

Complaint

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IN THE MATTER OF

JERROLD A. ROWLEY AND STANLEY EISENBERG TRADING AS RICHARD DONIGAN AND DISCOUNT SALES COMPANY

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

Docket 5726. Complaint, Dec. 20, 1949—Decision, Mar. 10, 1952

Where an individual engaged in the interstate sale and distribution of radios, fountain pens and other articles—

- (a) Made use of sales promotion plans pursuant to which he mailed to large numbers of prospective purchasers throughout the United States, advertisements of a table radio, order blanks, explanatory letters and push cards for use in accordance with a scheme whereby the cost of a "push" was determined by the chance number secured, persons selecting by chance the feminine name corresponding with that concealed in the card's master seal received one of the radios, persons securing two specified numbers received ball point pens, others received nothing, and the purchaser of the assortment for the approximate amount realized from the sale of the punches became entitled, upon the remission thereof, to the second radio included therewith; and
- (b) Shipped and delivered, in response to hundreds of orders received as a result of the aforesaid mailing, radios and ball points to purchasers located throughout the United States; and

Thereby supplied to and placed in the hands of purchasers of his merchandise the means of conducting lotteries or games of chance in connection with the resale or distribution thereof, in contravention of an established public policy of the United States Government; in the violation of which he thus assisted and participated:

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

Before *Mr. Clyde M. Hadley*, hearing examiner.

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

Nash & Donnelly, of Washington, D. C., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jerrold A. Rowley and Stanley Eisenberg, individuals and co-partners trading as Richard Donigan and Discount Sales Company, 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 thereto

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

PARAGRAPH 1. Respondents Jerrold A. Rowley and Stanley Eisenberg are individuals and co-partners trading and doing business under the trade names, Richard Donigan and Discount Sales Company, with their office and principal place of business located at 110 West 42nd Street in the city of New York, New York.

Respondents are now, and for more than two years last past have been, engaged in the sale and distribution of radios, fountain pens and other articles of merchandise and have caused said merchandise, when sold, to be transported from their places of business in the city of New York, New York 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 two years last past, a course of trade in such merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act 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 One 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 purchasing and consuming public. One 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 said merchandise and a circular explaining respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said push cards and to members of the purchasing and consuming public. One of the respondents' said push cards bears 80 feminine names with ruled columns on the back of said card for writing in the name selected. Said push card has 80 partially perforated discs. Each of said discs bears one of the feminine names corresponding to those on the list. Concealed within each disc is a number which is disclosed only when the customer pushes or separates a disc from the card. The push card also has a larger master seal and concealed within the master seal is one of the feminine names appearing on the disc. The person selecting the name corresponding

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to the one under the master seal receives a camera. The push card bears the following legend or instruction:

NAME UNDER SEAL RECEIVES A
BEAUTIFUL SHERATON RADIO
NEW

Amazing Performance—Beautiful Appearance

RCA licensed superheterodyne radio	Nos. 22 & 33 each receive a
Multi-power tubes, including beam power	handsome ALAMAC BALL
output tube	POINT PEN.
Permanent magnetic speaker with magnifi-	1¢ to 39¢
cent tone and volume	NO HIGHER
Durable plastic cabinet of modern design	Nos. 1 to 39 Pay What is
Plays anywhere on AC or DC	Drawn.
	Nos. over 39 pay only 39¢.

PUSH OUT WITH PENCIL

Sales of respondents' merchandise by means of said push cards are made in accordance with the above-described legend or instructions and said prizes or premiums are allotted to the customer or purchaser from said card in accordance with the above legend 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 the merchandise or the chance to receive said merchandise 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 plans or methods 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 said push cards use the same in selling and distributing respondents' merchandise in accordance with the aforesaid sales plans. Respondents thus supply to and place in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plans or methods 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 plans or methods is a practice 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 are attracted by said sales plans or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

The use by respondents of a sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

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

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on December 20, 1949, issued and subsequently served its complaint in this proceeding upon the respondents Jerrold A. Rowley and Stanley Eisenberg charging said respondents with violation of the provisions of that Act. An answer to said complaint was filed by respondent Jerrold A. Rowley but no answer was filed by respondent Stanley Eisenberg. Testimony and other evidence in support of the complaint were then introduced before a hearing 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 consideration by the said hearing examiner upon the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, and the hearing examiner having duly considered the record, on December 28, 1950, filed his initial decision herein with the Commission.

Within the time permitted by the Commission's Rules of Practice, counsel for respondent Jerrold A. Rowley filed with the Commission an appeal from said initial decision, and thereafter this proceeding regularly came on for final consideration by the Commission upon the record herein, including briefs in support of and in opposition to the

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appeal and oral argument of counsel; and the Commission, having issued its order granting said appeal in part and denying it in part, 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 and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Jerrold A. Rowley is an individual, with his office and principal place of business at 110 West 42nd Street, New York, New York. Prior to October 31, 1947, respondents Jerrold A. Rowley and Stanley Eisenberg were partners trading as Richard Donigan and Discount Sales Company, with their office and principal place of business at the same address. This partnership was discontinued as of October 31, 1947. Respondent Stanley Eisenberg has had no connection with the acts and practices alleged in the complaint herein.

PAR. 2. Respondent Jerrold A. Rowley, trading under the name Richard Donigan, in the latter part of 1947 and the early part of 1948 engaged in the sale of radios, fountain pens and other articles of merchandise and caused said merchandise, when sold, to be transported from his place of business in the State of New York to purchasers thereof in other States of the United States, maintaining a course of trade in such merchandise between the State of New York and the various other States of the United States. Since that time respondent Jerrold A. Rowley has engaged in the manufacture and sale of novelty merchandise under the name of Discount Sales Company.

PAR. 3. In the course and conduct of his said business of selling merchandise in commerce under the name Richard Donigan, respondent Jerrold A. Rowley on two separate occasions mailed lottery devices designed for use in the resale of his merchandise to a large number of prospective purchasers located throughout the United States. On one of these occasions he mailed to 50,000 such prospective purchasers sales promotional literature consisting of a push card, a circular advertising a table model radio, an order blank and a form letter describing respondent's sales promotional scheme. This form letter stated that by purchasing two radios and two ball point pens from said respondent for \$29.95, selling all of the chances on the enclosed push card and distributing one of the radios and both of the ball point pens to the persons selecting the winning punches in accordance with the instructions on the push card, the purchaser could keep the second radio at practically no cost to himself. The total amount received from the

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sale of punches approximately equalled the total purchase price of the merchandise of \$29.95.

The push cards which were enclosed in the letters carried the following legend and instructions:

NAME UNDER SEAL RECEIVES A
BEAUTIFUL SHERATON RADIO
NEW

Amazing Performance—Beautiful Appearance

RCA licensed superheterodyne radio	Nos. 22 & 23
Multi-power tubes, including beam power output tube	each receive a handsome
Permanent magnetic speaker with magnificent tone and volume	ALAMAC BALL POINT PEN.
Durable plastic cabinet of modern design	1¢ to 39¢—
Plays anywhere on AC or DC	NO HIGHER
	Nos. 1 to 39 Pay
	What Is Drawn.
	Nos. over 39 pay
	only 39¢.

PUSH OUT WITH PENCIL

Write your name on the reverse side opposite the name you select.

Each card contained eighty squares which were each inset with a small round detachable disc bearing a feminine name clearly displayed. In addition it contained the large red seal, referred to in the legend above, which concealed the winning feminine name. Additional instructions are set out on the reverse side of the card. If the push card is operated in accordance with these instructions, a purchaser of a chance selects and punches out one of the small discs. He then writes his own name on the reverse side of the card opposite the feminine name on the disc he selected. The amount he pays for the chance is determined by the figure concealed under the disc he punched out. If that number is either 22 or 23, he wins one of the ball point pens. After all of the punches have been sold, the radio is received by the person who punched out the disc containing the feminine name concealed under the large seal. Whether a purchaser of a chance receives one of the articles of merchandise or receives nothing for the amount paid, and the amount he pays for the chance itself, are both determined purely by lot or chance.

Respondent Jerrold A. Rowley received between 400 and 500 orders for radios and ball point pens in response to the above-described mailing. This merchandise, sold upon these orders, was shipped and delivered from the State of New York to the purchasers thereof located

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throughout the other States of the United States. The other mailing of lottery devices by this respondent to other prospective purchasers was made in a substantially similar manner as the mailing above described, varying from it only in minor details.

Respondent Jerrold A. Rowley, trading under the name Discount Sales Company, is presently engaged in the sale of novelty merchandise in connection with the sale of some of which he gives lottery devices to the purchasers thereof.

PAR. 4. Respondent Jerrold A. Rowley, trading as Richard Donigan in the manner above described, supplied to and placed in the hands of purchasers of his merchandise the means of conducting lotteries or games of chance in connection with the resale or distribution of such merchandise. The sale of merchandise by and through such means is a practice which is in contravention of an established public policy of the Government of the United States and this respondent, through the supplying of such means, in commerce, assisted and participated in the violation of such policy.

CONCLUSION

The acts and practices of respondent Jerrold A. Rowley, trading under the name of Richard Donigan, as hereinabove found, were all to the prejudice and injury of the public and constituted unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent Jerrold A. Rowley, trading as Richard Donigan, or Discount Sales Company, or under any other name or designation, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or 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 or other lottery 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. 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 complaint herein be, and it hereby is, dismissed as to respondent Stanley Eisenberg.

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It is further ordered, That respondent Jerrold A. Rowley, an individual, shall, within sixty (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.

Commissioner Mason concurring in the findings as to the facts and conclusion, but not concurring in the form of order to cease and desist, for the reasons stated in his opinion in Docket No. 5203, Worthmore Sales Company.¹

¹ 46 F. T. C. 606.

IN THE MATTER OF
SAMUEL COHEN AND IRWIN H. FISHER TRADING AS
MONROE SALES COMPANY

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

Docket 5782. Complaint, May 31, 1950—Decision, Mar. 10, 1952

Where two partners engaged in the interstate sale and distribution of watches, novelties and other articles, some at wholesale but by far the greater portion direct to members of the public, through traveling salesmen, mailed circulars, and recommendations of customers—

Sold much of their merchandise in the form of such typical assortments as two watches, two cigarette case and compact sets, together with a recording card and punchboard, for use in the resale and distribution of said products by the assortment's purchaser under a plan whereby the person who punched by chance the number corresponding to that of the "star punch", received a watch, those who punched two specified numbers received the compact and cigarette case sets, price of the particular punch was determined by chance, those who did not punch a lucky number received nothing further, and the operator-purchaser remitted the proceeds in payment for the assortment, retaining the second watch as his own prize or profit:

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

As respects contentions by way of defense that the only relation between respondents and the persons who resold their merchandise was that of seller and purchaser; that the purchaser was under no compulsion to use the punchboard and was entirely free to dispose of the merchandise as he saw fit subject to remission of the agreed purchase price; that the board, like the other articles, was sold separately as an item of merchandise;

Said position overlooked the fact that the entire merchandising plan contemplated the use of the punchboard by the purchaser of the assortment, and the resale or distribution of the assortment to the public by means of a lottery or game of chance since, aside from testimony as to actual instances in which the punchboard was so used, the nature of the transaction and the supplying by respondents of the lottery device which could serve no other purpose made such a conclusion inescapable.

In said connection the further fact that the price of the assortment included a specified amount, for punchboard and card, as contended, was immaterial, and while the fact that respondents did not sell the assortment to minors, but only to mature and responsible persons regarded by them as acceptable credit risks, was a mitigating circumstance, it did affect the legal principle involved.

As respects respondents' contention that the entire proceeding was fatally defective because the complaint did not charge, nor the evidence establish, that their merchandising plan was an unfair method of competition or that there was any injury to their competitors as a result of its use; it is no longer necessary, since the adoption of the Wheeler-Lea Amendment, to allege or