

IN THE MATTER OF

CALVINE COTTON MILLS, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 6119. Complaint, Aug. 19, 1953—Decision, Sept. 23, 1954

Order requiring a corporate manufacturer to cease use of a sales promotion plan under which each of its tobacco seed bed covers had a numbered label or coupon attached and prizes of farm implements or kitchen utensils were awarded to purchasers who happened to hold coupons selected at a "LUCKY NUMBER" drawing.

Before *Mr. Everett F. Haycraft*, hearing examiner.

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

Mr. Maurice A. Weinstein, of Charlotte, N. C., for respondent.

ORDERS AND DECISION OF THE COMMISSION

Order adopting initial decision as Commission decision and order to file report of compliance, Docket 6119, September 23, 1954, follow:

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision herein; and

The Commission having issued a tentative order modifying said initial decision in certain respects and having afforded respondent and counsel supporting the complaint opportunity to present any objections they may have to the proposed modification, and counsel supporting the complaint having filed his objections to the proposed modification; and

The Commission having further considered the entire record herein and now being of the opinion that the hearing examiner's initial decision is adequate and appropriate to dispose of this proceeding:

It is ordered that the attached initial decision of the hearing examiner shall, on September 23, 1954, become the decision of the Commission.

It is further ordered that respondent, Calvin Cotton Mills, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY EVERETT F. HAYCRAFT HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 19, 1953, issued and subsequently served its complaint in this proceeding upon respondent Calvin Cotton Mills, Inc., a corporation, charging it with the use of unfair acts and practices in commerce in violation of the provisions of the said Act. After the issuance of said complaint and the filing of an answer denying the material allegations of the complaint, a hearing was held in Washington, D. C., November 6, 1953, at which time a stipulation was entered into whereby it was stipulated and agreed that a Statement of Facts signed and executed by J. W. Brookfield, Jr., counsel supporting the complaint for the Federal Trade Commission and Maurice A. Weinstein, counsel for respondent, which was read into the record, may be taken as the facts in this proceeding and in lieu of evidence in support of the charges stated in the complaint or in opposition thereto; that the said Hearing Examiner may proceed upon said Statement of Facts to make his Initial Decision stating his Findings as to the Facts, including inferences which he may draw from the said stipulation of facts and his Conclusions based thereon. Both counsel reserved the right to submit proposed findings and conclusions, including memorandum on the law and requested oral argument on the proposed findings. On said date, oral argument was had on the proposed findings which had been submitted by counsel as stipulated. In addition four exhibits were received in evidence. Thereafter, this proceeding regularly came on for final consideration by said Hearing Examiner upon the complaint, answer, stipulation, and exhibits received in evidence, said stipulation having been approved by the Hearing Examiner who, after duly considering the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Calvin Cotton Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina with its office and principal place of business located at 5620 Bergenline Avenue, in the City of West New York, New Jersey.

PAR. 2. Respondent for more than six months last past has been engaged in the manufacture and sale of cotton fabric products and during the last few months of 1952 and in January and February of 1953 has been engaged in the manufacture and sale of tobacco seed bed

Findings

51 F. T. C.

covers in commerce between and among the various States of the United States and when sold, said products are caused to be shipped from respondent's place of business in the State of North Carolina to purchasers thereof located in other States of the United States. Respondent at all times mentioned herein maintained a substantial course of trade in said tobacco seed bed covers in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of its said business and for the purpose of promoting the sale and distribution of its said products, respondent has distributed through the United States mail and otherwise to dealers located in the various States of the United States certain literature setting out therein a sales promotion plan for selling its products. Said sales promotion plan is described in said literature as follows: A circular letter, distributed to wholesale dealers in respondent's product, states:

In order to enable you to get a larger share of the market, at no extra cost, to you, we are conducting a "LUCKY NUMBER" drawing, in which everybody has a chance to win a valuable prize, whether they purchase 1 or 100 seed bed covers.

Rules

The beauty of this contest is its simplicity. Every cover has a numbered label attached, as per the enclosed. No entries are called for and no skills are demanded. All the customer has to do is save his labels. In March, 1953, the end of the season, there will be a drawing of 100 lucky numbers in Charlotte, N. C., which numbers will be publicized. All any one has to do who holds the lucky numbers, is to fill in his name and address, mail it to us in Charlotte, and we will forward to them, their lucky prize.

Advertising

Every bale contains a large window poster and window streamer for the retailer to post in his window. The covers are also packed in an attractive carton so that it will serve as an advertising piece while it is on the retailers' floor.

Posters furnished respondent's dealers for display to the purchasing public in connection with the aforesaid plan state:

Buy Calvine Seed Bed Covers Here!

SAVE your lucky numbers

CALVINE LUCKY NUMBERS ARE GOOD FOR

FREE FARM IMPLEMENTS

Over 100 Useful Implements And Appliances

Given Away—Winners In Every Area!

No entries to send in, no slogans to write—here's the world's easiest contest! Just save the lucky number labels on your Calvine seed bed covers. Next March a public lucky-number drawing in Charlotte will pick more than 100

294

Conclusion

winners to fine farm implements and kitchen appliances. Lucky numbers will be announced locally. Then mail in your lucky number to Calvine and your prize will be shipped to your door.

FREE—You don't have to buy anything to be a winner. Just save your Calvine Labels or write Calvine Cotton Mills, Charlotte, North Carolina, for free label with lucky number!

Save this coupon

and win a valuable prize Free

THIS MAY BE YOUR LUCKY

Number!

Watch for
date & Location
of drawing

to CALVINE

tobacco seed bed cover

Calvine Cotton Mills
Charlotte, N. C.

And the paper wrappers in which the tobacco seed bed covers are packed contain the following legend:

Save this coupon and Win a Valuable Prize FREE!

THIS MAY BE YOUR LUCKY

Number!

CALVINE

World's Finest

tobacco seed bed cover

Calvine Cotton Mills
Charlotte, N. C.

Prizes are awarded to purchasers of respondent's products in accordance with the above-described plan and prizes were also awarded to those who wrote for and received without cost a label number from the company without purchasing any of respondent's merchandise.

In accordance with the sales promotion plan above-described, a drawing was held on March 30, 1953, at Charlotte, North Carolina. One hundred two winning numbers were drawn and merchandise distributed to the holders of the winning numbers in accordance with the terms of the advertising as set out above. The members forwarded or mailed to those who requested them without making a purchase were included with the numbers or labels of those who had made purchases for the purpose of the drawing.

CONCLUSION

The awarding of prizes, consisting of articles of merchandise, by means of a drawing as hereinbefore set forth constitutes a game of chance, lottery or gift enterprise. Many persons are attracted by

respondent's sales promotion plan and the element of chance involved therein and are thereby induced to buy and sell respondent's merchandise.

The use by respondent of a sales promotion plan involving a game of chance, lottery or gift enterprise as herein set forth in promoting the sale of or in selling respondent's products is contrary to the public interest and is contrary to an established public policy of the Government of the United States. The Federal Trade Commission Act condemns any method of competition in interstate commerce which is contrary to public policy, *Ostler Candy Co. vs. F. T. C.*, 106 F. 2d 962, 965. The use of a sales method which involves an element of chance is contrary to public policy, *F. T. C. vs. R. F. Keppel & Bro.*, 291 U. S. 304, 313; *Chicago Silk Co. vs. F. T. C.*, 90 F. 2d 689; *Wolf vs. F. T. C.*, 135 F. 2d 564, 566-7.

In the light of the foregoing, the aforesaid acts and practices of the respondent as set out in Paragraphs One through Three are all to the prejudice of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered that the respondent Calvin Cotton Mills, Inc., a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of tobacco seed bed covers or any other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising or using any sales promotion plan or scheme whereby purchasers of its said products are entitled to participate in a drawing for prizes, the award of which is or will be dependent on lot or chance.

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

SPECIAL CONCURRING OPINION OF COMMISSIONER CARRETTA

I agree with my colleagues on the Commission that respondent's sales promotion plan, which involves an element of chance, is contrary to the public interest and to an established public policy of the Government of the United States and constitutes an unfair practice which should be prohibited. I also believe that the order to cease and desist which is being issued herein is adequate and appropriate to prohibit

a continuation of the practice. *However, I think it should be made clear that, in my opinion, respondent's practice is not being condemned because it is a technical lottery, but because it is a method of merchandising which constitutes an unfair trade practice.* I believe the Commission should not be concerned with whether the three essential elements of a lottery, namely, prize, consideration, and chance are all present in respondent's sales promotion plan or whether the plan contravenes any of the criminal statutes with respect to lotteries. Rather, it should be concerned only with the unfair trade practice of distributing merchandise by means which are contrary to public policy. It is clear that respondent's sales promotion plan was intended to appeal to the gambling instincts of purchasers and prospective purchasers and was therefore contrary to public policy.

The Commission and the courts have heretofore considered numerous sales promotion plans similar in essential respects to the respondent's plan. Concerning one such plan the Supreme Court said: "It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the States, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy." (*FTC v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 313 (1934).) In *Modernistic Candies, Inc., v. FTC*, 145 F. 2d 454, 455 (1944), the Circuit Court of Appeals, Seventh Circuit; had before it a plan of merchandising which did not in and of itself constitute a technical lottery but which did aid and encourage merchandising by gambling. Of this plan the court said: "It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce. We think the Commission also has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandising by gambling. The gamblers and those who deliberately and designedly aid and abet them are both engaged in practices contrary to public policy. Merchandising by gambling should not be divided into insulated acts, which appear innocent when examined separately. This unfair practice should be viewed as a whole. If the Federal Trade Commission is to police merchandising by gambling it must police those who designedly and deliberately aid and abet this practice. We think the Commission has such power." (See also: *Chicago Silk Co. v. FTC*, 90 F. 2d 689 (1937); *Kritzik v. FTC*

Concurring Opinion

51 F. T. C.

125 F. 2d 351 (1942); *Koolish v. FTC*, 129 F. 2d 64 (1942); *Wolfe v. FTC*, 135 F. 2d 564 (1943); *Jaffe v. FTC*, 139 F. 2d 112 (1943); *Chas. A. Brewer & Sons v. FTC*, 158 F. 2d 74 (1946).)

The fact that under respondent's sales promotion plan it was possible for persons to obtain label numbers and to participate in the "lucky number" drawing without purchasing any of respondent's merchandise cannot be properly considered separate and apart from the other facts. It is the use of the plan as a whole which constitutes an unfair practice. There is no necessity to determine whether any particular part of the plan, if used alone, would or would not constitute an unfair practice.

Complaint

IN THE MATTER OF

HARRY A. BURCH TRADING UNDER THE NAMES OF
WASHINGTON INSTITUTE OF PRACTICAL NURSING
AND NATIONAL TRAINING SERVICE

CONSENT ORDER ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6170. Complaint, Feb. 11, 1954—Decision, Sept. 23, 1954

Consent order requiring the operator of a correspondence school in Seattle, Wash., to cease misrepresenting the nature of his school and the opportunities for employment in the field of practical nursing, among other things.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Charles S. Cox for the Commission.

Mr. R. Wayne Cyphers, of Seattle, Wash., 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 Harry A. Burch, trading as Washington Institute of Practical Nursing and National Training Service, 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 Harry A. Burch, is an individual trading under the firm names of Washington Institute of Practical Nursing and National Training Service, with his principal office and place of business located at Suite 203, Paramount Theater Building, 907 Pine Street, in the city of Seattle and State of Washington.

PAR. 2. Respondent is now, and has been for more than two years last past, engaged in the sale and distribution in commerce between and among the various States of the United States of courses of instruction, including among others a course in practical nursing, which said courses are pursued through the medium of the United States mail. Respondent causes said courses of instruction to be transported from his said place of business in the State of Washington to the purchasers thereof located in the various States of the United States other than the State of Washington.