5. The words "Lady Esther" have been used continuously since 1915 by the Lady Esther Co., Ltd., an Illinois corporation, and its predecessor in interest as a trade-mark for cosmetics and related products which this company manufactures and sells. Such words were registered for this purpose in the United States Patent Office in June 1921. Between January 1, 1922, and June 1944, Lady Esther Co.,

Ltd., spent \$18,000,000 in advertising its products, and for many years products bearing the trade-mark "Lady Esther" have been known and described as the products of the Lady Esther Co., Ltd. The products of this company are distributed over the entire United States, enjoy a wide and favorable reputation among the members of the purchasing public, and are recognized as being products of superior quality and performance.

PAR. 6. By the use on his products and in his literature of the trade-mark "Lady Esther," the respondent has created in the minds of the purchasing public much confusion and misunderstanding as to the origin, value, and quality of his products. Because of the public's long familiarity with the trade-mark "Lady Esther," and the tendency of many individual members of the public to associate such trade-mark with the Lady Esther Co., Ltd., such members of the public, upon seeing the name used on and in connection with the respondent's products, are led to believe that such products are manufactured by and are the products of the Lady Esther Co., Ltd. The appearance of the trade name on the guarantee which the respondent distributes as a part of his sales stimulator plan leads such members of the public to further believe that all of the representations made for such products are vouched for and backed by the guarantee of said Lady Esther Co., Ltd. Having used the products of the Lady Esther Co., Ltd., and found them to be of superior quality and performance, the members of the public, upon seeing the trade-mark "Lady Esther" used in connection with the respondent's tableware, are led to believe further that said tableware is likewise of superior quality and performance.

PAR. 7. In all of the above respects the members of the purchasing public may be, and often are, misled and deceived as a result of the respondent's practices. The respondent's sales stimulator plan and tableware sold in connection therewith are not the plan or the product of the Lady Esther Co., Ltd.; the tableware is neither manufactured nor guaranteed by the Lady Esther Co., Ltd., and there is no connection whatever between the respondent or his business and the Lady Esther Co., Ltd. The respondent's tableware is not of the quality and will not give the performance which the purchasing public ordinarily expects to receive in purchasing products manufactured and sold by the Lady Esther Co., Ltd., and the implication that they are of such quality and will give such performance arising out of the use by the respondent of the trade-mark "Lady Esther" is false and deceptive.

PAR. 8. For the reasons and in the respects herein mentioned the Commission finds that the use by the respondent of the brand name

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or trade-mark "Lady Esther" on and in connection with his tableware is deceptive and misleading. The respondent's use of said brand name or trade-mark on his merchandise and in his advertising literature also places in the hands of unscrupulous dealers the means whereby such dealers may further mislead and deceive purchasers into the belief that the respondent's products are the products of Lady Esther Co., Ltd.

CONCLUSION

The acts and practices of the respondent as herein found are all to the prejudice and injury 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 the respondent, testimony, and other evidence in support of and in opposition to the allegations of the complaint taken before trial examiners of the Commission theretofore duly designated by it, the trial examiners' recommended decision and exceptions thereto filed by counsel for the respondent, briefs and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent, Ben Braude, individually and trading as Sales Stimulators, or trading under any other name, and his agents, representatives, and employees, in connection with the offering for sale, sale, or distribution of tableware or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using or permitting to be used, in his behalf, the word "Lady Esther," either alone or in connection or conjunction with any other word or words, on his products or on circulars, display cards, or other advertising literature, to describe, designate, or refer to any such products.

2. Representing, either directly or by implication, through the use of any word, mark, label, or otherwise, that his products are the products of or that they are guaranteed by the Lady Esther Co., Ltd.

It is further ordered, That the respondent shall, within 60 days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

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IN THE MATTER OF

LAURIE AND 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 5555. Complaint, May 24, 1948—Decision, Nov. 19, 1948*

Where a corporation engaged in the interstate sale and distribution of push cards and punch boards, including (1) many designed for the sale and distribution of specified articles, as explained thereon, under plans whereby there was determined by customer's chance success or failure in securing a winning number, whether he received one of said articles at much less than the normal retail price, or nothing; and (2) other devices upon which the purchasers placed, in the blank spaces provided, instructions of similar import, and which were made use of by ultimate purchasers only to sell or distribute other merchandise by lot or chance—

- (a) Sold and distributed such devices in commerce to dealers in candy, cigarettes, clocks, razors, cosmetics, clothing, and other merchandise, who assembled the articles and devices and sold the combinations to retail dealers who exposed and sold them to the purchasing public in accordance with aforesaid sales plan; and

Where said corporation packed and assembled knives, watches, etc., for sale by chance to purchasing public, typical assortment consisting of a number of knives and a punch board for use in their sale and distribution under a plan whereby the success or failure of the purchaser in securing certain numbers determined whether he received for the 5 cents paid, a knife, a package of cigarettes, or nothing—

- (b) Sold such assortments to dealers, by whom, whether as direct or indirect purchasers, they were exposed and sold at retail to the purchasing public in accordance with the aforesaid lottery plan; and thereby,

Supplied to and placed in the hands of others, the means of conducting lotteries, gift enterprises, or games of chance in the sale or distribution of their merchandise, contrary to an established public policy of the Government of the United States, and in violation of criminal laws;

With the result that many members of the purchasing public, by reason of the element of chance involved, were induced to trade or deal with retailers who thus sold or distributed their merchandise; many retailers were induced to deal or trade with manufacturers, wholesalers, and jobbers who sold and distributed their products together with said push cards or punch boards; and gambling was taught and encouraged; to the injury of the public:

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

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