

IN THE MATTER OF
SAMUEL COHEN AND IRWIN H. FISHER TRADING AS
MONROE SALES COMPANY

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

Docket 5782. Complaint, May 31, 1950—Decision, Mar. 10, 1952

Where two partners engaged in the interstate sale and distribution of watches, novelties and other articles, some at wholesale but by far the greater portion direct to members of the public, through traveling salesmen, mailed circulars, and recommendations of customers—

Sold much of their merchandise in the form of such typical assortments as two watches, two cigarette case and compact sets, together with a recording card and punchboard, for use in the resale and distribution of said products by the assortment's purchaser under a plan whereby the person who punched by chance the number corresponding to that of the "star punch", received a watch, those who punched two specified numbers received the compact and cigarette case sets, price of the particular punch was determined by chance, those who did not punch a lucky number received nothing further, and the operator-purchaser remitted the proceeds in payment for the assortment, retaining the second watch as his own prize or profit:

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

As respects contentions by way of defense that the only relation between respondents and the persons who resold their merchandise was that of seller and purchaser; that the purchaser was under no compulsion to use the punchboard and was entirely free to dispose of the merchandise as he saw fit subject to remission of the agreed purchase price; that the board, like the other articles, was sold separately as an item of merchandise;

Said position overlooked the fact that the entire merchandising plan contemplated the use of the punchboard by the purchaser of the assortment, and the resale or distribution of the assortment to the public by means of a lottery or game of chance since, aside from testimony as to actual instances in which the punchboard was so used, the nature of the transaction and the supplying by respondents of the lottery device which could serve no other purpose made such a conclusion inescapable.

In said connection the further fact that the price of the assortment included a specified amount, for punchboard and card, as contended, was immaterial, and while the fact that respondents did not sell the assortment to minors, but only to mature and responsible persons regarded by them as acceptable credit risks, was a mitigating circumstance, it did affect the legal principle involved.

As respects respondents' contention that the entire proceeding was fatally defective because the complaint did not charge, nor the evidence establish, that their merchandising plan was an unfair method of competition or that there was any injury to their competitors as a result of its use; it is no longer necessary, since the adoption of the Wheeler-Lea Amendment, to allege or

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prove in such a proceeding as the instant one, evidence of competition or any injury thereto, and the present complaint proceeded upon the theory that the practice of a seller of merchandise of placing in the hands of others lottery devices for use in the sale and distribution of such merchandise to the public, is an unfair act or practice which promotes and encourages gambling and is in contravention of public policy.

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

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

Mr. Alfred L. Bennett, Mr. Wilbur N. Baughman and Mr. James Perkins Parker, of Washington, D. C., 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 Samuel Cohen and Irwin H. Fisher, individuals and partners trading as Monroe Sales Company, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Samuel Cohen and Irwin H. Fisher are individuals and partners trading and doing business as Monroe Sales Company, with their office and principal place of business located at 32 South Street, in the city of Baltimore, Maryland. Respondents are now, and for more than one year last past have been, engaged in the sale and distribution of watches, novelties and other articles of merchandise and have caused said watches, novelties, and merchandise when sold to be transported from their place of business in the city of Baltimore, Maryland, to purchasers thereof at their respective points of location in the various States of the United States other than Maryland and in the District of Columbia. There is now and has been for more than one year last past a course of trade by respondents in such merchandise, 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 business, as described in Paragraph One hereof, respondents sell and have sold to dealers and members of the public certain assortments of merchandise so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when such merchandise is sold and distributed to the purchasing public; and have furnished various plans of merchandising which involve the operation of a game of chance, gift enterprise, or lottery scheme when said merchandise is sold

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and distributed to the purchasing and consuming public. One method or sales plan adopted and used by the respondents is substantially as follows:

Respondents advertise in certain periodicals having a general circulation in various States of the United States for salesmen and through them sell certain merchandise deals consisting of punch boards and merchandise and push cards and merchandise. Respondents also sell directly to members of the purchasing public these deals, of which a typical one is described as follows:

The punch board deal sold by respondents consists of a small punch board and two watches. Each of the punch boards contains 160 punches and a prize punch, which is not punched until all of the punches are sold. Accompanying said punch board is a list on which is to be written the name of the purchaser of each punch opposite the number which is revealed when he purchases a punch. The purchaser of the board pays the price for his punch as shown by the punch received. When all of the punches have been sold, the prize punch is punched and the winner is disclosed. The person who has purchased a punch corresponding to the number disclosed by the prize punch is awarded a watch. The punch board has on its face the following legend or instructions:

WIN A GUARANTEED
10K Gold R. G. P.
FULLY JEWELLED WATCH
(FREE) Nos. 1 to 25 (FREE)
Star Prize—Do Not Punch
Until Entire Board is Sold
Nos. 26 to 50 pay what you draw
Nos. over 50 pay only 50¢
Nos. 33 and 44 each receive
Matched Compact & Cigarette Set

and the list on which the names of purchasers are written bears the legend as follows:

NUMBER UNDER STAR PRIZE RECEIVES
GUARANTEED 10K GOLD R. G. P.
FULLY JEWELLED WATCH
Nos. 33 and 44 Each Receive
MATCHED COMPACT AND CIGARETTE CASE SET

Respondents sell their punch board deals as above described to persons located in the various States of the United States, and these customers of respondents make sale of respondents' merchandise by means of said punch boards in accordance with the above described legend or instructions, and said watches and merchandise are awarded

to the customers or purchasers from said punch board in accordance with the above described legend. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and the amount to be paid for the chance to receive said merchandise is thus determined wholly by lot or chance. The watches and other merchandise have a retail value greater than the price paid for any of the chances.

Respondents sell and distribute various other punch board and push card and merchandise deals, all of which involve the sale of said merchandise by means of said other punch board and push card deals and vary only in detail. All of said merchandise plans embody the distribution of merchandise by game of chance, gift enterprise, or lottery schemes.

PAR. 3. Retail dealers, operators and others who purchase respondents' push card and punch board and watch assortments or deals, directly or indirectly, use the said push cards or punch boards for distribution of the watches to the purchasing public in accordance with the sales plan above described. Respondents thus supply to and place in the hands of other the means of conducting lotteries or games of chance in the sale of their products in accordance with the sales plans hereinabove set forth. The use by respondents of said sales plans and methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

PAR. 4. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

The use by respondents of a sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 5. The aforesaid acts and practices of respondents are all to the prejudice and injury of the public and constitute unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated March 10, 1952, the initial decision in the instant matter of Hearing Examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 31, 1950, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair acts and practices in commerce in violation of the provisions of that Act. After the filing by respondents of their answer to the complaint, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before the above-named hearing examiner, theretofore duly designated by the Commission, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Subsequently, the proceeding regularly came on for final consideration by the hearing examiner on the complaint, answer, testimony and other evidence, and proposed findings and conclusions submitted by counsel (oral argument not having been requested, the matter having already been argued at length upon a motion to dismiss the complaint made by respondents' counsel earlier in the proceeding), and the hearing examiner, having duly considered the matter, 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. The respondents, Samuel Cohen and Irwin H. Fisher, are individuals and partners trading under the name Monroe Sales Company, with their office and principal place of business located at 32 South Street, Baltimore, Maryland. Respondents are now, and since March 1949 have been engaged in the sale and distribution of watches, novelties and other articles of merchandise, and cause and have caused their products, when sold, to be transported from their place of business in the State of Maryland to purchasers located in various other States of the United States and in the District of Columbia. Respondents maintain and have maintained a course of trade in

their merchandise in commerce between and among various States of the United States and in the District of Columbia.

PAR. 2. While respondents sell some of their merchandise at wholesale, by far the greater portion is sold direct to members of the public. These customers are obtained in various ways—through solicitation by respondents' traveling salesmen, by advertising circulars sent by respondents through the mail, and through the recommendation of persons who are themselves customers of respondents.

Much of the merchandise so sold by respondents is in the form of assortments or combinations of merchandise and certain other articles, and it is these assortments which form the subject matter of the present proceeding. One of these assortments, which is typical of the sales method used by respondents, includes two watches, two cigarette case and compact sets, and a "sales outfit" consisting of a "block" and "chart." The block is in fact a small punchboard; the chart is merely a card upon which are to be written the names of persons playing or punching the board. The purchase price of the entire assortment is \$64.50, which includes 75¢ for the punchboard and card. The assortment is shipped only upon the written order of the purchaser, and usually upon credit terms, prepayment of the purchase price not being required.

The punchboard contains 160 small holes in each of which is a number, the number being concealed from view until the punch has been made and the number separated from the board. There is also a "star" or master punch which likewise contains a concealed number. On the face of the board appears the following:

WIN A GUARANTEED
10K Gold R. G. P.
FULLY JEWELLED WATCH
(FREE) Nos. 1 to 25 (FREE)
Star Prize—Do Not Punch
Until Entire Board is Sold
Nos. 26 to 50 pay what you draw
Nos. over 50 pay only 50¢
Nos. 33 and 44 each receive
Matched Compact & Cigarette Set

At the top of the chart or card appears the following:

NUMBER UNDER STAR PRIZE RECEIVES
GUARANTEED 10K GOLD R. G. P.
FULLY JEWELLED WATCH
Nos. 33 and 44 Each Receive
MATCHED COMPACT AND CIGARETTE CASE SET

Persons purchasing the assortment from respondents sell the 160 punches on the board to other members of the public in accordance

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with the foregoing instructions, noting on the card the name of each person punching the board, together with the number punched by such person. After all 160 punches have been sold, the star or master punch is separated from the board and the person who has punched the number on the board corresponding to the number of the star punch receives the main prize, which is one of the watches. The cigarette case and compact sets are also awarded in accordance with the instructions on the board and card. Persons not punching one of the lucky numbers receive nothing for the respective amounts paid by them other than the privilege of punching or playing the board. The sale of the 160 punches nets the operator of the board \$64.50, which he remits to respondents to cover the purchase price of the assortment. The second watch is retained by the operator as his own prize or profit from the transaction. Both of the watches are of good quality, each having a retail value greatly in excess of the amount paid for any of the punches on the board.

PAR. 3. It is clear from the foregoing that the sale or distribution of the merchandise in question to the ultimate consumer or general public involves the operation of a lottery or game of chance, and that respondents supply to and place in the hands of others lottery devices for use in the sale or distribution of respondents' merchandise. In addition to the punchboard described above, respondents have also supplied to purchasers of their merchandise push cards and other punchboards, all of which devices involved the operation of games of chance in the resale of such merchandise.

CONCLUSIONS

In their defense respondents urge that there is no relation of principal and agent existing between themselves and the persons who resell their merchandise, the only relation being that of seller and purchaser; that respondents require only that the purchaser pay them the stipulated price of the merchandise, the purchaser being under no compulsion or instruction to use the punchboard at all; that the purchaser is entirely free to keep all of the merchandise for himself, sell it in regular course without the use of the punchboard, or give it away, provided he remits to respondents the agreed purchase price of the merchandise; that the punchboard is not supplied or furnished by respondents free but is sold to the purchaser as an item of merchandise just as are the other articles in the assortment; that a purchaser is not required to buy any merchandise in assortments but is free to purchase any or all of the articles separately and without the punchboard, and may also purchase the punchboard separately and without any merchandise at

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all if he wishes to do so. Respondents further point out that they do not sell these assortments to children but only to mature and responsible persons whom respondents regard as acceptable credit risks.

The weakness in respondents' position is that it overlooks the fact that the entire merchandising plan contemplates the use of the punchboard by the purchaser of the assortment, and the resale or distribution of the merchandise to the public by means of a lottery or game of chance. Actual instances are disclosed by the testimony in which the punchboard was so used by purchasers, but even if there were no testimony at all on this point the conclusion would be inescapable from the nature of the transaction and the supplying by respondents of the lottery device. The punchboard could serve no other purpose. The fact that the purchase price of the assortment includes a specified amount for the punchboard and card is immaterial. While the fact that respondents do not sell the assortments to minors is a mitigating circumstance, it does not affect the legal principle involved.

It is further and earnestly urged by respondents that this entire proceeding is fatally defective for the reason that the Commission's complaint does not charge, nor does the evidence establish, that respondents' merchandising plan is an unfair method of competition or that there is any injury to respondents' competitors as a result of the use of the plan. As the examiner understands the decisions of the courts since the adoption of the Wheeler-Lea amendment to the Federal Trade Commission Act, it is no longer necessary to allege or prove in a proceeding of this kind either the existence of competition or any injury to competition. The present complaint proceeds upon the theory that the practice of a seller of merchandise of placing in the hands of others lottery devices for use in the sale or distribution of such merchandise to the public is an unfair act or practice, unfair to the public in that it promotes and encourages gambling and is in contravention of public policy. This theory appears to find ample support in the authorities. It is therefore concluded that the absence of the element of competition constitutes no bar to the present proceeding.

It is further concluded that the acts and practices of respondents as hereinabove set out are all to the prejudice of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Samuel Cohen and Irwin H. Fisher, individually and as partners trading under the name Monroe Sales Company or under any other name, and respondents' agents,

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representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of watches, novelties or any other merchandise, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others punchboards, push cards, or other lottery devices, either with assortments of merchandise or separately, which punchboards, push cards, or other lottery devices are to be used or may be used in the sale or distribution of respondents' merchandise to the public.
2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein 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 [as required by said declaratory decision and order of March 10, 1952].

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IN THE MATTER OF

WILL-WELD 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 5922. Complaint, Sept. 11, 1951—Decision, Mar. 13, 1952

Where a corporation and its three officers, engaged in the interstate sale and distribution of unassembled electric home welding machines; in advertising the same through magazines and circulars—

Represented that their said machine, made by assembling the various parts, would operate consistently and safely on the electric circuit ordinarily found in a home, on a 30 ampere fuse, use of which they recommended;

The facts being that their said machine could not be used safely in a home: the electric circuit in most homes is wired with No. 14 American wire gauge wire, which necessitates use of 15 ampere fuses; and use of their said machine with a 30 ampere fuse, which requires a No. 10 wire, on a No. 14 wire would cause overloading until the circuit breaker or fuse opened and result in overheating and a dangerous fire hazard, danger of which they failed to reveal or caution the public against;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that their assembled machine would operate safely on the ordinary home lighting circuit, and thereby induce purchase of said parts and the assembling and use of said machines in homes:

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.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. John W. Russell for the Commission.

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 Will-Weld Manufacturing Company, a corporation, and W. O. Schneiderwind, W. J. Dillman, and L. B. Bush, individually and as officers of said corporation, 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, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Will-Weld Manufacturing Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Nebraska, having its office and prin-