

Syllabus

IN THE MATTER OF
CONTAINER MANUFACTURING COMPANY ET AL.

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

Docket 5560. Complaint, May 24, 1948—Decision, Jan. 29, 1952

Where, as under the circumstances of the instant case, respondents were given ample opportunity to make an offer of proof by the hearing examiner and declined to do so, they estopped themselves from later urging, on appeal from the initial decision of the trial examiner, that such proof was available.

A contention, in a proceeding involving the sale in interstate commerce of lottery devices designed and used for the distribution of merchandise by gambling, in which the practices were challenged as unfair or deceptive, that, assuming that the acts were "unfair", the allegations of the complaint had not been sustained as there was no evidence of injury to the public, is without merit, since the Commission and the courts have clearly held in other cases that the sale in interstate commerce of such devices is to the injury of the public and an unfair act and practice in violation of the Federal Trade Commission Act, and proof of further specific injury to the public is unnecessary.

The Commission has jurisdiction over unfair practices in merchandising in interstate commerce, and the courts have repeatedly held that merchandising by gambling in interstate commerce and also the sale in commerce of devices designed and intended to encourage merchandising by gambling are unfair practices in violation of the Act, and a contention that the Commission by prohibiting the sale in commerce of such devices is attempting to police public morals and regulate gambling, and has exceeded its jurisdiction, is without merit.

The Commission takes judicial notice of many decisions of the Federal courts to the effect that merchandising by gambling is contrary to the public policy of the Government of the United States; and in a proceeding in which the Commission challenged the sale in interstate commerce of lottery devices designed and intended for use in merchandising through gambling, and in which it appeared that by the design of certain of respondent punchboards they encouraged and instructed purchasers in a method of merchandising by gambling, a finding that "the use of respondents' 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 such sales plan or method" was "a practice contrary to an established public policy of the Government of the United States and in violation of the criminal laws", and constituted "unfair acts and practices in commerce," was correct and fully supported by the facts of record.

Where a corporation and its president, engaged in the manufacture and interstate sale and distribution of push cards and punch boards—which, bearing explanatory legends of space therefor, were designed for use in the sale of merchandise to the consuming public through means of a game of chance,

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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 much less than their normal retail price, others receiving nothing for their money other than the privilege of a push or punch—

Sold and distributed such devices to manufacturers of and dealers in merchandise, including candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles, assortments of which, along with said devices, made up by the dealers, were exposed and sold by their direct or indirect retailer purchasers to the purchasing public in accordance with the aforesaid sales plan; and thereby supplied to and placed in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale and distribution of their merchandise, contrary to an established public policy of the United States Government and in violation of criminal laws; and means and instrumentalities for engaging in unfair acts and practices;

With the result that many members of the public were induced, because of the element of chance involved, to trade or deal with retailers who thus sold or distributed their merchandise; and many retailers were induced to deal or trade with manufacturers, wholesalers and jobbers who sold and distributed such assortments:

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.

In said proceeding, in which, after respondents had called witnesses to testify that the use of punch boards in the sale of merchandise did not divert trade and that distribution of merchandise by gambling through the use of punch boards did not constitute the sale of merchandise, respondents requested further hearings at various places throughout the United States for the presentation of evidence of a similar nature and other evidence, and the hearing examiner, stating that additional evidence of a similar nature would be of no value in determining the issues, requested respondents' counsel to indicate what other line of evidence he proposed to present so as to enable the examiner to determine whether it would be material to the issues, and said examiner, upon counsel's refusal so to indicate, denied respondents' request for additional hearings, respondents later contending that, had they been afforded the opportunity, they would have proven certain additional facts, some of which would have constituted proper evidence:

The Commission was of the opinion that under the conditions the hearing examiner's request that he be informed of the line of testimony to be developed at the requested additional hearings was eminently proper to insure a prompt and proper disposition of the matter, and that respondents, having refused to indicate to him any proper line of evidence to be presented at the requested hearings, could not later, as on said appeal, be heard to say that, if permitted, they would have presented evidence as to specific material facts, since they had, by their prior refusal, estopped themselves from then urging that said proof was available.

Merchandising by gambling should not be divided into isolated acts which appear innocent when examined separately, but the unfair practice should be viewed as a whole, and in the above proceeding the record showed that respondents sold in interstate commerce lottery devices intended and designed for use in merchandising by gambling, as shown on their fact, and that they were so used by certain of their purchasers.

Before *Mr. W. W. Sheppard*, *Mr. Abner E. Lipscomb* and *Mr. Everett F. Haycraft*, trial examiners.

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

Mr. James A. Murray, of Washington, D. C., and *Glassgold & Blumenthal*, 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 Container Manufacturing Company, a corporation, and Max Sax, Jack B. Schiff, and William Stone, individuals and officers of said Container Manufacturing Company, hereinafter referred to as respondents, have 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 its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Container Manufacturing Company, is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 1825 Chouteau Avenue, in the city of St. Louis, Missouri. Respondent Max Sax is president, respondent Jack B. Schiff is secretary-treasurer and respondent William Stone is vice president of respondent corporation, Container Manufacturing Company, and said corporation is owned, dominated, controlled, and directed by the individual respondents, Max Sax, Jack B. Schiff, and William Stone. All of said respondents have cooperated and acted together in the performance of the acts and practices hereinafter alleged.

Respondents are now and for more than three years last past have been engaged in the manufacture of devices commonly known as push cards and punch boards, and in the sale and distribution of said devices to manufacturers of and 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 located in the various States of the United States, and in the District of Columbia.

Respondents cause and have caused said devices when sold, to be transported from their place of business in the State of Missouri to purchasers thereof at their points of location in the various States of the United States other than Missouri, 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 respondents 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 their said business as described in paragraph one hereon, respondents sell and distribute, and have sold and distributed, to said manufacturers of and 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. Respondents sell and distribute, and have 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 respondents on said push card and punch board 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 respondents' 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 and 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 respondents 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 respondents thus supply to, and place in the hands of, said persons, firms, and corporations the means of, and instrumentalities for, engaging unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

PAR. 5. The aforesaid acts and practices of respondents 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 respondents' appeal from initial decision of the hearing examiner, decision of the Commission and order to file report of compliance, Docket 5560, January 29, 1952, follows:

This matter came on to be heard upon the appeal of respondents Container Manufacturing Company, Max Sax and William Stone from the hearing examiner's initial decision herein and upon briefs in support of and in opposition to said appeal. The Commission being of the opinion that the hearing examiner correctly dismissed the allegations of the complaint as to respondent Jack B. Schiff, and no appeal having been taken from this ruling, he will not be included in the term "respondents" as used hereinafter.

The grounds relied upon in support of this appeal are (1) the hearing examiner erred in refusing to allow respondents to adduce additional testimony, (2) the Commission did not prove any injury to the public, (3) the Commission is attempting to indirectly police public morals and regulate gambling, and (4) the hearing examiner's findings are not supported by the evidence. Specific exception was taken to Paragraphs One, Four and Five of the findings as to the facts and to the conclusion and order contained in the initial decision.

The record shows that respondent corporation manufactures and sells in interstate commerce punchboards and other lottery devices; that certain of these punchboards are sold with labels attached which provide instructions for use in connection with the distribution of merchandise by gambling; that others are sold in blank, both with and without separate labels containing similar instructions; that certain of these boards are purchased by wholesalers and jobbers who resell them to retailers, both alone and together with assortments of merchandise which the boards are designed and labeled to distribute; and that certain of these retailers in turn sell chances on these boards to the public and distribute the said merchandise to those persons making the winning punches in accordance with the instructions on the punchboards. Max Sax is the president and William Stone is the vice-president of the respondent corporation, both of whom are active in its management and in the direction of its policies.

In their defense respondents called witnesses who testified to the effect that the use of punchboards in the sale of merchandise does not divert trade and that distribution of merchandise by gambling through the use of punchboards does not constitute the sale of merchandise.

Respondents requested further hearings at various places throughout the United States for the presentation of evidence of a similar nature and other evidence. The hearing examiner stated that additional evidence of a similar nature to that already presented would be of no value in determining the issues, and requested respondents' counsel to indicate what other line of evidence he proposed to present, so as to enable the hearing examiner to determine whether it would be material to the issues. Upon the refusal of respondents' counsel to indicate what other type of evidence he intended to offer, the hearing examiner denied respondents' request for additional hearings. Respondents now state in their appeal brief that if they had been afforded the opportunity, they would have proved certain additional facts, some of which would have constituted proper evidence.

Upon this record the Commission is of the opinion that the hearing examiner's ruling refusing to set additional hearings was correct. Under the conditions, the hearing examiner's request that he be informed of the line of testimony to be developed at the requested additional hearings was eminently proper to insure a prompt and proper disposition of this matter. Respondents, having refused to indicate to the hearing examiner any proper line of evidence to be presented at the requested hearings, cannot now be heard to say that, if permitted, they would have presented evidence as to specific material facts. Respondents were given an ample opportunity to make an offer of proof by the hearing examiner. By their refusal to do so they have estopped themselves from now urging that such proof was available.

The respondents contend that, assuming their acts were "unfair," the allegations of the complaint have not been sustained, as there is no evidence of injury to the public. This argument is of no merit. The Commission and the courts have clearly held in other cases that the sale in interstate commerce of lottery devices designed and used for the distribution of merchandise by gambling is to the injury of the public and an unfair act and practice in violation of the Federal Trade Commission Act. Proof of further specific injury to the public is unnecessary.

Respondents further contend that by prohibiting the sale in interstate commerce of lottery devices for use in the distribution of merchandise, the Commission is attempting to police public morals and has exceeded its jurisdiction. The Commission has jurisdiction over unfair practices in merchandising in interstate commerce. The courts have repeatedly held that merchandising by gambling in interstate commerce is an unfair practice in violation of the Federal Trade Commission Act, and they have further held that the sale in interstate commerce of devices designed and intended to encourage merchandising

by gambling is in violation of that Act. Merchandising by gambling should not be divided into insulated acts, which appear innocent when examined separately. The unfair practice should be viewed as a whole. The record shows that respondents sold in interstate commerce lottery devices which showed on their face that they were intended and designed for use in merchandising by gambling, and the record further shows they were so used by certain of their purchasers. The contention that this practice does not come within the jurisdiction of the Commission is of no merit.

Respondents have taken specific exception to the following finding of the hearing examiner as not being supported by the record:

The use of respondents' 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 such sales plan or method, is a practice 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 commerce.

The record shows that by the design of certain of respondents' punchboards they encouraged and instructed the purchasers thereof in a method of merchandising by gambling. The Commission takes judicial notice of the many decisions of the Federal courts that merchandising by gambling is contrary to the public policy of the Government of the United States. This finding is thus correct and fully supported by the facts of record.

The Commission is of the opinion that all of the findings as to the facts contained in the initial decision are supported by the substantial probative evidence of record, that the conclusion contained therein is correct and that the order to cease and desist is proper upon this record and is required to provide proper relief from respondent's illegal practice.

The Commission, therefor, being of the opinion that the respondents' 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 respondents' 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 January 1952, become the decision of the Commission.

It is further ordered, That respondents Container Manufacturing Company, a corporation, and Max Sax and William Stone, individuals, shall, within sixty (60) 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 the order to cease

and desist contained in the said initial decision, a copy of which is attached hereto.

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.¹

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

INITIAL DECISION BY ABNER E. LIPSCOMB, TRIAL EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 24, 1948, issued and subsequently served its complaint in this proceeding upon respondents, Container Manufacturing Company, a corporation, and Max Sax, Jack B. Schiff, and William Stone, individuals and officers of respondent Container Manufacturing Company, charging them with the use of unfair or deceptive acts or practices in commerce in violation of the provisions of said Act. After the issuance of such complaint and the filing of respondents' 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 supporting the complaint, counsel for the respondents not having submitted proposed findings and oral argument before the trial examiner not having been requested. The said trial examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Container Manufacturing Company, is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 1825 Chouteau Avenue, in the city of St. Louis,

¹ March 10, 1950. See 46 F. T. C. 606 at 622.

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Missouri. Respondent Max Sax is president and respondent William Stone is vice president of respondent corporation, Container Manufacturing Company, and said corporation is owned, dominated, controlled and directed by the individual respondents, Max Sax and William Stone. All of said respondents have cooperated and acted together in the performance of the acts and practices hereinafter found.

The allegations of the complaint are not sustained as to respondent Jack B. Schiff.

PAR. 2. Respondents are now and for more than three years last past have been engaged in the manufacture of devices commonly known as push cards and punchboards, and in the sale and distribution of said devices to manufacturers of and 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 located in the various States of the United States, and in the District of Columbia.

PAR. 3. Respondents cause and have caused said devices, when sold, to be transported from their place of business in the State of Missouri to purchasers thereof at their points of location in the various States of the United States, other than Missouri, 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 respondents in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their said business as heretofore found respondents sell and distribute, and have sold and distributed, to manufacturers of and dealers in merchandise, push cards and punchboards so prepared and arranged as to provide for the use of games of chance, gift enterprises or lottery schemes in making sales of merchandise to the consuming public. Respondents sell and distribute, and have sold and distributed many kinds of push cards and punchboards, but all such 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 such push cards and punchboards vary in accordance with the individual device. Each purchaser is entitled to one push 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 numbers are effectively concealed from the purchaser or prospective purchaser 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 the card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of respondents' 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 respondents on the push card and punchboard devices first hereinabove described.

The primary use made of respondents' push card and punchboard devices and the usual manner in which they are used by the ultimate purchasers thereof is in combination with merchandise, to enable such ultimate purchasers of such push card and punchboard devices to sell or distribute merchandise by means of lot or chance as hereinabove found.

PAR. 5. 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 respondents' 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, and have sold said assortments to retail dealers and others for resale to the public.

Retail dealers who have purchased such assortments either directly or indirectly have exposed them to the purchasing public and have sold or distributed articles of merchandise by means of respondents' push cards and punchboards in accordance with the sales plan as heretofore described.

Because of the element of chance involved in connection with the sale and distribution of merchandise by means of respondents' push cards and punchboards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing merchandise by means thereof. As a result thereof, many retail deal-

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ers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute assortments comprised of merchandise together with such devices.

The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above found 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 respondents' 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 such sales plan or method, is a practice 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 commerce.

The sale or distribution of push cards and punchboard devices by respondents as hereinabove found supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise.

The respondents thus supply to, and place in the hands of, various 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 acts and practices of respondents as hereinabove found 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 respondents Container Manufacturing Company, a corporation, and Max Sax and William Stone, individuals and officers of said corporate respondent, Container Manufacturing Company, their representatives, agents 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, push cards, punchboards, or other lottery devices which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

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Order

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to respondent Jack B. Schiff, as an individual and as an officer of respondent Container Manufacturing Company, a corporation.

ORDER TO FILE REPORT OF COMPLIANCE

It is further ordered, That respondents Container Manufacturing Company, a corporation, and Max Sax and William Stone, individuals, shall, within sixty (60) 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 the order to cease and desist contained in the said initial decision, a copy of which is attached hereto [as required by aforesaid orders and decisions of the Commission].

IN THE MATTER OF
SUPERIOR PRODUCTS ET AL.

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

Docket 5561. Complaint, May 24, 1948—Decision, Jan. 29, 1952

Where a corporation and its president, engaged in the manufacture and interstate sale and distribution of push cards and punchboards—which, bearing explanatory legends or space therefor, were designed for use in the sale of merchandise to the consuming public 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 much less than their normal retail price, others receiving nothing more for their money than the push or punch—

Sold and distributed such devices to manufacturers of and dealers in candy, cigarettes, clocks, razors, cosmetics, clothing and other articles, assortments of which, made up with said devices by dealers, were exposed and sold by their direct or indirect retailer purchasers to the purchasing public in accordance with the aforesaid sales plan; and thereby supplied to and placed in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the sale and distribution of their merchandise, contrary to an established public policy of the United States Government and in violation of criminal laws; and supplied means and instrumentalities for engaging in unfair acts and practices;

With the result that many members of the public were induced, by the element of chance involved, to deal with retailers who thus sold or distributed their merchandise; many retailers were thereby induced to deal or trade with suppliers of such assortments; and gambling among members of the public was taught and encouraged, to its injury:

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.

Before *Mr. W. W. Sheppard*, *Mr. Abner E. Lipscomb* and *Mr. Everett F. Haycraft*, trial examiners.

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

Mr. James A. Murray, of Washington, D. C., and *Glassgold & Blumenthal*, 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 Superior Products, a corporation, and M. Robert Sax, Allen J. Sucherman, and Jack

Morley, officers and directors of Superior Products, 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 issues its complaint and states its charges in that respect as follows:

PARAGRAPH 1. Respondent, Superior Products, is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 2133 West Fulton Street, in the city of Chicago, Illinois. Respondent M. Robert Sax is president; respondent Allen J. Sucherman is secretary; and respondent Jack Morley is an officer and active in the management of respondent corporation, Superior Products, and said corporation is owned, dominated, controlled, and directed by the individual respondents, M. Robert Sax, Allen J. Sucherman, and Jack Morley. All of said respondents cooperated and acted together in the performance of the acts and practices hereinafter alleged.

Respondents are now and for more than three years last past have been engaged in the manufacture of devices commonly known as push cards and punchboards, and in the sale and distribution of said devices to manufacturers of, and 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 located within the several States of the United States, and in the District of Columbia.

Respondents cause and have caused said devices when sold to be transported from their place of business in the State of Illinois to purchasers thereof at their points of location in the various States of the United States other than Illinois, 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 respondents 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 their said business as described in Paragraph One hereof, respondents sell and distribute, and have sold and distributed, to said manufacturers of and 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. Respondents sell and distribute, and have 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 respondents 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 respondents' 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 card 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 method 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 respondents 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 respondents thus supply to, and place in the hands of, said persons, firms and corporations the means of, and instrumentalities for, engaging unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

PAR. 5. The aforesaid acts and practices of respondents 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.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on May 24, 1948, issued and subsequently serviced its complaint in this proceeding upon respondents, Superior Products, a corporation, and M. Robert Sax, Allen J. Sucherman, and Jack Morley, individuals and officers of Superior Products, the corporate respondent herein, charging them with the use of unfair acts or practices in commerce in violation of the provisions of said Act. After the issuance of such complaint and the filing of respond-

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ents' 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 a hearing 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 hearing examiner on the complaint, the answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusion presented by counsel supporting the complaint (counsel for the respondents not having submitted proposed findings); and said hearing examiner, on July 11, 1951, filed his initial decision.

Within the time permitted by the Commission's Rules of Practice, respondents filed with the Commission an appeal from said initial decision, and thereafter this proceeding regularly came on for final consideration by the Commission upon the record herein, including briefs in support of and in opposition to the appeal; and the Commission, having issued its order granting said appeal in part and denying it in part, 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, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Superior Products is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 2133 West Fulton Street, in the city of Chicago, Illinois. Respondent M. Robert Sax is the president of respondent corporation, Superior Products, and is active in its management and the direction of its policies.

The allegations of the complaint have not been sustained as to respondents Allen J. Sucherman and Jack Morley, and said individuals are, therefore, not included in the term "respondents" as used hereinafter.

PAR. 2. Respondents are now and for more than three years last past have been engaged in the manufacture of devices commonly known as push cards and punchboards, and in the sale and distribution of said devices to manufacturers of and 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 located in the various States of the United States, and in the District of Columbia.

PAR. 3. Respondents cause and have caused said devices, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof at their points of location in the various States of the United States, other than Illinois, 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 respondents in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their said business as heretofore found, respondents sell and distribute, and have sold and distributed, to manufacturers of and dealers in merchandise, push cards and punchboards so prepared and arranged as to provide for the use of games of chance, gift enterprises, or lottery schemes in making sales of merchandise to the consuming public. Respondents sell and distribute, and have sold and distributed, many kinds of push cards and punchboards, but all of such 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 such 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 purchaser or prospective purchaser 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 the card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of respondents' 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 respondents on the push card and punchboard devices first hereinabove described.

The primary use made by respondents' push card and punchboard devices and the usual manner in which they are used by the ultimate purchasers thereof is in combination with merchandise, to enable such ultimate purchasers of such push card and punchboard devices to sell or distribute merchandise by means of lot or chance as hereinabove found.

PAR. 5. 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 respondents' 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, and have sold said assortments to retail dealers and others for resale to the public.

Retail dealers who have purchased such assortments, either directly or indirectly, have exposed them to the purchasing public and have sold or distributed articles of merchandise by means of respondents' push cards and punchboards in accordance with the sales plan as heretofore described.

Because of the element of chance involved in connection with the sale and distribution of merchandise by means of respondents' push cards and punchboards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing 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 assortments comprised of merchandise together with such devices.

The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above found 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 respondents' 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 such sales plan or method, is a practice 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 commerce.

The sale or distribution of push cards and punchboard devices by respondents as hereinabove found supplies to and places in the hands

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of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise.

The respondents thus supply to, and place in the hands of, various 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 acts and practices of respondents as hereinabove found 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 respondents Superior Products, a corporation, its officers, and M. Robert Sax, an individual, and their representatives, agents 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, push cards, punchboards, or other lottery devices which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to the individual respondents Allen J. Sucherman and Jack Morley.

It is further ordered, That respondents, Superior Products, a corporation, and M. Robert Sax, an individual, shall, within sixty (60) 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 said order.

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.¹

¹ March 10, 1950. See 46 F. T. C. 606 at 622.

Complaint

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IN THE MATTER OF

ALBERT A. SCHWARTZ TRADING AS ELECTRICAL
CENTER

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

Docket 5934. Complaint, Oct. 30, 1951—Decision, Jan. 29, 1952

Where an individual engaged in the District of Columbia in the competitive sale and distribution of television sets, radios and various household appliances; through newspaper advertisements—

Represented that if a television set, radio or appliance was purchased at the regular price, another of the same kind and value might be purchased for an additional dollar, through such typical advertisements as "\$1 SALE ALL NEW 1951 MODELS TELEVISION \$1—Refrigerators \$1—WASHERS \$1 * * * ALL FOR JUST \$1 HERE'S ALL YOU DO: Buy Any Famous Make TV, Radio or Appliance . . . THEN CHOOSE Another FOR JUST \$1 MORE * * * it's so EASY! Get TWO brand new appliances for the price of one, PLUS ONE DOLLAR! * * *—That's how it works on all Famous Name appliances in the entire store * * * ";

The facts being that the article which could be purchased for the additional dollar was based upon the price of the article purchased and was of much less value and price than such article; and an explanation near the bottom of the advertisement in such comparatively small type that it did not constitute an adequate notice of the actual offer, as to articles which might actually be purchased for one dollar, was contrary to the offer contained in the main portion thereof;

With capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that such representations were true and thereby induce its purchase of said products; and with the result that trade in commerce was unfairly diverted to said individual from his competitors, to their substantial injury;

Held, That such acts and practices, under the circumstances set forth, constituted unfair and deceptive acts and practices in commerce, and unfair methods of competition therein.

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

Mr. Jesse D. Kash for the Commission.

Mr. Sylvan Schwartz, of Washington, D. C., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal