

IN THE MATTER OF
RAY MERTZ TRADING AS RAY MERTZ & COMPANY

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

Docket 5911. Complaint, Aug. 8, 1951—Decision, May 5, 1952

Where an individual engaged in the manufacture and interstate sale of various kinds of push cards, which, bearing explanatory legends or space therefor, were designed for and used only in the sale of merchandise to the consuming public through means of games of chance, under plans whereby, as typical, the price paid by purchasers for an article was determined by the push selected by chance, or whereby the purchasers who, by chance, selected a certain one of various feminine names displayed, received, without additional cost, an article of merchandise, the normal retail price of which exceeded the chance determined price of the push, others receiving nothing for their money other than the privilege of a push or punch or in some cases, a small piece of candy of less value—

Sold and distributed such devices to dealers in candy, cigarettes and other articles, assortments of which, along with said devices, made up by the dealers, and were exposed and sold by the 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 enterprise 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 purchasing 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 the only testimony offered by respondent in his defense—to the effect that competition in either the wholesale or retail sale of merchandise was not affected by the sale of punchboards in commerce, that the use thereof in the sale of merchandise did not divert trade, and that, consequently, their use did not constitute an unfair method of competition—was rejected as immaterial and irrelevant to the issues in the instant proceeding, since the complaint did not charge respondent with the use of such methods, but only with the use of unfair acts and practices in commerce.

Before *Mr. Frank Hier*, hearing examiner.

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

Mr. F. W. James, of Evanston, Ill., for respondent.

Complaint

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 Ray Mertz, an individual trading and doing business as Ray Mertz & Company, hereinafter referred to as respondent, has 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. Respondent, Ray Mertz, is an individual trading and doing business as Ray Mertz & Company, with his office and principal place of business located at 525 South Dearborn Street, in the city of Chicago, Illinois. Respondent is now, and for more than two years last past has been, engaged in the manufacture of devices commonly known as push cards, and in the sale and distribution in commerce between and among the various States of the United States of said devices to manufacturers of and dealers in various articles of merchandise.

Respondent causes and has caused said device, when sold, to be transported from his aforesaid place of business in Chicago, Illinois, to purchasers thereof at their respective points of location in various States of the United States other than the State of Illinois. There is now and for more than two years last past has been a course of trade in such push card devices by said respondent in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his said business, as described in Paragraph One hereof, respondent sells and distributes, and has sold and distributed, to said manufacturers and dealers, push cards so prepared and arranged as to involve games of chance, gift enterprises, or lottery games when used in making sales of or distributing merchandise to the consuming public. One of said push cards has 50 small partially perforated discs on the face of which is printed the word "Push." Concealed within each disc is a number which is disclosed when a disc is pushed or separated from the card, the card bears a legend as follows:

CANDY BAR SPECIAL!!

May Cost Only 1¢ - - - Not Over 5¢

Each Sale Receives A

High Grade Full Value Candy Bar

Pay What You Push

1¢—2¢—3¢—4¢—5¢

Many other of said push cards have printed on the face thereof other labels or instructions that express the manner in which said devices are to be used or may be used in the sale or distribution of candy or various other specified articles of merchandise. Each purchaser pays an indicated price which may be determined either by the printed legend on the card or by the number appearing under the disc which he pushes. In the use of the card referred to above, the purchaser of each push receives a candy bar. Whether he pays 1¢, 2¢, 3¢, 4¢ or 5¢ for said bar is determined wholly by chance.

Other push cards sold and distributed by respondent bear various other legends and are used for the distribution of various articles of merchandise, the winners being determined by a number or name concealed in a master list. Typical of such push cards is one consisting of 12 concealed discs each of which bears a feminine name and a list for writing the name of the person who selects each name. This card contains a concealed master disc or master seal which is pushed after all the other discs have been sold and the winner is determined by the name appearing under said master seal. Prices of the purchase of each push on this type of card are determined by the number which appears under each seal so that the winner as well as the price to be paid by each purchaser of a push from the card is determined wholly by lot or chance. Persons securing by their push lucky or winning numbers or names receive articles of merchandise without additional cost, the prices of said pushes are less than the normal retail price of said articles of merchandise. Persons who do not secure winning numbers in some cases receive a small piece of candy of less value than the price paid for the push or in other cases receive nothing for their money. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of said push card devices have no instructions or legends thereon but have blank spaces provided therefor. On those push cards the purchasers thereof place instructions or labels which have the same or similar import or meaning as the instructions or labels placed by respondents on said push card devices hereinabove described.

Respondent sells and distributes and has sold and distributed many kinds of push cards but all of said devices involved the same chance or lottery features when used in connection with the sale or distribution of candy or other merchandise and vary only in detail. The only use to be made of said push cards and devices and the only manner in which they are used by the purchasers thereof is in combination with other merchandise so as to enable said purchasers to sell or distribute said other merchandise by means of lottery or chance, as hereinabove alleged.

PAR. 3. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, and within the various States of the United States, purchase and have purchased respondent's said push card devices, and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise, together with said push card 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 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 card 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, engaging 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.

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 May 5, 1952, the initial decision in the instant matter of hearing examiner Frank Hier, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 8, 1951, issued and subsequently served its complaint in this proceeding upon respondent Ray Mertz charging him 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 the allegations of said complaint were introduced before the above-named 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. Testimony was offered by respondent at a hearing held for that purpose but rejected by the hearing examiner for immateriality and irrelevance. Proffer of such testimony appears in the record. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, no proposed findings or conclusions having been filed by any counsel; and said hearing 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, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Ray Mertz is an individual trading and doing business as Ray Mertz & Company, with his office and principal place of business located at 525 South Dearborn Street, in the city of Chicago, Illinois. Respondent is now, and for more than two years last past has been, engaged in the manufacture of devices commonly known as push cards, and in the sale and distribution in commerce between and among the various States of the United States of said devices to manufacturers of and dealers in various articles of merchandise.

Respondent causes and has caused said device, when sold, to be transported from his aforesaid place of business in Chicago, Illinois, to

purchasers thereof at their respective points of location in various States of the United States other than the State of Illinois. There is now and for more than two years last past has been a course of trade in such push card devices by said respondent in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his said business, as described in Paragraph One hereof, respondent sells and distributes, and has sold and distributed, to said manufacturers and dealers, push cards so prepared and arranged as to involve games of chance, gift enterprises, or lottery schemes when used in making sales of or distributing merchandise to the consuming public. One of said push cards has 50 small partially perforated discs on the face of which is printed the word "Push." Concealed within each disc is a number which is disclosed when a disc is pushed or separated from the card, the card bears a legend as follows:

CANDY BAR SPECIAL!!
May Cost Only 1¢—Not Over 5¢
Each Sale Receives A
High Grade Full Value Candy Bar
Pay What You Push
1¢—2¢—3¢—4¢—5¢

Many other of said push cards have printed on the face thereof other labels or instructions that express the manner in which said devices are to be used or may be used in the sale or distribution of candy or various other specified articles of merchandise. Each purchaser pays an indicated price which may be determined either by the printed legend on the card or by the number appearing under the disc which he pushes. In the use of the card referred to above, the purchaser of each push receives a candy bar. Whether he pays 1¢, 2¢, 3¢, 4¢ or 5¢ for said bar is determined wholly by chance.

Other push cards sold and distributed by respondent bear various other legends and are used for the distribution of various articles of merchandise, the winners being determined by a number or name concealed in a master list. Typical of such push cards is one consisting of 12 concealed discs each of which bears a feminine name and a list for writing the name of the person who selects each name. This card contains a concealed master disc or master seal which is pushed after all the other discs have been sold and the winner is determined by the name appearing under said master seal. Prices of the purchase of each push on this type of card are determined by the number which appears under each seal so that the winner as well as the price to be paid by each purchaser of a push from the card is determined wholly by lot or chance. Persons securing by their push lucky or winning

Findings

48 F. T. C.

numbers or names receive articles of merchandise without additional cost, the prices of said pushes are less than the normal retail price of said articles of merchandise. Persons who do not secure winning numbers in some cases receive a small piece of candy of less value than the price paid for the push or in other cases receive nothing for their money. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of said push card devices have no instructions or legends thereon but have blank spaces provided therefor. On those push cards the purchasers thereof place instructions or labels which have the same or similar import or meaning as the instructions or labels placed by respondents on said push card devices hereinabove described.

Respondent sells and distributes and has sold and distributed many kinds of push cards but all of said devices involved the same chance or lottery features when used in connection with the sale or distribution of candy or other merchandise and vary only in detail. The only use to be made of said push cards and devices and the only manner in which they are used by the purchasers thereof is in combination with other merchandise so as to enable said purchasers to sell or distribute said other merchandise by means of lottery or chance, as hereinabove alleged.

PAR. 3. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, and within the various States of the United States, purchase and have purchased respondent's said push card devices, and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise, together with said push card 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 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.

Order

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 card 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 enterprises 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, engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

CONCLUSIONS

1. The only testimony offered by respondent in his defense was to the effect that competition in either the wholesale or retail sale of merchandise was 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. However, the complaint in this proceeding does not charge respondent with the use of unfair methods of competition but is confined to a charge of the use by him of unfair acts or practices in commerce. Consequently, the evidence proffered by respondent is immaterial and irrelevant to the issues in this proceeding.

2. The aforesaid acts and practices of respondent, as hereinabove described and 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 the respondent, Ray Mertz, an individual trading as Ray Mertz & Company, or under any other name or trade name, directly or through any corporate or other device, do forthwith cease

Order

48 F. T. C.

and desist from selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, punchboards, push cards or any 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.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist [as required by said declaratory decision and order of May 5, 1952].

Commissioner Mason concurring in the findings as to the facts and conclusions but not concurring in the form of order to cease and desist, for the reasons stated in his opinion concurring in part and dissenting in part in Docket 5203—Worthmore Sales Company.¹

¹ See 46 F. T. C. 606.

Syllabus

IN THE MATTER OF
BOOK-OF-THE-MONTH CLUB, INC. ET AL.

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

Docket 5572. Complaint, June 30, 1948—Decision, May 8, 1952

In the enactment of Section 5 of the Federal Trade Commission Act, Congress declared "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce to be unlawful, and it has been well settled by the Commission and the courts that included within the statute containing such standards of conduct is the principle that a false statement or representation of a material fact in the sale and distribution of merchandise in interstate commerce, which has the tendency and capacity to deceive and injure competition or customers, is an unlawful method, act or practice calling for corrective action by the Commission in the public interest.

The problem involved in the use of the word "free" or similar words in the sale and distribution of merchandise should be approached by applying to the representation made, the same yard stick that should be applied to all advertising, viz.: "It is true or false?"

A statement in an advertisement which is totally false cannot be qualified or modified, nor may a seller make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end. And the fact that the careful observer would not be misled is not, of course, material, for the statute is intended to protect the unthinking and credulous members of the public as well as the more sophisticated and intelligent.

The word "free" as used in the sale and distribution of books in the instant case has the definite and absolute meaning of a gift or a gratuity given without charge, cost or condition; is unambiguous and without a secondary meaning; and since it makes a single representation and is untrue, cannot be qualified but can only be contradicted.

The astute advertiser well knows that once the average mind has received the impression conveyed by the word "free", it can never be completely eradicated by any other words of explanation or contradiction, and when a prospective customer is offered something "free", it is not unreasonable to assume that the conscious or subconscious appeal involved in the offer will influence his judgment so that the value of the so-called "free" article will divert the customer from the major inquiry into the quality of the article or of competing articles, at the risk of his dissatisfaction, in order to obtain the so-called "free" article.

As respects the drawing power of the word "free" and the drawing power of the lottery or chance, there is not the slightest difference in the psychological appeal of the two methods.