

Complaint

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IN THE MATTER OF
BEE JAY PRODUCTS, INC., 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 5736. Complaint, Jan. 25, 1950—Decision, Sept. 29, 1952

Where two corporations and three officers thereof, engaged in the manufacture and interstate sale and distribution of (1) push cards and punchboards, which, bearing explanatory legends or space therefor, were designed for and used only by ultimate purchasers in combination with other merchandise, under plans whereby customers who by chance selected certain specified numbers received articles without additional cost at much less than their normal retail price; and of (2) jar and spindle games for similar use and under similar plans whereby the concealed ticket number entitled the chance purchasers thereof to merchandise or nothing—

Sold and distributed such devices to dealers who incorporated the same in assortments of candy, cigarettes, clocks, razors, cosmetics, clothing and other articles of merchandise, which were exposed and sold or distributed to the purchasing public by means of said devices and in accordance with the aforesaid sales plans, by the direct or indirect retail purchasers thereof; 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 or distribution of their merchandise, contrary to an established public policy of the United States Government, and means for engaging in unfair acts and practices;

With the result that many members of the public were induced to trade with retailers who thus sold or distributed such merchandise; many retailers were induced to deal with suppliers of such products; and gambling among members of the public was taught and encouraged:

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 in commerce.

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

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

Mr. F. W. James, of Evanston, Ill., 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 Bee Jay Products, Inc., a corporation, and Joseph Berkowitz, Reuben Berkowitz and Maurcy M. Ball, individuals and officers of Bee Jay Products, Inc.,

and Universal Manufacturing Company, Mrs. Anna Berkowitz, Reuben Berkowitz and Miss Bertha Berkowitz, individuals and officers of Universal Manufacturing 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 regard thereto would be in the public interest, hereby issues its complain stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bee Jay Products, Inc., is a coporation organized and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 6320 South Harvard Street in the city of Chicago, Illinois. Respondent Joseph Berkowitz is president. Respondent Reuben Berkowitz is vice-president, and respondent Maurcy M. Ball is secretary of respondent corporation, Bee Jay Products, Inc., and said corporation is owned, dominated, controlled and directed by said individual respondents, Joseph Berkowitz, Reuben Berkowitz, and Maurcy M. Ball.

Respondent Universal 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 405 East 8th Street, in the city of Kansas City, Missouri. Respondent Mrs. Anna Berkowitz is president, respondent Reuben Berkowitz is vice-president, and respondent Bertha Berkowitz is secretary-treasurer of respondent corporation, Universal Manufacturing Company, and said corporation is owned, dominated and directed by said individual respondents and Joseph Berkowitz.

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 3 years last past have been engaged in the manufacture of devices commonly known as push cards and punchboards and jar games and spindle games, 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 places of business in the States of Illinois and Missouri to purchasers thereof at their respective points of location in the various States of the United States, other than Illinois and 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 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.

The jar games and spindle games sold by respondents in the same manner as the punchboard devices above referred to are operated by purchasers in the same manner as above described except that these devices consist of jars containing a number of tickets or spindles to which a number of tickets are attached, the tickets being numbered from one to as many as there are in the jar or attached to the spindle and the numbers are concealed from the prospective purchaser until one of the tickets has been selected from the jar or spindle. A label is attached to said jar or spindle stating the winning numbers of the merchandise which is given to the persons selecting such numbers. Sales are made in the same manner as the sales of the punches in the punchboards and the purchasers of the tickets called for by the labels are awarded prizes in the same manner as the purchasers of punches from the punchboards, and the jar and spindle devices are otherwise operated in an entirely similar manner to the operation of the punchboard devices.

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 jars and spindles and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise together with said 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, jars and spindle devices 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, jars and spindles 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, jar and spindle 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 enterprises 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 in 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 January 25, 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 an answer to the complaint, a hearing was held before a hearing examiner of the Commission theretofore duly designated by it at which hearing counsel for all of the respondents except Maurcy M. Ball and Mrs. Anna Berkowitz requested leave to withdraw their answer to the complaint and to substitute therefor an answer admitting all of the material allegations of fact in the complaint and waiving all intervening procedure and further hearing as to the facts, the substitute answer reserving, however, the right of such respondents to appeal from any decision rendered in the proceeding by the hearing examiner and/or the Commission. The substitute answer was tendered upon condition that the initial decision of the hearing examiner in the proceeding be deferred until the determination by the Commission of another proceeding, that of Superior Products, Docket No. 5561. The request to file such substitute answer being granted by the hearing examiner, it was duly received and filed as a part of the record in the proceeding. At the

hearing testimony was received with respect to respondents Maurcy M. Ball and Mrs. Anna Berkowitz, the two respondents not joining in the substitute answer, and such testimony was duly recorded and filed in the office of the Commission. Thereafter, the Commission having rendered its final decision in the Superior Products case, the hearing examiner, on February 15, 1952, filed his initial decision herein.

Within the time permitted by the Commission's Rules of Practice, counsel for all respondents, other than Maurcy M. Ball and Mrs. Anna Berkowitz, 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 said appeal (Respondents' application for oral argument of counsel before the Commission having been denied); 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 and its conclusion drawn therefrom and its order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Bee Jay Products, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 6320 South Harvard Street, Chicago, Illinois. Respondents Joseph Berkowitz and Reuben Berkowitz are president and vice president, respectively, of the corporation and dominate, control and direct its policies and practices. While respondent Maurcy M. Ball was at one time secretary and legal counsel and a member of the board of directors of the corporation, he severed his connection with it in the latter part of 1949 and now has no interest in the business other than as owner of one share of its capital stock, this one share constituting one-half of one percent of the total capital stock of the corporation. It appears that Ball did not at any time participate in the formulation of the policies of the corporation or the directing of its operations and practices. Moreover, on the merits of the case, the record fails to establish any of the charges in the complaint insofar as Ball is concerned.

Respondent Universal 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

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at 405 East 8th Street, Kansas City, Missouri. Respondents Reuben Berkowitz and Bertha Berkowitz are vice-president and secretary-treasurer, respectively, of the corporation and, together with respondent Joseph Berkowitz, dominate, control and direct its policies and practices. Respondent Mrs. Anna Berkowitz, who was formerly president of the corporation, died on March 2, 1950.

For the reasons indicated the complaint is being dismissed as to respondents Maury M. Ball and Mrs. Anna Berkowitz, and the term "respondents" as used hereinafter will not include these two individuals.

Respondents have cooperated and acted together in the performance of the acts and practices hereinafter set forth.

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 jar games and spindle games, and in the sale and distribution of such 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 their devices, when sold, to be transported from their places of business in the States of Illinois and Missouri to purchasers thereof at their respective points of location in the various States of the United States, other than Illinois and 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 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 business as described in Paragraph One, respondents sell and distribute, to such 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 many kinds of push cards and punchboards, but all of them 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 the push cards and punchboards have printed on the face thereof certain legends or instructions which explain the manner in which the 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 the 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 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 the articles. 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 the push cards and punchboards 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 cards and punchboards first described. The only use to be made of such 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 such ultimate purchasers to sell or distribute such other merchandise by means of lot or chance as hereinabove set forth.

The jar games and spindle games sold by respondents are operated by purchasers in the same manner as above described except that these devices consist of jars containing a number of tickets, or spindles to which a number of tickets are attached, the tickets being numbered from one to as many as there are in the jar or attached to the spindle, and the numbers are concealed from the prospective purchaser until the ticket has been selected from the jar or spindle. A label is attached to the jar or spindle stating the winning numbers of the merchandise which is given to the persons selecting such numbers. Sales are made in the same manner as the sales of the punches on the punchboards, and the purchasers of the tickets called for by the labels are awarded prizes in the same manner as the purchasers of punches from the punchboards, and the jar and spindle devices are otherwise operated in a manner similar to the operation of the punchboard devices.

PAR. 3. Many persons, firms and corporations who sell and distribute 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 respondents' push cards, punchboards, jars and spindles and pack and assemble assortments comprised of various articles of merchan-

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dise together with such devices. Retail dealers who have purchased such assortments either directly or indirectly have exposed them to the purchasing public and have sold or distributed such articles of merchandise by means of such push card, punchboard, jar and spindle devices in accordance with the sales plan as described in Paragraph Two. Because of the element of chance involved in the sale and distribution of such merchandise by means of such devices, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing such merchandise by means thereof. As a result many retail dealers have been induced to deal with manufacturers, wholesale dealers and jobbers who sell and distribute such merchandise together with such devices.

PAR. 4. The sale of merchandise to the purchasing public through the use of such devices in the manner above described 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. The use of such sales plan or method in the sale of merchandise and the sale of merchandise by and through the use thereof is a practice which is contrary to an established public policy of the Government of the United States.

The sale or distribution of such push card, punchboard, jar and spindle devices by respondents as hereinabove set forth 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. Respondents thus supply to and place in the hands of such persons, firms and corporations the means and 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 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 respondents Bee Jay Products, Inc., a corporation, and Universal Manufacturing Company, a corporation, and their respective officers, and Joseph Berkowitz, Reuben Berkowitz and Bertha Berkowitz, individually and as officers of either or both of said corporations, and their respective agents, representatives and

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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, jar games, spindle games, or other lottery devices which are to be used or which, due to their design, are suitable for use 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 respondents Bee Jay Products, Inc., Universal Manufacturing Company, Joseph Berkowitz, Reuben Berkowitz and Bertha Berkowitz 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 this order.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Mrs. Anna Berkowitz, deceased, and Maurcy M. Ball.

IN THE MATTER OF
FRED SCHAMBACH

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

Docket 5405. Complaint, Nov. 27, 1945—Decision, Sept. 30, 1952

Where an individual engaged in the interstate sale and distribution of musical vanity chests; among other merchandise—

(a) Distributed to prospective purchasers form letters, together with advertisements depicting the merchandise involved, order blanks and push cards for use in the resale thereof by lot or chance under a plan whereby persons selecting by chance from 75 feminine names displayed on card the name concealed under the card's master seal became entitled to a musical vanity chest; those selecting four specified numbers concealed within the card's tabs received manicure kits; amount paid by customers for their chances was similarly determined by the numbers revealed; and purchaser-operator of the card and scheme, upon remittance of the money thus collected, was free to keep for himself a second musical chest included with the other merchandise sent him for distribution to the winners; and

Thereby supplied to and placed in the hands of purchasers the means of conducting lotteries or games of chance in the distribution and resale of his merchandise;

(b) Stated in certain of said form letters that the list price of the musical vanity chests was \$15, and in others made such statements as "Upon receipt of your order this musical treasure, (which cannot be bought anywhere for less than \$20) is yours"; notwithstanding the fact that he was selling said products directly to the public for \$13.50; and

(c) Represented that if the chest were ordered "within 15 days", there would be included "an additional Free Surprise Gift, an article you will be glad to have"; the facts being the so-called free gift consisted of an inexpensive item such as a manicure kit, which was always sent to each purchaser of his combination offer of two musical vanity chests and four manicure kits for \$29.80 regardless of when his order was received;

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

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 in commerce.

Commissioner Carretta, in a dissenting opinion in which Commissioner Mason joins, while agreeing that "respondent should be prohibited from using the word 'free' under the circumstances of this case", did "not feel that it is necessary in the public interest to limit so categorically the use of the word