

IN THE MATTER OF
ESTHER ZITSERMAN TRADING AS J. M. HOWARD CO.

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

Docket 5737. Complaint, Jan. 25, 1950—Decision, Nov. 29, 1951

The Commission is of the opinion that the distribution in commerce of devices which aid and encourage merchandising by gambling is contrary to the interest of the public.

Merchandising by gambling should not be divided into isolated acts, which, when examined separately, might appear innocent, and in said connection both the gamblers and those who furnish them with the instrumentalities by means of which merchandising by gambling is conducted, are engaged in practices contrary to public policy.

Where an individual engaged in the manufacture and interstate sale and distribution of push cards and punchboards which, bearing appropriate explanatory legends and depictions (or space therefor), were designed for use by retailers in the sale and distribution of merchandise to the public by means of a game of chance, under plans whereby the purchasers of a punch or push who by chance selected concealed winning numbers became entitled to designated articles of merchandise without additional cost, at prices which were much less than their normal retail prices, others receiving nothing for their money other than the privilege of a push or punch—

Sold and distributed such devices to dealers in candy, cigarettes, pipes, clocks, razors, cosmetics and other articles, assortments of which, along with said devices, were made up by said dealers and exposed and sold by the retailer purchasers to the purchasing public wholly by lot or chance in accordance with the aforesaid plan; and thereby supplied to and placed in the hands of retailers the means of conducting lotteries or games of chance in the sale and distribution of merchandise to the general public, and knowingly and purposely assisted and participated in the violation of an established public policy of the United States Government;

With the result that gambling among members of the public was taught and encouraged, to its injury, and said individual thus polluted the stream of interstate commerce by supplying to and placing in the hands of others instrumentalities for engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act:

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

As respects respondent's appeal from the hearing examiner's initial decision in the instant matter on the ground that the proceeding was not in the interest of the public, since prohibiting respondent from selling lottery devices in commerce would not eliminate the unfair practice, which was the distribu-

tion of merchandise by lottery: the hearing examiner correctly concluded that respondent's acts and practices were to the injury of the public.

With regard to said appeal and the second ground relied upon in support thereof, namely, that respondent did not receive a fair hearing as the hearing examiner arbitrarily refused to consider evidence to the effect that competition was not affected by the sale of punchboards in commerce, that use thereof in the sale or merchandise did not divert trade, and that consequently their use did not constitute an unfair method of competition:

The hearing examiner ruled correctly in rejecting such evidence as immaterial to the issues in the matter, in view of the fact that the complaint did not allege that respondent's practices constituted an unfair method of competition, but alleged that her practice of supplying to others the means of conducting lotteries in the sale or distribution of merchandise was in and of itself an unfair act and practice, so that the effect thereof upon competing sellers of merchandise was immaterial.

Before *Mr. Frank Hier*, trial examiner.

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

Mr. J. R. Mulliner, of Salt Lake City, Utah, and *Mr. F. W. James*, of Evanston, 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 Esther Zitserman, individually and trading as J. M. Howard Co., hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in regard thereto would be in the public interest, hereby issues this complaint by stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Esther Zitserman, is an individual trading and doing business as J. M. Howard Co. with her office and principal place of business located at 117 Sylvan Avenue in the city of Newark, New Jersey.

Respondent is now and has been for more than three years last past engaged in the sale and distribution of devices commonly known as push cards and punchboards and in the sale and distribution of said devices to dealers in various articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia and to dealers in various articles of merchandise in the various States of the United States and in the District of Columbia.

Respondent causes and has caused said devices when sold to be transported from her place of business in the State of New Jersey to pur-

chasers thereof at their points of location in the various States of the United States, and in the District of Columbia. There is now and has been for more than three years last past a course of trade in such devices by said respondent 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 her said business as described in Paragraph One hereof, respondent sells and distributes, and has sold and distributed, to said dealers in merchandise, push cards and punchboards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in making sales of merchandise to the consuming public. Respondent sells and distributes, and has sold and distributed many kinds of push cards and punchboards, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of merchandise and vary only in detail.

Many of said push cards and punchboards have printed on the faces thereof certain legends or instructions that explain the manner in which said devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. The prices of the sales on said push cards and punchboards vary in accordance with the individual device. Each purchaser is entitled to one push or punch from the push card or punchboard, and when a push or punch is made, a disc or printed slip is separated from the push card or punchboard and a number is disclosed. The numbers are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise. Persons securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of said push card and punchboard devices have no instructions or legends thereon but have blank spaces provided therefor. On those push cards and punchboards the purchasers thereof place instructions or legends which have the same import and meaning as the instructions or legends placed by the respondent on said push card and punchboard devices first hereinabove described. The only use to be made of said push card and punchboard devices, and the only

manner in which they are used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable said ultimate purchasers to sell or distribute said other merchandise by means of lot or chance as hereinabove alleged.

PAR. 3. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, purchase and have purchased respondent's said push card and punchboard devices, and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise together with said push cards and punchboard devices. Retail dealers who have purchased said assortments either directly or indirectly have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said push cards and punchboards in accordance with the sales plan as described in Paragraph Two hereof. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said push cards and punchboards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof, many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute said merchandise together with said devices.

PAR. 4. The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above alleged, involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof and teaches and encourages gambling among members of the public, all to the injury of the public. The use of said sales plan or methods in the sale of merchandise and the sale of merchandise by and through the use thereof, and by the aid of said sales plan or method is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws, and constitutes unfair acts and practices in said commerce.

The sale or distribution of said push cards and punchboard devices by respondent as hereinabove alleged supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprise in the sale or distribution of their merchandise. The respondent thus supplies to, and places in the hands of, said persons, firms and corporations the means of, and instrumentalities for, en-

gaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

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

ORDERS AND DECISION OF THE COMMISSION

Order denying respondent's appeal from initial decision of the hearing examiner and decision of the Commission and order to file report of compliance, Docket 5737, November 29, 1951, follows:

This matter came on to be heard by the Commission upon the respondent's appeal from the hearing examiner's initial decision herein and the brief in opposition thereto filed by counsel in support of the complaint.

The grounds relied upon in support of said appeal are (1) that this proceeding is not in the interest of the public, as prohibiting respondent from selling lottery devices in commerce will not eliminate the unfair practice which is the distributing of merchandise by lottery, and (2) that respondent did not receive a fair hearing as the hearing examiner arbitrarily refused to consider certain evidence.

The Commission is of the opinion that the distribution in commerce of devices which aid and encourage merchandising by gambling is contrary to the interest of the public. Merchandising by gambling should not be divided into isolated acts, which when examined separately may appear innocent. The gamblers and those who furnish them with the instrumentalities by means of which merchandising by gambling is conducted are both engaged in practices contrary to public policy. The hearing examiner, therefore, correctly concluded that respondent's acts and practices were to the injury of the public.

Respondent's contention that she did not receive a fair hearing relates to the ruling of the hearing examiner striking from the record the testimony of witness W. J. Jennings and his refusal to receive the testimony of certain other witnesses, all of which testimony being to the effect that competition is not affected by the sale of punchboards in commerce, that the use of punchboards in the sale of merchandise does not divert trade and that consequently their use does not constitute an unfair method of competition. Inasmuch as the complaint herein does not allege that respondent's practice constitutes an unfair method of competition but alleges that respondent's practice of supplying to others the means of conducting lotteries in the sale or dis-

tribution of merchandise is in and of itself an unfair act and practice, the effect of the said practice upon competing sellers of merchandise is immaterial. The hearing examiner, therefore, ruled correctly in rejecting this evidence as being immaterial to the issues in this matter.

The Commission, therefore, being of the opinion that the respondent's appeal is without merit and that the hearing examiner's initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered, That the respondent's appeal from the hearing examiner's initial decision be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner shall on the 29th day of November 1951, become the decision of the Commission.

It is further ordered, That the respondent Esther Zitserman shall, within sixty (60) days after service upon her of this order, file with the Commission a report in writing setting forth in detail the manner and form in which she has complied with the order to cease and desist.

Commissioner Mason concurring in this decision insofar as it relates to the findings as to the facts and conclusion, but not concurring in this decision insofar as it relates to the form of order to cease and desist, for the reasons stated in his opinion concurring in part and dissenting in part in Docket No. 5203, Worthmore Sales Company.

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

INITIAL DECISION BY FRANK HIER, TRIAL EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on January 25, 1950, issued and subsequently served its complaint in this proceeding upon respondent Esther Zitserman, charging her with the use of unfair acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondent's answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named trial examiner theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said trial examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel; and said trial examiner, having duly considered the record herein, finds that this proceeding is in the interest of the

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public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Esther Zitserman is an individual trading and doing business as J. M. Howard Co., with her office and principal place of business located, since 1940, at 117 Sylvan Avenue, Newark, New Jersey. Prior to 1940, she was located in Philadelphia, Pennsylvania.

Respondent is now and has been for many years engaged in the manufacture, sale and distribution of devices commonly known as push cards and punchboards to dealers in various articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia and to dealers in various articles of merchandise in the various States of the United States and in the District of Columbia.

PAR. 2. Respondent causes and has caused said devices, when sold, to be transported from her place of business in the State of New Jersey to purchasers thereof at their places of business located in the various States of the United States and in the District of Columbia. There is and has been for many years a constant course of trade in such devices by said respondent 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 her business, as hereinabove described, respondent sells and distributes and has sold and distributed to said dealers in various merchandise, push cards and punchboards designed, prepared and arranged for use by retailers in the sale and distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme. Respondent sells and distributes and has sold and distributed many kinds of push cards and punchboards, which vary in detail but all involve the same principle of merchandise distribution by chance or lottery.

Some of said push cards and punchboards have printed on the faces thereof, legends or instructions which explain the manner in which said devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. The prices of the sales on these push cards and punchboards vary with the individual device. Each purchaser is entitled to one punch or push from the push card or punchboard, and when a push or punch is made, a disc or printed slip is separated from the push card or punchboard and a number is disclosed. The number is effectively concealed from the purchaser or

prospective purchaser until a selection has been made, the price of the punch paid and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise. Purchasers securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Purchasers who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the public wholly by lot or chance.

Some of these push cards and punchboards bear picturizations of various articles of merchandise, such as candy, cigarettes, pipes, etc. Others have no pictures, legends or instructions but have blank spaces provided for the insertion thereon by the purchaser of the device of his own instructions and a statement of the merchandise to be awarded by chance as prizes. The only use to be made of any of these push card and punchboard devices and the only manner in which they are used, by the ultimate purchasers thereof, is for the distribution of merchandise, such as candy, cigarettes, pipes, etc., by means of lot or chance, as hereinabove described.

PAR. 4. Persons, firms and corporations who sell and distribute and have sold and distributed candy, cigarettes, pipes, clocks, razors, cosmetics and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia purchase and have purchased respondent's push card and punchboard devices, and pack and assemble and have packed and assembled assortments composed of various articles of merchandise, together with said push card and punchboard devices and have sold such combinations in commerce to retailers. Retail dealers who have purchased said assortments or combinations, either directly or indirectly, have exposed the same to the purchasing public and have sold or distributed the merchandise so assembled and combined as outlined hereinabove in Paragraph Three.

PAR. 5. Respondent thus supplies to and places in the hands of retail dealers, through the channels of interstate commerce, either directly or indirectly, the means of conducting lotteries or games of chance in the sale and distribution of merchandise to the general public and teaches and encourages gambling among members of the public to its injury. The sale of merchandise by and through such means and methods is a practice which is in contravention of an established public policy of the Government of the United States and respondent, through the supplying of such means, knowingly and pur-

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posely assists and participates in the violation of such policy. Respondent thus pollutes the stream of interstate commerce by supplying to and placing in the hands of other persons, firms and corporations the means of and the instrumentalities for engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

CONCLUSION

The aforesaid acts and practices of respondent, as hereinabove described, are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Esther Zitserman, individually, and trading as J. M. Howard Co., or under any other name, her 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, punchboards, push cards, or other lottery devices which are to be used, or which may be used, in the sale and distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

ORDER TO FILE REPORT OF COMPLIANCE

It is further ordered, That the respondent Esther Zitserman shall, within sixty (60) days after service upon her of this order, file with the Commission a report in writing setting forth in detail the manner and form in which she has complied with the order to cease and desist [as required by aforesaid orders and decision of the Commission].

Syllabus

IN THE MATTER OF
NEO-MINERAL COMPANY, INC. ET AL.

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

Docket 5711. Complaint, Nov. 17, 1949—Decision, Dec. 1, 1951

Where a corporation and three officers thereof, engaged in the interstate sale and distribution of their "Neo-Mineral" preparation; through statements in advertisements disseminated through the mails—

- (a) Falsely represented that their said product was a competent and effective treatment for and would cure stomach and kidney ailments, bloating, constipation, and bowel adhesions, rheumatism, arthritis, and other conditions; would relieve the pain of rheumatism or arthritis; would cure headaches, nervousness and dizzy spells; restore vitality, energy and weakened sexual powers; improve the appetite and increase the weight of the user; enrich the blood, and correct tiredness, poor appetite and lack of ambition to work or play; and restore sparkle in the eye and mental brilliance, and correct and cure similar symptoms and conditions;
- (b) Falsely represented that it contained no drugs and restored health without use thereof, that it contained the same minerals in therapeutic amounts as were found in the mineral waters of the best mineral springs, and that its use would produce the benefits ordinarily ascribed to the use of such mineral waters;
- (c) Falsely represented that it kept the colon free from waste matter, and that the black stools and evidence of impurities in the urine following its use demonstrated these results;

The facts being that such stools and impurities in the urine were due to chemical reaction of the iron compounds in the preparation with sulphur compounds in the fecal matter and had no therapeutic significance; and

- (d) Represented that 68% of all persons over 35 suffered from nutritional mineral-iron anemia, and that when a person was nervous, dull, tired, lazy, had headaches and dizzy spells, had a poor appetite and was underweight, where the eyes lacked sparkle and the mind brilliance, such or similar conditions indicated a lack of minerals in the blood, and the use of said preparation would correct them and restore health;

The facts being there are no reliable medical statistics showing that 68% or any other percent of persons over 35 suffer from nutritional mineral-iron anemia, and the preparation would not accomplish the results claimed;

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

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

As regards the corporation laws of the state of Michigan, under which the corporate respondent was brought into being, the examiner in the proceeding took official notice of certain provisions in connection with the filing of a