

IN THE MATTER OF
FRED SCHAMBACH

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

Docket 5405. Complaint, Nov. 27, 1945—Decision, Sept. 30, 1952

Where an individual engaged in the interstate sale and distribution of musical vanity chests; among other merchandise—

(a) Distributed to prospective purchasers form letters, together with advertisements depicting the merchandise involved, order blanks and push cards for use in the resale thereof by lot or chance under a plan whereby persons selecting by chance from 75 feminine names displayed on card the name concealed under the card's master seal became entitled to a musical vanity chest; those selecting four specified numbers concealed within the card's tabs received manicure kits; amount paid by customers for their chances was similarly determined by the numbers revealed; and purchaser-operator of the card and scheme, upon remittance of the money thus collected, was free to keep for himself a second musical chest included with the other merchandise sent him for distribution to the winners; and

Thereby supplied to and placed in the hands of purchasers the means of conducting lotteries or games of chance in the distribution and resale of his merchandise;

(b) Stated in certain of said form letters that the list price of the musical vanity chests was \$15, and in others made such statements as "Upon receipt of your order this musical treasure, (which cannot be bought anywhere for less than \$20) is yours"; notwithstanding the fact that he was selling said products directly to the public for \$13.50; and

(c) Represented that if the chest were ordered "within 15 days", there would be included "an additional Free Surprise Gift, an article you will be glad to have"; the facts being the so-called free gift consisted of an inexpensive item such as a manicure kit, which was always sent to each purchaser of his combination offer of two musical vanity chests and four manicure kits for \$29.80 regardless of when his order was received;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such representations were true and thereby induce its purchase of his said merchandise:

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 in commerce.

Commissioner Carretta, in a dissenting opinion in which Commissioner Mason joins, while agreeing that "respondent should be prohibited from using the word 'free' under the circumstances of this case", did "not feel that it is necessary in the public interest to limit so categorically the use of the word

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'free' as included in Paragraph 4" of the Commission's order in the instant matter, for the reasons there set forth, suggests a form that, in his opinion, the prohibition as to this matter might well take, and, among other things, quotes in support of his position from the brief filed in behalf of the Commission in 1937, under the signature of the then Solicitor General, now Mr. Justice, Stanley Reed, and the then Assistant Attorney General, now Mr. Justice, Robert H. Jackson in the *Standard Education* case, 302 U. S. 112.

Before *Mr. James A. Purcell*, hearing examiner.

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

Nash & Donnelly, of Washington, D. C., 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 Fred Schambach, an individual, hereinafter referred to as the 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 Fred Schambach is an individual, with his office and principal place of business located at 110 West 42nd Street, New York, New York. Respondent is now, and for more than six month last past has been, engaged in the sale and distribution of musical vanity chests, toiletries, fountain pens and other articles of merchandise, and has caused said merchandise, when sold, to be transported from his said place of business in the city of 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 six months last past a course of trade by respondent in such merchandise in commerce between and among the various States of the United States and in the District of Columbia.

In the course and conduct of his business, respondent is, and has been, in substantial competition with other individuals and with corporations and partnerships 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 his business, as described in Paragraph One hereof, respondent, in soliciting the sale of, and in selling and distributing his said merchandise, furnishes and has fur-

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nished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is offered for sale, sold, and distributed to the purchasing public. The method or sales plan adopted and used by respondent is substantially as follows:

Respondent distributes, and has distributed, to operators and to members of the public, certain literature and instructions including, among other things, push cards, order blanks, illustrations of his said merchandise, and a circular letter explaining respondent's 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 respondent's said push cards bears seventy-six feminine names with the same names printed on the back thereof for writing in the name of the customer opposite the feminine name selected. Said push card has seventy-six partially perforated discs; each of said discs bear the word "Push" and each disc also is printed in an individual frame labeled with one of the feminine names appearing on the list on the back of said cards. Concealed within each disc is a number which is disclosed only when the disc is pushed or separated from said card. The push card also has a large master seal, and concealed within said master seal is one of the feminine names appearing in the frames with the individual small discs. The person selecting the feminine name corresponding to the one under the master seal receives one of the musical vanity boxes as a prize. The push card bears the following legend or instructions:

MUSICAL VANITY CHEST
Lift the Lid and Hear it Play

Name under Seal receives
MUSICAL Vanity CHEST
Attractively Packed with Toiletries

1c to 35c—NO HIGHER
Nos. 1 to 35, Pay What you Draw
Nos. Over 35, Pay only 35c.

Sales of respondent's merchandise by means of said push cards are made in accordance with the above described legend or instructions. Said prizes or premiums are allotted to the customers or purchasers in accordance with the above described 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 the merchandise, are thus determined wholly by lot or chance.

Respondent furnishes and has furnished various other push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of his 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 respondent furnishes, and has furnished, the said push cards, used the same in purchasing, selling and distributing respondent's merchandise in accordance with the aforesaid sales plan. Respondent thus supplies to, and places in the hands of, others the means of conducting lotteries in the sale of his merchandise in accordance with the sales plan hereinabove set forth. The use by respondent of said sales plan or method in the sale of his merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plan or method 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, firms and corporations who sell or distribute merchandise in competition with the respondent, as above alleged, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance, or any 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 respondent in the sale and distribution of his merchandise and the element of chance involved therein, and thereby are induced to buy and sell respondent's merchandise in preference to merchandise offered for sale and sold by competitors of respondent who do not use the same or an equivalent method. The use of said method by respondent, because of said game of chance, has a tendency and capacity to unfairly divert substantial trade in commerce between and among the various States of the United States and in the District of Columbia to respondent from his said competitors who do not use the same or an equivalent method.

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

Additional surprise gift.
Free surprise gift.

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thereby representing that the article referred to is given free or without cost to the recipient thereof. In truth and in fact, respondent gives no merchandise free or unconditional and the so-called "free surprise gift" is given only as compensation to the operators of respondent's sales plan and is not given without cost or without the rendering of service. Respondent also caused to be published in its circulars distributed to the purchasing public the statement: "List price \$15" and "List price \$20", referring to its musical vanity chests, thereby representing that these chests have a retail value of \$15 and \$20. In truth and in fact, the chests do not have a normal retail value of \$15 and \$20 and the so-called list price of \$15 and \$20 is a fictitious and exaggerated price.

PAR. 6. The use by the respondent 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 respondent as herein alleged are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 27, 1945, issued and subsequently served its complaint in this proceeding upon the respondent, Fred Schambach, charging him with unfair methods of competition in commerce and unfair acts and practices in commerce in violation of the provisions of that Act. No answer was filed to said complaint. 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, this proceeding came on for final consideration by the Commission on the complaint, testimony and other evidence, recommended decision of the hearing examiner and brief in support of the complaint (no brief having been filed by respondent 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. Respondent Fred Schambach is an individual, with his office and principal place of business located at 110 West 42nd Street, New York, New York. Respondent has been engaged for several years in the sale and distribution of various articles of merchandise including musical vanity chests. Respondent has caused said merchandise, when sold, to be transported from his said place of business in the City of New York to purchasers thereof at their respective points of location in the various States of the United States other than New York. There has been a course of trade by respondent in such merchandise in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his said business of selling merchandise in commerce, respondent mailed to prospective purchasers throughout the United States push cards designed for use in the resale of said merchandise, together with a form letter containing instructions for their use, advertisements containing illustrations of said merchandise, and order blanks. One such form letter urged the recipient to sell the chances on the enclosed push card to his friends. After completing the sale of the chances, the letter instructed him to send the enclosed order blank to respondent and thus purchase two musical vanity chests and four utility manicure kits at a cost of \$29.80. One of the musical vanity chests and the four manicure kits so purchased were to be distributed to the persons making the winning punches in accordance with the instructions on the push card. The purchaser could then retain the remaining musical vanity chest at no cost to himself, the proceeds from the sale of chances on the push card being sufficient to cover the purchase price of the merchandise from respondent.

PAR. 3. One of the push cards so mailed out by respondent carried the following legend and instructions:

MUSICAL VANITY CHEST
Lift the Lid and Hear it Play

Name Under Seal Receives
MUSICAL VANITY CHEST
Attractively Packed with Toiletries

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Nos. 15—30—45—60 Each Receive
A UTILITY MANICURE KIT
1¢ to 35¢—No Higher
Nos. 1 to 35, Pay what you draw
Nos. over 35, Pay only 35¢

Said card contained seventy-five squares in each of which was printed a different feminine name. Under each name was inset a small round detachable disc. Concealed within each disc was a number which was disclosed only when the disc was separated from the card. The card also had a large master seal which concealed one of the feminine names appearing on the card. On the reverse side of the card was another list of the feminine names. A purchaser of a chance selected a name and pushed out the adjoining disc. He then wrote his name on the reverse side of the card opposite the name he selected. The amount he paid for the chance was determined by the number concealed under the disc he punched out. If that number was either 15, 30, 45 or 60, he won one of the utility manicure kits. After all of the punches had been sold, the musical vanity chest was received by the person who had selected the name concealed under the large seal. Whether a purchaser of a chance received one of the articles of merchandise or received nothing for the amount paid, and the amount he paid for the chance itself, were both determined purely by lot or chance.

Respondent's practice was to make a mailing of such push cards and literature from two to three times a year. The number of letters in each mailing varied from ten to fifty thousand. Orders for such merchandise were received from approximately one per cent of the persons to whom such mailings were made. Respondent's gross income from sales of such merchandise was approximately \$200,000 in the year 1945.

PAR. 4. Respondent, 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.

PAR. 5. The form letters mailed out by respondent in the manner above described contained the following statement:

If we receive your order within 15 days, we will include an additional Free Surprise Gift, an article you will be glad to have.

Certain of said letters contained statements that the list price of the musical vanity chests was \$15.00. Others stated:

Upon receipt of your order this musical treasure, (which cannot be bought anywhere for less than \$20.00), is yours.

By such statements respondent represented that by so ordering the purchaser would receive something free, and that the musical vanity chests could not be purchased anywhere at retail for less than \$15.00 or \$20.00.

PAR. 6. In fact the so-called free gift was not free. It consisted of an inexpensive item of merchandise such as a manicure kit, which was given only upon the purchase of respondent's combination offer of two musical vanity chests and four manicure kits for \$29.80. Said "free" gift was always sent to each purchaser of said merchandise regardless of when his order was received.

Also respondent's representations that his musical vanity chests could not be purchased anywhere at retail for less than \$15.00 or \$20.00 are false. During the same period of time respondent was mailing out said statements, he was also selling said musical vanity chests directly to the public for \$13.50.

PAR. 7. The use by respondent of the foregoing false, misleading and deceptive statements had a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and to induce a substantial portion of the purchasing public to purchase said merchandise because of such erroneous and mistaken belief.

CONCLUSION

The acts and practices of respondent, as herein 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 TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, testimony and other evidence and the recommended decision of the hearing examiner; and the Commission having made its findings as to the facts and conclusion that respondent has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent Fred Schambach, an individual, 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, either with other merchandise or separately, which said push cards or other lottery devices are to be used, or which due to their design, are suitable for use in the sale or distribution of said merchandise to the public.

2. Selling or otherwise disposing of, any merchandise by means of a game of chance, gift enterprise or lottery scheme.

3. Representing, directly or by implication, that any of said merchandise has a retail or list price in excess of the actual price at which such merchandise ordinarily is sold to consumers.

4. Using the word "free," or any other word or words of similar import or meaning, in advertising to designate or refer to any article of merchandise which is not in fact a gift or gratuity or is not given without requiring the purchase of other merchandise or the performance of some service inuring, directly or indirectly, to the benefit of the respondent.

It is further ordered, That respondent Fred Schambach, 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.

Commissioners Mason and Carretta dissenting.

DISSENTING OPINION OF COMMISSIONER ALBERT A. CARRETTA

In view of the fact that the record in this case was closed prior to my appointment to the Federal Trade Commission, I want to state at the outset that this dissenting opinion is based upon a careful reading of the complete record herein.

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 27, 1945, issued and subsequently served its complaint in this proceeding upon the respondent, Fred Schambach, charging him with unfair methods of competition in commerce, and with unfair and deceptive acts and practices in commerce, in violation of the provisions of that Act.

The respondent offered various articles of merchandise for sale to the public. In the course and conduct of his business, he sometimes sold said articles directly to a certain line of accounts in the usual manner. However, it appears from the record that this respondent distributed most of his merchandise to the public through the use of "push cards," a form of lottery. There was no question raised in this

proceeding concerning respondent's sales made in the usual manner. If any unfair methods of competition, or if any unfair and deceptive acts and practices were engaged in by the respondent, they were in connection with his distribution of articles of merchandise via the "push card" lottery method. Let us, therefore, examine in some detail his method of operation. Incidentally, there is no doubt that this respondent was engaged "in commerce" as that term is defined in the Federal Trade Commission Act.

Mr. Schambach operated out of New York City. He assembled music boxes and offered for sale and sold or distributed them through direct mail advertising. His mailing lists were obtained in different ways ranging from telephone book listings to the purchase of lists from mail order houses. Two or three times a year, respondent mailed his literature and "push cards" to from 10,000 to 50,000 addressees per mailing. Orders for merchandise were received from approximately 1 percent of those addressed.

The initial mailing to an addressee usually consisted of: (1) a form letter outlining respondent's plan and showing photographic reproductions of the "Musical Vanity Chest"; (2) a "sales card" which has heretofore been referred to as push card; (3) a circular entitled either "A Musical Treasure" or "Musical Vanity Chest"; (4) an order blank; and (5) a business reply envelope addressed to Fred Schambach.

Now let us look at one of the form letters referred to above. The second paragraph reads as follows:

With very little effort and no cost to you, *YOU TOO* can own this dazzling, beautiful two tune musical treasure vanity and jewelry chest, fitted with excellent perfumes and toiletries, resting on a platform, gorgeously draped with rich colorful silk rayon.

The sworn testimony of Mr. Schambach who signed the form letter containing the above-quoted paragraph and who testified at the hearing held in this matter, was that the "dazzling, beautiful two tune musical treasure vanity and jewelry chest" referred to cost him \$7.00. He also testified that the "excellent perfumes and toiletries" contained in such chest cost him 62 or 63 cents.

Another paragraph in said form letter reads as follows:

Selling the enclosed sales card is not only amusing, but it affords you the opportunity of owning this musical beauty, without cost.

Then, after describing the manner in which the sales card is intended to be used, the respondent states in the same form letter:

After completing sales card, kindly use the enclosed order blank and send in the full amount (\$29.80) * * * and we will ship you via Railway Express pre-

paid two (2 tune) Musical Chests and four Utility Manicure Kits (consolation awards).

We should now determine whether the sale of the chances on the "sales card" actually afforded the seller the opportunity of owning this musical beauty, *without cost*. The card which accompanied this form letter contained one hundred squares, in each of which was printed a different feminine name. Under each name was inset a small round detachable disc. Concealed within each disc was a number which determined the amount of money to be paid by the purchaser of the chance. Those purchasers punching out numbers 11 to 20, inclusive, were not required to pay anything for their chance. All others were required to pay the same number of cents as the number drawn, except that no one would be required to pay more than 35¢. Thus, it is a simple matter to compute the total which would be collected by a seller of one of these cards if he followed the instructions printed on the card. He would collect \$27.50. The amount which the seller of the card was asked to remit to the respondent was \$29.80, a difference of \$2.30. Yet the respondent advised his customers that they could own the musical chest *without cost*.

This same form letter also contains the following paragraph:

Today is the day! Do it now! Upon receipt of your order this Musical Treasure (which cannot be bought anywhere for less than \$20.00) is yours.

Although the letter states that this musical treasure cannot be bought anywhere for less than \$20.00, the respondent, Fred Schambach, testified at the hearing held in this matter that he sold this same musical chest directly, without inclosing any literature, for \$13.50.

Now with respect to the "Free Surprise Gift" offered by the respondent. A footnote to the form letter accompanying that card reads as follows:

If we receive your order within 15 days, we will include an additional Free Surprise Gift, an article you will be glad to have.

The order, of course, would have to be accompanied by \$29.80 or a \$10.00 deposit with a balance of \$19.80 being paid at the time of delivery of the merchandise. As set forth in the form letter, the purchaser would receive for his \$29.80, two (2 tune) musical chests and four utility manicure kits, which latter kits were intended to be used as consolation awards for those purchasers of chances who pushed out numbers 40, 50, 60 and 70. As stated above, there was testimony that the 2-tune musical chests were sold at times by the respondent for \$13.50 each. These two items, therefore, had an established value of \$27.00. Mr. Schambach further testified that the utility manicure kits had a normal retail value of from 75¢ to \$1.00 each. Assuming that

these manicure kits were valued at only 75¢ each, the four would have a total value of \$3.00. This amount, plus the \$27.00, gives us a total established money value for the two 2-tune musical treasures and the four utility manicure kits of \$30.00. Summing this up, we come to the conclusion that the purchaser from Schambach would collect a total of \$27.50 from the sale of the chances; he would pay Schambach \$29.80 for merchandise which had a total value of approximately \$30.00. The purchaser of the merchandise would be paying to Schambach \$2.30 more than he collected from the sale of chances, but he would be receiving merchandise from Schambach having a value of 20¢ in excess of the amount he paid for such merchandise. Consequently, the purchaser would be out of pocket the net amount of \$2.10. As mentioned above, if the purchaser's order was returned within 15 days, the purchaser was promised a "Free Surprise Gift" (as a matter of fact, the record discloses that the respondent Schambach forwarded this Free Surprise Gift to his customers whether or not they returned their orders to him within the 15-day period). The record indicates that "for the most part" these Free Surprise Gifts consisted of "a little more elaborate manicure kit than the ones" enclosed with the musical chests. Since such latter manicure kits were said by the respondent to have a normal retail value of from 75¢ to \$1.00, it would appear that a very liberal value of this more elaborate manicure kit which was given to respondent's customers as a Free Surprise Gift would be \$2.00. But the purchaser, having already paid the respondent the net figure of \$2.10 over and above the amount collected by him from the sale of chances, it can hardly be said that the respondent was giving his customers any "free" gift at all.

The foregoing quotations and the procedure to be followed in using the "sales card" were taken from one particular form letter. The record in this case also includes *another form letter* used by respondent in merchandising his products, which had as an enclosure a 75-square push card instead of the 100-square push card described above. The amount which was to be remitted to respondent in connection with the 75-square push card was \$24.90. The actual amount which the seller of such card would collect from the sale of chances on such card would amount to \$20.30. The seller of the card would thus have to pay out of his pocket \$4.60 over and above the amount which he collected from the sale of chances. No mention was made in this form letter of the fact that the seller would have to remit an amount greater than that actually collected. Yet the respondent stated therein that such seller would be "*earning*" a musical chest. Respondent made the same "Free Surprise Gift" offer in this second form letter as was made in the form letter used in connection with

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the 100-square push card, and, for the same reasons as set forth above, such "free" gift was not in fact a "free" gift at all.

There is no doubt in my mind that the respondent, Fred Schambach, should be ordered to cease and desist from selling merchandise through the use of games of chance or lottery schemes. That this practice is contrary to established public policy of the Government of the United States and that this practice is an unfair method of competition is well settled. Further, there is ample evidence in the record that by reason of the deception used by this respondent in the literature circulated by him to thousands of people throughout the United States, he has been engaged in a deceptive act in commerce in violation of section 5 of the Federal Trade Commission Act.

I also agree that the respondent should be ordered to cease and desist from representing that any of his merchandise has a retail price in excess of the actual price at which such merchandise is sold by him to other customers.

However, I cannot agree with the inhibition contained in Paragraph Four of the "Order to Cease and Desist" issued by the Commission herein, which orders the respondent to cease and desist from:

"Using the word 'free,' or any other word or words of similar import or meaning, in advertising to designate or refer to any article of merchandise which is not in fact a gift or gratuity or is not given without requiring the purchase of other merchandise or the performance of some service inuring, directly or indirectly, to the benefit of the respondent."

I agree that the respondent should be prohibited from using the word "free" under the circumstances of this case, but I do not feel that it is necessary in the public interest to limit so categorically the use of the word "free" as included in Paragraph Four of the order of the Commission. In my opinion, where advertisements or offers pertaining to "free" goods clearly and conspicuously set forth the terms and conditions under which the free goods may be secured; where the free goods are not distributed by lot or chance; where there is no deception or probability of deception through fictitious price marking of the goods sold, or through the substitution of inferior merchandise or otherwise, the free goods offer does not constitute an unfair method of competition or an unfair or deceptive act or practice. In the subject case, the free goods were not only offered in connection with a distribution thereof by lot or chance, but they were in effect paid for by the customer.

Based upon the facts in this case, the respondent might well be ordered to cease and desist from:

Using the word "free" or any other word or words of similar import or meaning in advertising or in offers to the public

(a) when such word is used in connection with the distribution of merchandise by lot or chance;

(b) when all of the conditions, obligations, or other prerequisites to its receipt and retention by the offeree are not so clearly and conspicuously explained or set forth as to leave no reasonable probability that the terms of the offer would be misunderstood;

(c) when there is an additional cost over and above the ordinary and usual price of the merchandise required to be purchased, or inferior merchandise has been substituted for that ordinarily and customarily sold at the designated price involved in the transaction; or

(d) when the price charged for the merchandise required to be purchased is not the same as that ordinarily and customarily charged for such merchandise but includes an additional hidden charge for the "free" article.

The word "Free" is susceptible of application according to either semantics or sense. In one sense nothing under the sun is "free"; certainly very few would pay to advertise anything that is really free in accordance with the present policy of the Commission.

In my opinion, what we should do is to put only such limitation on the use of the word "Free" as may be necessary to prevent its deceptive use.

In my consideration of this matter, I have read with interest the brief filed in behalf of the Federal Trade Commission in the Supreme Court of the United States in September 1937 in the matter of *Federal Trade Commission v. Standard Education Society*. Among other things, the Federal Trade Commission in that brief stated:

"Genuine offers to give something away free of charge in order to induce a person to buy something else are not unfair. It is a commonplace that persons may be induced to buy if they think they are getting a bargain. An opportunity to receive something free in addition to the article paid for is a powerful incentive to purchase. If a merchant thinks that his business will be benefitted by the distribution of gifts, prizes, or premiums to his customers, that is his affair. His customers may gain by his apparent generosity. They cannot lose, and they are not deceived. They know that the purpose of the gift is to induce them to purchase another article, and they assume that the donor expects ultimately to recover the cost of the gift in increased returns from sales."

In a footnote to this paragraph, the brief contains the following language:

"It is true that the cost of the premium is borne by the manufacturer or seller, and that this cost must eventually be recovered in the price of the product sold if the business is to operate at a profit. But if the regular price of the article sold without the premium is the same as the price with the premium the premium does not cost the customer anything. It is **FREE TO HIM** regardless of whether or not it is ultimately included in the purchase price, and he does not care whether the manufacturer or dealer makes sufficient profit on the sale to cover the cost of the premium, whether the cost is termed as an advertising expense, or whether it causes the manufacturer or dealer to operate at a loss." (Emphasis of words **FREE TO HIM** was included in footnote of brief.)

The brief also contains the following paragraph:

"When such an offer of a gift is made, the customer understands from the use of the word 'gift' that an article is to be received without payment being made for it. If he is told that it is to be received 'Free of Charge' if another article is purchased, the word 'free' causes him to understand that he is paying nothing for that article and only the usual price for the other. If this is not the true situation, there is no free offer and a customer is misled by the representation that he is to be given something free of charge."

The above quotations from a brief filed in behalf of the Federal Trade Commission are most interesting, especially in view of the fact that the brief was signed in 1937 by Stanley Reed, then Solicitor General, and by Robert H. Jackson, then Assistant Attorney General. The thoughts of these two eminent lawyers and jurists who now sit on the Supreme Court of the United States should be given considerable weight unless conditions have so changed since 1937 as to warrant a change of attitude on the part of the Federal Trade Commission. In my humble opinion, no such change of conditions has taken place, and what was expressed in 1937 is just as true today.

Consequently, it is with regret that I record this dissent to Paragraph Four of the order issued by the Commission in this matter, and trust that some day soon the Commission will adopt a more realistic approach to the use of the word "Free" if it continues to appear in advertising or in other offers to the public.

Commissioner Mason joins in the above dissent.

Syllabus

IN THE MATTER OF

RHODES PHARMACAL COMPANY, INC., J. SANFORD
RHODES AND JEROME H. RHODES

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

Docket 5691. Complaint, Aug. 17, 1949—Decision, Oct. 3, 1952

As regards the characterization of a medicinal preparation as a new discovery, on the basis of the inclusion along with an ingredient which had been used for years by the medical profession, of other ingredients which had no beneficial effect: the fact, as contended, that the combination was unique did not make the resultant preparation a remarkable, amazing, sensational new discovery of scientific research.

With respect to the use of the word "temporary" in cease and desist orders having to do with the false advertisement of medicinal preparations: the Commission is of the opinion that advertising claims should always be so limited where only temporary relief is afforded unless, by the very nature of the claim, there is no real danger of deception.

The terms "arthritis" and "rheumatism" are general terms, sometimes used interchangeably, which refer to any of a number of diseases or pathological conditions including, among others, neuritis, sciatica, neuralgia, gout, fibrositis, rheumatoid arthritis, osteoarthritis, rheumatic fever and infectious arthritis, all of which are characterized by such symptoms as pain, stiffness, and inflammatory and destructive changes in the joints and tissues of the body, and which, as pathological conditions, are of known as well as unknown origin.

Where a corporation and two officers thereof, engaged in the manufacture and interstate sale and distribution of their "Imdrin" medicinal preparation; in advertisements through broadcasting stations and in various newspapers circulated throughout the United States, directly and by implication—

- (a) Falsely represented that said preparation, taken as directed, constituted an adequate, effective and reliable treatment for, and would arrest the progress and correct the underlying causes of, all forms of rheumatism and arthritis, including neuritis, sciatica, gout, fibrositis, and bursitis, and would cure all forms of such diseases or afflictions; and
- (b) Falsely represented that, thus taken, it constituted such a treatment for the symptoms and manifestations of all said diseases or afflictions and would afford complete, permanent relief for the aches, pains and discomforts thereof;

The facts being that there is no drug or combination of drugs which constitutes an adequate, effective or reliable treatment for any of the various forms of arthritis or rheumatism, or which can restore to normal the resulting pathological changes; delay of needed treatment in such cases may result in irreparable crippling, especially in those forms caused by specific infec-