

IN THE MATTER OF
SAMUEL WORTH DOING BUSINESS AS WORTHMORE
SALES COMPANY

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

Docket 5203. Complaint, Aug. 10, 1944—Decision, Mar. 10, 1950

Where lottery schemes are devised and sold in connection with disclaimers which pretend to offer them as straight sales promotion plans, free of the lottery element, prudence requires that the Commission's remedy should reach any variations of the plans which, as a result of their design, readily lend themselves to the operation of a lottery scheme; and such a remedy obviously would not reach or be intended to reach a plan which was in fact free of the lottery element, but which might be so changed or corrupted by customers of the seller as to be used in connection with lotteries.

As examination of pertinent decisions of the several Circuit Courts of Appeal with respect to orders of the Commission enjoining the use of merchandising plans or sales promotion plans which reasonably anticipate or suggest a lottery, or are of such a nature that a lottery is likely to occur therefrom, make it clear that there is no difference in the purpose or scope of the orders intended by the Commission and those approved by said courts, and that the only differences between the opinions of the several Circuit Courts and between certain of said courts and the Commission involved construction of the language used rather than the proper scope of the orders themselves.

As respects orders in such cases it seems clear from the decisions concerned, and it is the opinion of the Commission, that such orders should be sufficient to enjoin the use of such merchandise plans or sales promotion plans as above described. It is not the intent of the Commission, however, to go beyond such point, and no Court has held that the Commission's orders in such cases were too broad when construed as the Commission intended they should be construed, it appearing, as above noted, that differences involved question of construction only.

A type of order in such cases, adopted in 1942 for general use in appropriate matters, as a result of a study directed to the possibility of choosing language which would eliminate the uncertainty of construction found by the courts, but would still be sufficiently broad to accomplish the purposes intended, and which requires a respondent engaged in lottery schemes of the nature concerned, to cease and desist from "selling or distributing any merchandise so packed and assembled that sales of said merchandise to the public are to be made or, *due to the manner in which such merchandise is packed and assembled at the time it is sold by respondent* may be made by means of a game of chance, gift enterprise or lottery scheme," was designed, through the addition of the *underscored* language, to make it clear that such orders were intended to apply only to those plans which might

be used as lottery schemes as a result of the manner in which the merchandise was packed and assembled at the time it was sold by the party charged with the violation.

While said type of order has been used in many subsequent cases and has not thus far been disapproved by any court, appropriate changes in language are necessary to fit the facts of each case, and such a modification as involved in an order requiring a respondent, who had devised and sold lottery schemes in connection with disclaimers which pretended to offer them as straight sales promotion plans, free of the lottery element, to cease and desist from selling sales promotion plans and similar articles "so designed that their use in connection with the distribution of merchandise constitutes, *or due to such design may constitute*, the operation of a game of chance, gift enterprise or lottery scheme," and in which the language *underscored* clearly limited the order to sales plans and merchandise so designed by the respondent that they might or were likely to constitute a game of chance, in the opinion of the Commission met the criticisms which had been raised by some of the Circuit Courts, without narrowing or impairing the effectiveness of the order.

Where an individual engaged in the manufacture and interstate sale and distribution of sales promotion plans, trade cards and similar devices, including several groups of plans—sold in units of 500, or multiples thereof—with trade cards to be distributed by the retailer-purchaser to his customers designed to secure to the consumer, when his purchases aggregated the total displayed on the card a "dividend" (in trade or otherwise, as the case might be) as determined by the number concealed under the card's "Secret Panel" and the schedule of dividends or prizes as arranged and displayed by the merchant concerned (the superiority of which over ordinary trade cards—where the holder knows from the beginning what he will get—he stressed)—

Sold his said stimulator plans with their explanatory advertising matter, posters, "secret panel" trade cards, trade card punches, and award sheets setting out the numbers concealed in the different panels (which had been so arranged by him that the higher the number, the fewer there were) to each of his retail merchant customers, who distributed the cards to their customers and thereby entitled them, upon the punching out of the cards, in trade, without choice—and in disregard of said individual's instructions as to how, if each holder had his choice of awards, the use of the plan could not be considered a lottery, and was not so intended—to merchandise of varying value as set out by the particular merchant on blank lines on the award sheet opposite the different numbers displayed and arranged as aforesaid, and as determined by the concealed number secured by the particular customer;

Whereby the awards received were thus determined and distributed wholly by chance, through the operation of said game of chance or lottery scheme in the sale of merchandise to the purchasing public; and he supplied to and placed in the hands of retail merchants, as intended, the means through which they conducted games of chance, gift enterprises, and lottery schemes in the sale of merchandise to the public, contrary to the established public policy of the United States Government;

With tendency and capacity to induce members of the purchasing public to deal with or purchase merchandise from dealers using such plans in preference to

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those using sales promotion plans of competitors which did not contain an element of chance; and with the result that retail merchants and dealers were attracted to his sales plans by their element of chance, and were thus induced to purchase said plans in preference to those offered by competitors; and with capacity and tendency thereby to unfairly divert trade from his competitors to him:

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

Under such schemes no reasonable person could feel any real suspense, in trading out his card, to learn what his concealed number might be unless that number had some influence in determining what award he would receive, and the only consideration that gave point and purpose to the number concealed in the "secret panel" was that it served to identify specifically the award or bonus which the holder of the number would receive, and inspired the hope that through it by chance the holder might receive one of the larger awards. Should the holder know that, regardless of his secret number, he might receive his choice of any of the listed prizes it is wholly unreasonable to believe that he would have any curiosity as to what that number might be. The Commission, accordingly, found it surprising that respondent in the above matter should seriously argue that the plan was not designed or intended to be used as a lottery, that the element of chance had been entirely eliminated by instructions to the merchants to give any listed prize which their customers might select regardless of the hidden number on the customer's card, and that while the hidden number provided an attractive element of suspense, the customer was nevertheless not limited in his choice of awards as above set forth, and that respondent's instruction to the retailer relieved him of responsibility for any lottery which might be employed by the retailer in actual operation; or, that such arguments, having been offered, should be seriously considered.

Before *Mr. John P. Bramhall* and *Mr. Frank Hier*, trial examiners.

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

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Samuel Worth, an individual trading and doing business under the name of Worthmore Sales Co., 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 interest of the public, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Samuel Worth, is an individual trading and doing business under the name of Worthmore Sales Co., with his

principal office and place of business located at 221 East Cullerton Street, Chicago, Ill. Respondent is now and for more than 6 months last past has been engaged in the manufacture of sales promotion cards and in the sale and distribution thereof to dealers located at points in the various States of the United States and in the District of Columbia. Respondent causes and has caused his sales cards, when sold, to be transported from his place of business in the city of Chicago, Ill., to purchasers thereof at their respective points of location in various other States of the United States and in the District of Columbia. There is now and has been for more than 6 months last past a course of trade by respondent in such sales promotion cards 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 said business respondent is in competition with other individuals and with corporations and firms engaged in the manufacture of sales promotion cards, trade cards, discount cards, premium cards, coupons and trading stamps 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. 3. In the course and conduct of his business as described in paragraph 1 hereof respondent sells and has sold cards so designed and arranged as to involve the use of a lottery scheme or gift enterprise when used by dealers in promoting and increasing sales of their merchandise to the consuming public. The respondent manufactures and distributes several groups of sales promotion cards but they all involve a lottery scheme or gift enterprise and vary only in detail. The sales promotion cards in one such group are herein described for the purpose of showing arrangement, design and principle involved:

Gas	2 2 2 2 2 2 2 2 2 3 3 3 3 3 3 3 3	Gas
Sales		Sales
THIS CARD IS VALUABLE—Use it and Discover YOUR HIDDEN TREASURE		
Mystery!	Under This SECRET PANEL	No blanks
Thrills!	is Your Award	
Surprises!	Warning! Void if Opened	
	Every Card a Winner!	
	Read Rules on Other Side	
Gas	Oil 1 1 1 Oil	Gas
Sales	5 5 5 5 5 Sales 223 Sales 5 5 5 5 5	Sales

Under the secret panel appears various legends, some of which have the numbers 400, 300, etc., and the words "See Chart for Award." On the reverse or back of said sales card appears the following legend:

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Customers Dividend Club
Membership Card

Name

Address

Each purchase you make will be punched out. When entirely punched out, we will open the "Secret Panel" revealing a hidden number which entitles you to a valuable dividend award absolutely free. See selection of awards in our place. Should you open "Secret Panel" card becomes void.

Mfd. by Worthmore, 221 E. 20th St., Chicago
U. S. Pat. No. 2,109,603.

Each set of the sales promotion cards sold by respondents is accompanied by a poster, typical of which is the one bearing the following legend:

J O I N O U R
CUSTOMER'S DIVIDEND CLUB

\$ Trade
Here

It \$
Pays

ask for a
"Secret Panel" Treasure Card
It's Free

When your card is fully punched out we will open "Secret Panel" revealing your hidden dividend number which entitles you to choice of gifts below.

No.		<i>Dividends below are absolutely free</i>
950	Receives	
900	Receives	
800	Receives	
700	Receives	
600	Receives	
500	Receives	
400	Receives	
300	Receives	
200	Receives	
150	Receives	

The secret panel referred to on said card is partially perforated indicating where the panel may be opened, but until the panel is opened, the legend thereunder is effectively concealed from the holder of said card. The legends under the secret panel contain numbers corresponding to some of those shown on the poster. The legend under the secret panel is effectively concealed under the panel except when opened, and the number which the holder of said card has drawn is effectively concealed and determined wholly by lot or chance. Respondent furnishes his customers various posters and advertising matter explaining the operation of the sale plan, and in his literature and by his representations suggests various methods for the use of

his sales cards by dealers, all of which methods involve a lottery or game of chance.

PAR. 4. Each of the cards included in one of the groups of sales cards embodying respondent's sales plan is intended for use in the sale of various amounts of merchandise, and others manufactured and sold to filling stations are intended for use by proprietors of service stations in sales of oil and gas aggregating specified amounts and provide for various awards as determined by the proprietors of said stations. The retail merchandise and service station operators to whom respondent sells and has sold assortments of such sales promotion cards distribute the same to their customers and prospective customers and, on the poster furnished by respondent for the purpose opposite the various numbers, list prizes or awards in varying amounts as determined by said merchants. The cards are distributed free to customers and prospective customers of said retail merchants and filling station operators and, when purchases are made, numbers corresponding to the amount of such purchase are punched from the margin of said card. And when all the numbers around the said margin are punched, the secret panel is opened and the customer is entitled to merchandise in the amount shown on the poster opposite the number corresponding to the number appearing under the secret panel without additional charge. In few or no cases are the retail customers of said merchants given their choice of the various prizes listed on the poster.

PAR. 5. There are in competition with respondent various manufacturers and distributors of sales promotion cards, premium cards, price concession cards, coupons and trading stamps, which, when used by dealers, do not involve a lottery scheme, game of chance, or gift enterprise. Many persons, firms and corporations who sell and distribute various cards or devices for promoting or increasing the sales of dealers do not offer for sale or sell cards or devices so designed and arranged as above alleged, or otherwise designed and arranged, as to involve a game of chance, lottery scheme, or gift enterprise.

PAR. 6. The use by respondent of said methods in designing and arranging his said cards and distributing the same for redistribution to the public is a practice which is contrary to an established public policy of the Government of the United States. The consuming public is induced to deal with or purchase merchandise from dealers using respondent's cards in preference to purchasing merchandise from dealers using the devices of respondent's competitors, because of the lottery scheme, game of chance, or gift enterprise connected with respondent's said cards. By reason thereof, dealers are induced to purchase respondent's said cards in preference to devices of respondent's

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competitors. The sale and distribution of the aforesaid sales cards has the tendency and capacity to unfairly divert trade to respondent from its said competitors.

PAR. 7. The aforesaid acts and practices of the 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 August 10, 1944, issued and subsequently served its complaint in this proceeding upon the respondent Samuel Worth, an individual trading as Worthmore Sales Co., charging him with the use of unfair methods of competition in commerce and unfair acts and practices in commerce in violation of the provisions of said act. After the respondent filed his answer, testimony and other evidence in support of and in opposition to the allegations of the complain were introduced before a trial 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 regularly came on for final hearing before the Commission upon the complaint, the answer thereto, testimony and other evidence, recommended decision of the trial examiner, and briefs and oral argument in support of and in opposition to the complaint; 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, Samuel Worth, is an individual trading and doing business under the name of Worthmore Sales Co., with his office and place of business located at 1825 South Michigan Avenue, Chicago, Ill. He is now, and since 1942 has been, engaged in the manufacture of sales promotion plans, including trade cards and other similar devices, which have been distributed to retail dealers located at points in the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business, respondent causes and has caused his sales plans, trade cards, and other similar devices,

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when sold, to be transported from his place of business in the State of Illinois to purchasers thereof located in the various States of the United States and in the District of Columbia. Respondent maintains, and has maintained, a course of trade in his products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of his business, respondent sells, and has sold and distributed, several groups of sales promotion plans, trade cards, and similar devices which involve the same general principle and vary only in detail, typical and illustrative of which are the following:

Gas	2	2	2	2	2	2	2	2	2	3	3	3	3	3	3	3	3	3	Gas							
Sales																			Sales							
THIS CARD IS VALUABLE—Use it and Discover YOUR HIDDEN TREASURE																										
Mystery!											Under This SECRET PANEL										No Blanks					
Thrills!											is Your Award															
Surprises!											Warning! Void if Opened															
										Every Card a Winner!																
										Read Rules on Other Side																
Gas											Oil	1	1	1	Oil											Gas
Sales	5	5	5	5	5	5	5	5	5	Sales	223	Sales	5	5	5	5	5	5	Sales							

Under the secret panel appear various legends, some of which have the numbers 400, 300, etc., and the words "See Chart for Award." On the reverse or back of said sales card appears the following legend:

Customers Dividend Club

Membership Card

Name

Address

Each purchase you make will be punched out. When entirely punched out, we will open the "Secret Panel" revealing a hidden number which entitles you to a valuable dividend award absolutely free. See selection of awards in our place. Should you open "Secret Panel" card becomes void.

Mfd. by Worthmore, 221 E. 20th St., Chicago

U.S. Pat. No. 2,109,603.

Each set of the above cards is accompanied by the following poster:

JOIN OUR
CUSTOMER'S DIVIDEND CLUB

\$ Trade
Here

It \$
Pays

ask for a

"Secret Panel" Treasure Card

It's Free

When your card is fully punched out we will open "Secret Panel" revealing your hidden dividend number which entitles you to choice of gifts below.

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No. *Dividends below are absolutely free*

950 Receives

900 Receives

800 Receives

700 Receives

600 Receives

500 Receives

400 Receives

300 Receives

200 Receives

150 Receives

100 Receives

PAR. 4. These sales stimulator plans are sold in units consisting of 500 or multiples thereof, "secret panel" trade cards, several award sheets, window posters, and a trade card punch. The secret panel referred to on said trade card is partially perforated, indicating where the panel may be opened, but until the panel is opened, the legend thereunder is effectively concealed from the holder of said card and the number held is determined by lot or chance. The numbers on the award chart match the concealed numbers on the cards according to a schedule fixed by the respondent so that the higher the number, the fewer the cards bearing that number. Thus, there are only two cards having the highest number concealed, while there are 140 cards with secret panels concealing the lowest number on the award sheet.

Respondent supplies each of his customers with posters and advertising matter which describe the operation of the sales plan and the use of cards by them to attract customers and increase sales. He also sends to each customer a sheet showing a photographic facsimile of the patent on his sales plan, on the reverse side of which are printed instructions to them that so long as the card holder has his choice of awards the use of the plan cannot be considered a lottery and that it is intended to be so used.

PAR. 5. The respondent's sales plans, trade cards, and similar devices are all designed and arranged for use by retail merchants in the sale and distribution of their merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme. The retail merchants to whom respondent sells his plans distribute the sales cards to their customers without charge and without knowledge on the part of either as to the numbers concealed on the cards. On the award poster furnished by respondent for this purpose, retailers list prizes or awards opposite the various numbers in varying amounts which are determined solely by said retailers. As purchases are made by the card holders from the retailer, the latter punches out the value of each purchase

from the sales or trade card until all the numbers around the margin, equaling the face value of the card, are punched out. The retailer then opens the secret panel on the trade or punch card, and the customer is entitled to merchandise in the amount shown on the poster opposite the number corresponding to the number appearing under the secret panel, without additional charge. Such customer is not given a choice of the awards listed but must take the one listed opposite the same number as his card bears. The award received is thus determined and distributed wholly by chance.

PAR. 6. Retail merchants who purchase respondent's sales plans and cards use them to operate a game of chance, gift enterprise, or lottery scheme in the sale of merchandise to the purchasing public. That these plans and cards are designed, arranged, and sold by the respondent for that purpose is evident from the make-up of the plan and the cards themselves; from respondent's description of the superiority of his plans with concealed numbers to ordinary trade cards, where the holder knows from the beginning what he will get; from the literature advertising his plans; and from his instructions to his retailer-customers as to how, if used as directed, they do not involve a lottery but if otherwise used they do.

PAR. 7. Respondent supplies to and places in the hands of retail merchants the means by which they have been, and are, conducting games of chance, gift enterprises, and lottery schemes in the sale of merchandise to the public. The sale of merchandise by and through such means is a practice which is contrary to the established public policy of the government of the United States, and the respondent, through the supplying of such means, assists and participates in a violation of said policy.

PAR. 8. Respondent is in competition with other individuals, firms, or corporations who sell and distribute trade cards, sales plans, premium cards, etc., which are not designed, arranged, sold, or used to sell merchandise by games of chance, gift enterprises, or lottery methods. The lot or chance feature of respondent's sales plans has the tendency and capacity to induce members of the purchasing public to deal with or purchase merchandise from merchants using such plans in preference to merchants or others using sales promotion plans of competitors which do not contain an element of lot or chance. Therefore, retail merchants and dealers are attracted to respondent's sales plans or methods by the element of chance involved in the sale of merchandise by the use of said plans and are thereby induced to purchase said plans in preference to sales promotion plans offered by competitors which do not contain an element of chance. Thus, the offering for sale, sale, and

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distribution by respondent of said sales plans have the capacity and tendency, because of the lot or chance feature, unfairly to divert trade to respondent from his competitors who do not sell, or offer for sale, sales plans containing an element of chance.

CONCLUSION

The acts and practices of the respondent as herein found 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 acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Commissioner Mason concurring in part and dissenting in part.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, recommended decision of the trial examiner, and briefs and oral argument in support of and in opposition to the complaint; and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent, Samuel Worth, trading as Worthmore Sales Company or under any other name, his agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, sales stimulator plans, trade cards, sales cards, premium cards, or other articles so designed that their use in connection with the distribution of merchandise constitutes, or due to such design may constitute, the operation of a game of chance, gift enterprise, or lottery scheme.

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

Commissioner Mason concurring in part and dissenting in part.

OPINION OF THE COMMISSION

AYRES, COMMISSIONER: Respondent sells various sales promotion plans which involve the same general principle. Typical of such

plans are cards which respondent sells to retailers for free distribution among their customers. The cards are intended to stimulate the business of the retailer by providing bonuses to his customers upon their purchase of merchandise from him aggregating the amount shown on each card. Figures around the edge of the card are punched in an amount corresponding with the amount of each purchase. Some of the cards are punched out in full when purchases amount to \$5, and others when they amount to \$10. In the center of each card is a "secret panel," containing a hidden number, which is opened by the retailer when the card has been completely punched out. The customer then becomes entitled to a bonus corresponding with the number in the panel according to a schedule posted in the retailer's store.

On the printed form for the schedule of bonuses, which form is supplied by respondent, appears the following information for the retailer's customers:

When your card is fully punched out we will open "Secret Panel" revealing your hidden dividend number which entitles you to choice of gifts below.

The form showing the schedule of bonuses has blank spaces in which the retailer lists the bonuses to be awarded for each of 11 numbers. In each unit of 500, the "secret panel" of only two cards conceals the highest of the eleven numbers, the lower numbers appearing in the "secret panel" of progressively more cards.

Evidence concerning the actual operation of the plan discloses that merchants give a larger award, usually an amount in trade, for the highest numbers, and progressively smaller awards for the lower numbers, and that the customer is entitled to receive only the award listed for his number. On this basis of operation, it is clear that the amount of the award received by each customer is determined wholly by lot or chance.

Respondent argues that this plan is not designed or intended to be used as a lottery; and that the element of chance has been entirely eliminated by instructions to the merchants to give any listed prize which their customer may select, regardless of the hidden number on the customer's card. It is contended that the "secret panel" or hidden number provides an element of suspense which is attractive, but that the customer is not limited in his choice of awards to that listed for his number on the schedule, and may select any one of the awards listed. Respondent urges that its instructions to the retailer relieves it of responsibility for any lottery which may be employed by the retailer in actual operation.

It is surprising that respondent's arguments should be seriously offered or considered. No reasonable person could feel any real suspense in trading out his card to learn what his concealed number may be unless that number had some influence in determining what award he would receive. If the customer knows, as respondent contends that he should know, that regardless of the number in his "secret panel" he may receive his choice of any one of the listed prizes, it is wholly unreasonable to believe that he has any curiosity as to what his number may be. The only consideration that gives point and purpose to the concealed number is that it serves to identify specifically the award or bonus which the holder of the number will receive, and inspires the hope that through it the finger of chance will fall upon one of the larger awards.

It is clear that the plans are designed to be used in connection with lottery schemes and the Commission has no difficulty in reaching such a conclusion from the plans themselves and from the evidence of their use. This method of competition has previously been condemned as unfair, and the circumstances in this case require an order to cease and desist.

Having decided that corrective action is required, we come to the scope of the remedy which is needed. The order in this matter requires respondent to cease and desist from:

Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, sales stimulator plans, trade cards, sales cards, premium cards, or other articles so designed that their use in connection with the distribution of merchandise constitutes, or due to such design may constitute, the operation of a game of chance, gift enterprise, or lottery scheme.

There has been disagreement particularly with respect to including in the order the phrase, "or due to such design may constitute."

The respondent has devised and sold lottery schemes in connection with disclaimers which pretend to offer them as straight sales promotion plans, free of the lottery element. Prudence requires that the Commission's remedy should reach any variations of the plans which, as a result of their design, readily lend themselves to the operation of a lottery scheme. Obviously such a remedy would not reach, and is not intended to reach, a plan which is in fact free of the lottery element but which may be so changed or corrupted by respondents' customers as to be used in connection with lotteries.

It has been urged that there is disagreement among the United States circuit courts of appeal concerning provisions of this nature in orders to cease and desist. We do not find such differences in the opinions of the circuit courts.

In May 1942 the Circuit Court of Appeals for the Ninth Circuit considered an order of the Commission which required respondents to discontinue selling merchandise "so packed and assembled that sales of said merchandise to the public are to be made or may be made by means of a game of chance, gift enterprise, or lottery scheme," and modified the order by striking the words "or may be made." (*Lee Boyer's Candy v. Federal Trade Commission*, 128 F. (2d) 261). In that opinion the Court specifically reaffirmed its 1939 decision in *Helen Ardelle, Inc. v. Federal Trade Commission*, 101 F. (2d) 718, and refused to follow the action of other Circuit Courts which had approved the inclusion of similar language in cease and desist orders.

In explaining the reason for its decision in the *Ardelle* case *supra*, the court stated in part as follows:

The orders, as drawn, would prevent petitioners from selling any candy which any person might thereafter sell by means of a lottery, gaming device, or gift enterprise, or might thereafter use in conducting a lottery, gaming device, or gift enterprise, even though such sale or use was not designed, intended, caused, procured, or consented to by petitioners. This, obviously, was not the intention of Congress.

In reaching this decision, the Court relied upon *Federal Trade Commission v. A. McLean & Son*, 84 F. (2d) 910, decided by the Circuit Court of Appeals for the Seventh Circuit in 1936, and upon *Federal Trade Commission v. Charles N. Miller Company*, 94 F. (2d) 563, decided by the Circuit Court of Appeals for the First Circuit in 1938.

The *Miller* case relied in turn almost wholly upon the *McLean* case from which it quoted with approval the following language:

We are convinced, however, that paragraphs (1) and (2) of the cease and desist order are too broad in that they prevent the sale and distribution to jobbers and wholesalers for resale to the retailers of any candy so packed and assembled that retail sales may be made by means of a lottery, or gaming device. This clearly would prevent the sale of any candy which might afterwards be sold by the retailer by means of a lottery, gaming device, or gift enterprise. Obviously, this was not the intention of Congress, and we think it was not the intention of the Commission. We have, therefore, stricken the word "may" from paragraphs (1) and (2) of the orders and substituted the words "are designed to," and as thus modified, the orders of the Commission are affirmed, and respondents, their officers, directors, agents, representatives, and employees are hereby ordered to comply therewith.

The *McLean* decision which was relied upon in both the *Ardelle* and *Miller* cases, was specifically overruled by the Court of Appeals for the Seventh Circuit in 1939 in its decision in *National Candy Co. et al. v. Federal Trade Commission*, 104 F. (2d) 999. In that case, the Court

stated that this particular question had but scant attention in the argument of the McLean case but, referring to the Commission, said:

It now presents authorities in support of its construction of the present order and urges us to approve the present order on the theory that it cannot reasonably be construed to apply to the sale and distribution of straight candy, that is to say, to candy that is not "so packed and assembled that sales of such candy to the general public are to be made or may be made by means of a lottery, gaming device, or gift enterprise."

We deem this suggestion worthy of consideration in view of the fact that the development of plans calculated to evade the intent of the statute, as illustrated by those here presented, convinces us that the substitution we made in the *McLean* case lacks effectiveness in carrying out the intention of Congress. A further consideration convinces us that the language of the order in the light of the allegations of the complaint and findings of the Commission cannot reasonably be construed to be applied to the sale of "straight" candy. Regardless of the substitution made by us in the *McLean* case, we affirm the order of the Commission as here presented. We regard it as inapplicable to "straight" candy or to any candy that does not carry an unfair appeal to retail dealers and retail purchasers because of the element of chance involved in the sale thereof. We had no intention of holding otherwise in the *McLean* case.

In a decision in 1940 the United States Circuit Court of Appeals for the Second Circuit modified a similar order of the Commission (*Sweets Company of America, Inc., v. Federal Trade Commission*, 109 F. (2d) 296), with the following explanation:

We think that an innocent vendor will not be subjected to the risk of violating the order if it be modified so that the words "are likely to be made" are substituted for "may be made" * * *. The order as thus modified would only preclude sales where a lottery system was known to be practiced or where the packing of the candy carried an unfair appeal to the purchasers. It would not preclude a manufacturer from selling its candies when so packed that a lottery was neither reasonably anticipated nor suggested nor likely to occur.

In some of the other cases in which this question was specifically considered, the United States circuit courts of appeal affirmed the board language used by the Commission. In *Ostler Candy Company et al., v. Federal Trade Commission*, 106 F. (2d) 962, for example, which was decided in 1939, the Circuit Court of Appeals for the Tenth Circuit carefully considered the decisions of the other circuit courts and elected to follow the Seventh Circuit in the *National Candy Company* case, *supra*. There, the court said, among other things:

These orders must be construed in the light of the allegations contained in the complaint and the findings of the Commission. And when construed in that manner it is reasonably clear that the first and second paragraphs apply exclusively to candy which is so packed or arranged as to be especially suited to sale at retail in a manner which makes an unfair appeal to retail dealers and retail purchases on account of the element of chance involved, and to candy

which is peculiarly adapted in some other manner to sale at retail by chance method. With these paragraphs thus construed, the orders are not objectionably broad in scope and effect.

In *Hill v. Federal Trade Commission*, 124 F. (2d) 104, decided in 1941, the Circuit Court of Appeals for the Fifth Circuit sustained the broad form of order, stating in part as follows:

It is our view that those decisions which declare that the order is not subject to the construction which petitioners fear (citing cases); are more soundly based than those on which petitioners rely (citing cases). These latter, we think, as a result of yielding to an unfounded apprehension, have the effect of leaving a loophole for evasion which is certainly closed and no more than closed, by the use of the words in controversy. For we think they must be construed as intending to prohibit and as prohibiting only those practices which petitioners have in some way, made themselves a party to, in some way assisted in carrying out.

From the foregoing references, it will be seen that there is no difference in the purpose or scope of the orders intended by the Commission and those approved by all of the courts referred to. The only differences between the opinions of the several circuit courts and between certain of the Courts and the Federal Trade Commission involve construction of the language used rather than the proper scope of the orders themselves. It seems clear from the decisions, and it is the opinion of the Commission, that when merchandise plans or sales promotion plans reasonably anticipate or suggest a lottery or from which a lottery is likely to occur, the order should be sufficiently broad to enjoin their use. It is not the intention of the Commission to go beyond this point.

No court has held that the orders in question were too broad when construed as we intended that they should be construed. In the light of the decisions discussed above and other decisions of a similar nature, the Commission believed that since the differences involved questions of construction only, they could be resolved by modifying the language of the orders to meet the objections of the courts. We considered carefully, therefore, the possibility of choosing language which would eliminate the uncertainty of construction found by the courts, but which would still be sufficiently broad to accomplish the purposes intended. As guides in this study we gave particular attention to the language "are designed to" which was substituted by the courts in the *Miller* and *McLean* cases, *supra*, and the language "are likely to" which was substituted by the court in the *Sweets Company* case, *supra*.

The study we made of this problem resulted in our adopting, in 1942, for general use in appropriate matters, language which will

require respondents who are proved to be engaged in lottery schemes of this nature, to cease and desist from:

Selling or distributing any merchandise so packed and assembled that sales of said merchandise to the public are to be made, or, *due to the manner in which such merchandise is packed and assembled at the time it is sold by respondent*, may be made by means of a game of chance, gift enterprise or lottery scheme.

The underscored language was added before the words "may be made," so as to make it clear that such orders are intended to apply only to those plans which may be used as lottery schemes as a result of the manner in which the merchandise is packed and assembled at the time it is sold by the party charged with the violation. This type of order has been used in many subsequent cases and has not thus far been disapproved by any court.

Appropriate changes in language are necessary to fit the facts of each case and such a change was required in the present matter. As indicated above, the order here prohibits respondent from selling sales promotion plans and similar articles "so designed that their use in connection with the distribution of merchandise constitutes, *or due to such design may constitute*, the operation of a game of chance, gift enterprise or lottery scheme." The underscored language here clearly limits the order to merchandise so designed by the respondent that it may or is likely to constitute a game of chance, gift enterprise, or lottery scheme. It is the opinion of the Commission that this modification meets the criticisms which have been raised by some of the circuit courts, without narrowing or impairing the effectiveness of the order.

OPINION OF COMMISSIONER LOWELL B. MASON CONCURRING IN PART AND
DISSENTING IN PART

I concur in the findings of fact entered by the majority, but I cannot concur in the form of an order that gives effect to the so-called "possibility" rule.

First, as to the facts, the public records of the Commission (which we may judicially notice when determining judgments in other cases) disclose that respondent corporation here is but a thinly veiled substitute for one Samuel Worth against whom we have already entered an order.¹ Worth's defiance of this Commission's mandate is evidenced from the fact that on March 28, 1949, the Government obtained

¹ Civil penalties of \$10,000 were awarded the Government by the United States District Court for the Northern District of Illinois in a civil action against Worthmore Sales Promotion Service, Samuel Worth, president, 221 East Twentieth Street, Chicago, for two violations of a Federal Trade Commission cease and desist order, Docket No. 2946.

a judgment of \$10,000 for violation of our order in the above entitled cause.

But, as the Supreme Court has often shown, neither the evil nature of a charge nor the low estate of a defendant taken alone is sufficient grounds on which to base sanctions. Regardless of who the defendant is, sanctions may be issued only on a finding of guilt, and even then, must not exceed the authority granted by Congress to the court or administrative agency entering the order.

We are an administrative agency devoted to the elimination of unfair practices in commerce. To accomplish this, we delineate what are unfair acts through fact findings as to what constitutes unfair commercial practices, and we base our order on such findings.

In the first case, Docket 2946, we told the Worthmore corporation that it must not sell boards or cards that are so designed that their use by retail merchants constitutes or may constitute the operation of a lottery, or selling plans or schemes which may be used *without alteration or rearrangement* to conduct a lottery.

Samuel Worth, the present respondent (president and owner of the former corporation), apparently trying to purge himself of selling cards that were designed for lotteries, made his new product so that they could not be so used unless changed. The findings of fact and testimony show that it was the Government's own witnesses who changed the cards, not the defendant. In order to reach the defendant's present practices, we would have to extend the scope of our order to prohibit the selling of cards that *may* be used as a lottery, even if changed by someone else not a party to the suit.

In my opinion, the decision in the *Brewer* case does not support this order. The *Brewer* decision rests on certain essential conclusions which cannot be drawn in this case because the facts do not support the same. The conclusion in the *Brewer* case which I believe we are unable to parallel in the *Worthmore* case is as follows:

That the boards and cards are designed and sold by respondents for that *specific* purpose is evident not only from the make-up of the boards and cards themselves, but also from statements made by the respondents in the catalogs advertising their devices. [Italics supplied.] (*Federal Trade Commission v. Brewer, Docket 3952.*)

These findings were commented on with approval by the Sixth Circuit Court in its opinion, as follows:

The Commission found specifically that, among the various types of punch boards and push cards manufactured and sold by petitioners, many are designed for use by retail dealers in the sale and distribution of merchandise to the public "by means of a game of chance, gift enterprise or lottery scheme." * * * The

Commission found, further, that * * * the boards and cards of petitioners are designed and sold for that *specific* purpose, as evidenced, not only from the make-up of the boards and cards, but also from statements contained in the catalogs advertising petitioners' devices. [Italics supplied.] (C. C. A. 6th, Oct. Term 1945, Docket 9993.)

In this case the Sixth Circuit Court relied on the Supreme Court's opinion in the *Winsted Hosiery* case (258 U. S. 483) where the manufacturer (the respondent) placed in the hands of the retailer an "unlawful instrument." In the instant matter, the respondent's product, the sales stimulator, did not become unlawful until after the Government's own witnesses altered it to make it so. So the same conclusions cannot be correctly drawn paralleling those in the *Brewer* or *Winsted* cases.

The Commission, in drafting the order here, has not followed the pattern set down by the Second Circuit Court of Appeals in its decision of *Sweets v. Federal Trade Commission*. The order in that case as originally issued by the Commission required the defendant to cease and desist from "selling and distributing candy so packed and assembled that sales of such candy to the general public are to be made *or may be made* by means of a lottery," etc. The court criticized the use of the words "or may be made," saying that any box of candies might be used for gambling purposes, and indicated that the order should be modified by substituting the words "are likely to be used." Thus the Second Circuit would require something more than a mere possibility of an illegal use of the defendant's products before banning them.

The order as drawn does not agree with the Second Circuit, and in all fairness, it should be added that neither do the Seventh or Tenth Circuits, though on the other hand, the First and Ninth seem to go along with the Second.

I concede that it is difficult to frame an order that will prevent manufacturers of games of chance from marketing an instrumentality that may be used as a lottery. But hard cases make bad law. From apples to zithers (including dominoes, parcheesi and playing cards), there is nothing produced that cannot be diverted to illegal use. Thus, in the instant case, chasing a man with a bad name, we have thrown ourselves past the bounds of accepted legal sanctions.

Sometimes hunters riding to hounds become so intent on catching their quarry they trample the farmers' grain. I feel the same about administrative orders based on the "possibility" rule. We may catch a fox but we endaguer the concept of freedom. The burden of the

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law needs more justification than the prevention of the possibility of wrong. Its hand should rest lightly except on the guilty.

While we need waste no sympathy on this respondent nor fear that this order which overreaches itself will be used by the present Commissioners as an instrument of oppression, some day, some time, those who seek to ban any product can use the precedent set by this case to demonstrate the legality of their prohibitions.

I am against it.

Cases cited: *In the Matter of Kenneth E. Brewer, Everette R. Brewer and Nelson C. Brewer, trading under the name of Chas. A. Brewer & Sons* (Docket 3952. Complaint November 16, 1939—Decision February 1, 1945) 40 F. T. C. 65. *Chas. A. Brewer & Sons. v. Federal Trade Commission* (C. C. A., 6th Circuit, December 5, 1946) 158 F. (2d) 74. *Sweets Company of America, Inc. v. Federal Trade Commission* (C. C. A., 2nd Circuit, January 29, 1940) 109 F. (2d) 296. *Federal Trade Commission v. Winsted Hosiery Co.* (Supreme Court, April 24, 1922) 258 U. S. 483, 42 S. Ct. 184, 66 L. Ed. 729.

Complaint

46 F. T. C.

IN THE MATTER OF

BENJAMIN HOLIN AND HARRY RICHTER TRADING AS
BOND TRADING COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 5535. Complaint, Apr. 7, 1948—Decision, Mar. 14, 1950*

Where an individual engaged in purchasing old, soiled, worn, or previously used hat bodies which had been cleaned and dyed, and were thereafter converted into finished hats, some of which had the appearance of new—

Offered and sold said products in interstate commerce without any label, marking, or designation to indicate that they were reconditioned or second-hand hats;

With the result that a substantial portion of the purchasing public was led to believe that said hats were in fact new products, made entirely from new materials, and purchased substantial quantities; and that there was placed in the hands of purchasers for resale a means of misleading the public in regard thereto:

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

In said proceeding against the two respondent partners, in which it developed that over a year prior to the complaint one partner severed his connection with the partnership, and did not thereafter engage as partner in any of the alleged acts or practices, and in which it further appeared that the record contained no evidence concerning the extent to which he had participated in the affairs of the partnership or engaged in the acts or practices charged, and that he filed no answer and was not represented at the hearing in person or by counsel: the Commission was of the opinion that the complaint as to him should be dismissed without prejudice.

Before *Mr. William L. Pack*, trial examiner.

Mr. DeWitt T. Puckett for the Commission.

Barshay & Frankel, of New York City, 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 Benjamin Molin and Harry Richter, individually and as copartners trading as Bond Trading Co., 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 thereof would be in the public interest, hereby