

IN THE MATTER OF

MIKE GELLMAN AND NATE GELLMAN, INDIVIDUALLY,
AND TRADING AS GELLMAN BROTHERS

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

Docket 1880. Complaint, Nov. 28, 1930—Decision, Jan. 13, 1938

Where a firm engaged in sale and distribution of hunting knives, clocks, wrist watches, compacts, cameras and various other articles of merchandise—
Furnished various devices and plans of merchandising involving variety of punchboards, push cards, or similar devices for retailer's or operator's use in selling and delivering to purchasing public its said products, under schemes by which chance purchaser received more costly article, or nothing further, dependent upon success or failure in selection of right number, and paid, in accordance with particular plan, fixed, or varying, amount, or nothing, dependent upon particular number secured; and thereby put in hands of others means of conducting lotteries, games of chance, or gift enterprises in distribution of their merchandise, with knowledge and intent that such devices were and would be used in such distribution to public by lot or chance by retail dealers and other vendees of their said products, contrary to public policy long recognized by the common law and criminal statutes, and to an established public policy of the United States Government, and in competition with many who are opposed to use of such devices in sale and distribution of their merchandise, and refrain from furnishing the same;

With result that sale of merchandise by means of said devices by competitors was injuriously affected, and trade was diverted to them from competitors by reason of furnishing the same, to their prejudice and injury and that of public, and there was a restraint upon and a detriment to the freedom of fair and legitimate competition:

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank for the Commission.

Nash & Donnelly, of Chicago, Ill., for respondents.

COMPLAINT

Acting in the public interest, pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that Mike Gellman and Nate Gellman, individually and as copartners trading as Gellman Brothers, hereinafter referred to as respondents, have been and are using unfair methods of competition

in interstate commerce in violation of the provisions of Section 5 of said act, and states its charges in that respect as follows:

PARAGRAPH 1. The respondents, Mike Gellman and Nate Gellman, are copartners doing business under the firm name and style of Gellman Brothers, and have their principal office and place of business located in the city of Minneapolis, State of Minnesota. They are now and for more than four years last past have been engaged in selling various articles of merchandise to purchasers thereof located in various States of the United States. They cause said merchandise, when sold, to be transported from their place of business in the State of Minnesota into and through other States of the United States to purchasers thereof located in a State or States of the United States other than the State of Minnesota. In the course and conduct of their business respondents are engaged in competition with other corporations, partnerships, and individuals engaged in the sale and distribution of similar articles of merchandise in commerce between and among various States of the United States.

PAR. 2. In the course and conduct of their business as described in paragraph 1 hereof the respondents have been and are now soliciting the sale of, and selling and transporting in commerce to retail dealers in various States of the United States certain articles of merchandise, and in the sale and distribution of their said merchandise or products said respondents have furnished various devices and plans of merchandising which involves the operation of gift enterprises and/or lottery schemes, and a distribution of such merchandise or products to the ultimate consumers wholly by lot or chance. Said devices or plans consist of a variety of punchboards, push cards or fortune boards, and other similar devices, the method or use of which by retail dealers in connection with the sale and delivery to the purchasing public of respondents' said merchandise or products was and is substantially as follows:

Said punchboards consist of boards of various shapes and sizes, with from one hundred to four thousand holes. Into each of the holes has been inserted a small slip of paper bearing a printed number, the printed slips bearing consecutive numbers according to the number of holes contained in the board, and said slips are so placed and secreted in said punchboard that they cannot be seen by the customer except when they are punched from the board. The punchboards bear legends indicating the numbers which entitle the purchasing public to an article of merchandise or prize, and in some cases the last punch in each board receives a prize. Every customer pays 5¢ or 10¢ for each punch from the board and the purchasers of punches who receive

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numbers other than those enumerated on the board, or who do not qualify by purchasing the last punch on the board, receive nothing for their money. The said articles of merchandise vary in value, but each of said articles of merchandise is of greater value than the cost of a single punch from the said board, and the combined value of the articles of merchandise is much less than the cost of the total punches on the board.

The purchasing public are thus induced and persuaded into purchasing punches from the said boards in the hope that they may obtain one of the prize winning numbers and thus obtain one of the prizes called for by the said numbers. The merchandise of the respondents is thus distributed to the purchasers of punches from the board wholly by lot or chance.

The said punchboards also make use of various other plans or schemes for the distribution of merchandise to the consuming public other than that just above described. These various forms or schemes are known and described by the respondents as "Put and Take," "Hit Me—Take Me," "Numbers from 1 to 22, pay what you draw. Numbers over 22 pay 22¢," "New Style 'Double Pay' Merchandise Assortment 5¢ punch pays single on money winners, 10¢ punch pays double on money winners," "Combination Merchandise Assortments. New Three Way Sales Board," "Full Value Every Punch a Winner," "Sweets for your Sweetie. Has special 'money row with 36 additional punches free,'" "This year's sales board surprise. 600 free punches (each marked free) with equal chance to win," "Lucky Stops," "Lucky Cash," "Galloping Dominoes," "Game of Hands," "Top the Seven," "Down the Stretch," "Lose and Win," "Movie Stars," "Big Business," "Teapot Dome Oil Gusher," "Rays of Fortune," "Pick your favorite fruit," "Can Can," "Cash Register," "K. O. Vendor," "Odd Ball," "Blond or Brunette," "Kelly Pool," "Batter Up," "Horse Race," "Ace High," and various other titles or schemes.

The punch cards and fortune boards involve substantially the same plan or plans as referred to above.

PAR. 3. The aforesaid retail dealers of the respondents expose said articles of merchandise in connection with the aforesaid punchboards, push cards, or fortune boards, and sell punches, pushes, or fortune cards to the purchasing public in accordance with the aforesaid plans whereby the said merchandise of the respondents is distributed to the purchasers of punches, pushes, or fortune cards from the said boards wholly by lot or chance. Respondents thus supply to and place in the hands of others the means of conducting a lottery in the sale of their products in accordance with the respondents' sales plan hereinabove set forth.

PAR. 4. The respondents' sales plans as mentioned in paragraphs 2 and 3 thus tend to and do induce many of the consuming public to purchase respondents' said products in preference to the products of respondents' said competitors because of the chance of obtaining one of said articles of merchandise at a price of 5¢ or 10¢, rather than at the normal retail price of the same, which is many times greater than 5¢ or 10¢, or because of the chance of obtaining one of the said articles of merchandise at a price less than its normal retail price by one of the various other plans, schemes or methods described in paragraph 2, and the distribution of said articles of merchandise to the consuming public is determined wholly by lot or chance.

PAR. 5. The above alleged acts and practices of respondents are all to the prejudice of the public and respondents' competitors, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on November 28, 1930, issued, and on December 1, 1930, served, its complaint in this proceeding upon the respondents, Mike Gellman and Nate Gellman, individually and as copartners trading as Gellman Brothers, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Henry C. Lank, attorney for the Commission, and in opposition thereto by John A. Nash, attorney for the respondents, before Miles J. Furnas, an examiner of the Commission, theretofore duly designated by it. The said 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 on the said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel aforesaid; and the Commission having duly considered the same, and being now fully advised in the premises, finds that this proceeding is in the interest

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of the public, and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO FACTS

PARAGRAPH 1. The respondents, Mike Gellman and Nate Gellman, are individuals doing business as a copartnership under the firm name and style of Gellman Brothers, and have their principal office and place of business located in the city of Minneapolis, State of Minnesota. They are now and for several years last past have been engaged in the sale and distribution of various articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia. They cause said merchandise, when sold, to be shipped from their principal place of business in the State of Minnesota to purchasers thereof in the State of Minnesota and in practically all the other States of the United States, as well as in the District of Columbia, at their respective points of location. There is now and has been for several years last past a course of trade and commerce by said respondents in such merchandise between and among the States of the United States and in the District of Columbia. In the year 1936 such commerce amounted to approximately \$8,000 of sales volume. In so carrying on said business, respondents are and have been engaged in active competition with other partnerships and with corporations and individuals engaged in the manufacture of similar or like articles of merchandise and in the sale and distribution thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In connection with the sale and distribution of such merchandise said respondents have furnished various selling and merchandising devices and plans which involve the operation of gift enterprises, lottery schemes, or games of chance. Said devices or plans consist of a variety of punchboards, push cards, or fortune boards, and other similar devices, the method of use of which by retail dealers in connection with the sale and delivery to the purchasing public of respondents' said merchandise or products was and is substantially as follows:

Said punchboards consist of boards of various shapes and sizes, with from one hundred to four thousand holes. Into each of the holes has been inserted a small slip of paper bearing a printed number, the printed slips bearing consecutive numbers according to the number of holes contained in the board. These numbers are not arranged in numerical sequence. Said slips are so placed and secreted in said punchboard that they cannot be seen by the cus-

tomers except when they are punched from the board. The punchboards bear legends indicating the numbers which entitle the purchasing public to an article of merchandise or prize, and in some cases the last punch in each board receives a prize. Each customer pays 5¢ or 10¢ for each punch from the board and the purchasers of punches who receive numbers other than those enumerated on the board or who do not qualify by purchasing the last punch on the board, receive nothing for their money. The said articles of merchandise vary in value, but each of said articles of merchandise is of greater value than the cost of a single punch from the said board.

The said punchboards also make use of various other plans or schemes for the distribution of merchandise to the consuming public other than that just above described. These various forms or schemes are known and described by the respondents as "Put and Take," "Hit Me—Take Me," "Numbers from 1 to 22, pay what you draw, Numbers over 22 pay 22¢." "New Style 'Double Pay' merchandise assortment 5¢ punch pays single on money winners, 10¢ punch pays double on money winners," "Combination Merchandise Assortments, New Three Way Sales Board," "Full Value Every Punch A Winner," "Sweets for your Sweetie. Has special 'money row with 36 additional purchases free'," "This year's sales board surprise. 600 free punches (each marked free) with equal chance to win," "Lucky Stops," "Lucky Cash," "Gallop Dominoes," "Game of Hands," "Top the Seven," "Down the Stretch," "Lose and Win," "Movie Stars," "Big Business," "Teapot Dome Oil Gusher," "Rays of Fortune," "Pick your favorite fruit," "Can Can," "Cash Register," "K. O. Vender," "Odd Ball," "Blond or Brunette," "Kelly Pool," "Batter Up," "Horse Race," "Ace High," and various other titles or schemes.

The merchandise sold and distributed by respondents included penknives, hunting knives, clocks, wrist watches, novelty smoker sets, cigarette lighters, pipes, ladies' compacts, cameras, and various other articles of merchandise. The said punchboards, push cards and fortune boards vary in detail but all involve substantially the same features as the above plans and lottery schemes. In all of the aforesaid plans the person who receives the article of merchandise is selected wholly by lot or chance and makes no additional payment, while the other purchasers receive nothing for their money other than the privilege of making a push or punch.

PAR. 3. The retail dealers and the members of the public to whom respondents sell and distribute their merchandise, together with the punchboards, push cards, fortune boards, or other devices, use such

devices to distribute respondents' merchandise as described above. The sale and distribution of respondents' merchandise through the use of or by means of said punchboards, push cards, fortune boards, or other devices constitute the operation of lotteries, games of chance, or gift enterprises. The respondents in furnishing said devices put in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the distribution of their merchandise.

PAR. 4. The respondents in furnishing said devices have knowledge that said devices are and have been and will be used in distributing their merchandise, and furnish said devices so that their merchandise may be sold or distributed to the public by lot or chance. The use by respondents of said method in the sale of merchandise, and the sale of merchandise by and through the use thereof and by the aid of said method is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy; and is contrary to an established public policy of the Government of the United States.

PAR. 5. There are in the United States many manufacturers and distributors selling and distributing similar or like merchandise to that distributed by the respondents who do not furnish punchboards, push cards, fortune boards, or other devices similar to those furnished by respondents and who do not furnish any devices by which their merchandise can be distributed to the public by lot or chance. There are also many competitors of respondents who are opposed to the use of such devices in the sale and distribution of their merchandise, and such competitors refrain from furnishing such devices. Competitors of respondents were called as witnesses and testified in this proceeding and the Commission finds that the sale of merchandise by means of said devices injuriously affects the sale of similar or like merchandise by competitors and that trade is diverted to respondents from competitors by reason of the furnishing of said punchboards, push cards, fortune boards, or like devices. The use of such methods by the respondents in the sale and distribution of their merchandise is prejudicial and injurious to the public and to respondents' competitors, and has resulted in the diversion of trade to respondents from their said competitors and is a restraint upon and a detriment to the freedom of fair and legitimate competition.

CONCLUSION

The aforesaid acts and practices of the respondents, Mike Gellman and Nate Gellman, individually and trading as Gellman Brothers, are to the prejudice of the public and of respondents' competitors and are unfair methods of competition in commerce and constitute a viola-

tion of the Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondents, testimony and other evidences taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral arguments by Henry C. Lank, counsel for the Commission, and by John A. Nash, counsel for the respondents, and the Commission having made its findings as to the facts that said respondents have violated the provisions of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is ordered, That the respondents, Mike Gellman and Nate Gellman, individually and trading as Gellman Brothers, their agents, representatives, and employees, in connection with offering for sale, sale and distribution of various articles of merchandise in interstate commerce or in the District of Columbia do forthwith cease and desist from:

1. Supplying to or placing in the hands of retail dealers or others punchboards, push cards, fortune boards, or similar devices so as to enable such retail dealers and others to dispose of or sell by the use thereof such articles of merchandise;

2. Mailing, shipping, or transporting to retail dealers or others punchboards, push cards, fortune boards, or similar devices so prepared or printed as to enable such retail dealers or others to sell or distribute merchandise by the use thereof;

3. Selling or otherwise disposing of various articles of merchandise by the use of punchboards, push cards, fortune boards or similar devices.

It is further ordered, That the respondents, Mike Gellman and Nate Gellman, individually or trading as Gellman Brothers, shall, within 30 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order to cease and desist hereinabove set forth.

IN THE MATTER OF
MARCH OF TIME CANDIES, INC.

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

Docket 2806. Complaint, May 15, 1936—Decision, Jan. 13, 1938

Where a corporation engaged in manufacture and sale of candy, including certain assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to the consumers thereof, and one of which was composed of a number of penny pieces of uniform size and shape, together with number of packages of candy to be given as prizes to those purchasers of aforesaid penny candies procuring piece, colored center of which differed from that of majority, and together with large candy bar to be given free to purchaser of last piece in assortment—

Sold, to wholesalers and to retailers for display and resale to purchasing public, in accordance with aforesaid sales plans, said assortments, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of its products in accordance with aforesaid plans, contrary to public policy long recognized by the common law and criminal statutes and to an established public policy of the United States Government, and in competition with many who, unwilling to offer or sell candy so packed and assembled, or otherwise arranged and packed for sale to purchasing public, as to involve game of chance or any other method of sale contrary to public policy, refrain therefrom;

With result that many dealers in and ultimate purchasers of candy were attracted by said method and manner of packing said product and by element of chance involved in sale thereof as above set forth, and thereby induced to purchase said candy, thus packed and sold by it, in preference to that offered and sold by said competitors who do not use same or equivalent method, and with tendency and capacity, because of said game of chance, to divert to it trade and custom from its said competitors as aforesaid, exclude from said trade all competitors who are unwilling to and do not use such or equivalent method as unlawful, lessen competition in trade involved and tend to create monopoly thereof in it and such other distributors as use same or equivalent method, deprive purchasing public of benefit of free competition in trade in question, and eliminate therefrom all actual and exclude therefrom all potential, competitors who do not adopt and use such or equivalent method:

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Miles J. Furnas*, trial examiner

Mr. Henry C. Lank and *Mr. P. C. Kolinski* for the Commission.

Beach, Fathchild & Scofield, of Chicago, Ill., for respondent.