

Decision

IN THE MATTER OF
ELLIOTT MELVIN FISHER ET AL. DOING BUSINESS
AS PHILMOR COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 6121. Complaint, Aug. 25, 1953—Decision, Dec. 8, 1953

Where four partners engaged in the interstate sale and distribution of assortments of merchandise packed and assembled to involve the use of a game of chance, gift enterprise, or lottery scheme, when sold and distributed to the purchasing public, including, as typical, two watches, along with a small punchboard, for use under a plan whereby the purchaser by chance of one of 156 numbers concealed in the board, corresponding to the prize punch number, received a watch; those who by chance secured two other specified numbers received automatic lighters; the amount paid for a punch, if any, was similarly chance determined; and whether the purchaser received an article, the retail value of which exceeded the price of a chance, or nothing, and the amount paid was wholly thus determined—

Sold and distributed such assortments to retail dealers, salesmen, and others, including members of the purchasing public, by whom said punchboards or push cards were made use of in the sale of their merchandise to the purchasing public in accordance with the aforesaid plan involving a game of chance or the sale of a chance to procure one of said articles at much less than the normal retail price thereof; and

Thereby supplied to and placed in the hands of others the means of conducting lotteries or games of chance in the sale of their products, contrary to an established public policy of the U. S. Government:

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.

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 December 8, 1953, 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 August 25, 1953, issued and sub-

sequently 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. Respondents filed no answer to the complaint, nor did they enter any appearance at a hearing held on October 20, 1953, by the above-named hearing examiner, theretofore duly designated by the Commission, such hearing being held in accordance with notice given in the complaint and supplemental notice issued by the hearing examiner and duly served upon respondents. Thereafter the proceeding regularly came on for final consideration by the hearing examiner upon the complaint, 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. Respondents Elliot Melvin Fisher, Edward Shores, Irvin Katz (also known as Irwin Katz) and Lucius D. Smith, Jr., are individuals and partners trading and doing business as Philmor Company, with their office and principal place of business located at 218 East Saratoga 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, silverware, novelties and other articles of merchandise and have caused such 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, 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 such merchandise is sold 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 for and obtain salesmen and through them sell certain merchandise deals consisting of punchboards and mer-

chandise 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 punchboard deal sold by respondents consists of a small punchboard and two watches. Each of the punchboards contains 156 punches and a prize punch, which is not punched until all of the punches are sold. Accompanying the punchboard 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 punch 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 punchboard has on its face the following instructions:

Lucky No. Receives (arrow) (Picture of star)

BENRUS

OFFICIAL WATCH OF
FAMOUS AIRLINES

FREE—Nos. 1 to 15—FREE

Nos. 16 to 59 Pay What You Draw

Nos. Over 59 Pay ONLY 59¢

Nos. 44 & 55 Each Receive

Evans FULLY AUTOMATIC

RED SEAL LIGHTER

and the list on which the names of punchers are written bears the following legend:

NUMBER UNDER STAR PRIZE RECEIVES
BENRUS WATCH

Official Watch of Famous Airlines

Nos. 44 and 55 Each Receive

Fully Automatic

RED SEAL LIGHTER

Respondents sell their punchboard deals as above described to persons located in the various States of the United States, and these customers of respondents make sales of respondents' merchandise by means of said punchboards in accordance with the above described legend or instructions, and said watches and merchandise are awarded to the customers or purchasers from said punchboard in accordance with the above described legend. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and

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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 punchboard and push card and merchandise deals, all of which involve the sale of merchandise by means of said other punchboard 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 punchboard and watch assortments or deals, directly or indirectly, use the said push cards or punchboards 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 others 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 described 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.

CONCLUSION

The acts and practices of respondents as herein found 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, Elliott Melvin Fisher, Edward Shores, Irvin Katz (also known as Irwin Katz) and Lucius D. Smith, Jr., individually and as partners trading under the name Philmor Company, or any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce,

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as "commerce" is defined in the Federal Trade Commission Act, of watches, silverware, 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 other merchandise or separately, which punchboards, push cards or other lottery devices are designed or intended to be used in the sale or distribution of said merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

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 December 8, 1953].

IN THE MATTER OF
LEVER BROTHERS CO.

Docket 5585. Amended and supplemental complaint, Apr. 26, 1951—Order denying appeal, etc., and opinion, Dec. 16, 1953

Charge: Discriminating in price by selling soap products in commerce to certain customers, usually small businessmen, at higher prices than to other and generally larger competing customers, in violation of subsection 2 (a) of the Clayton Act, as amended; and

Entering into advertising arrangements with certain customers whereby respondent paid or contracted to pay them compensation for services or facilities furnished by them in connection with the sale, etc., of respondent's soap products without making comparable payments or consideration available to their competitors, in violation of subsection 2 (d) of the Clayton Act, as amended.

Before *Mr. Randolph Preston* and *Mr. Earl J. Kolb*, hearing examiners.

Mr. John L. York and *Mr. William H. Smith* for the Commission.
Arnold, Fortas & Porter, of Washington, D. C., and *Mr. Martin J. Pendergast*, of New York City, for respondent.

ORDER DENYING APPEAL FROM INITIAL DECISION OF HEARING
EXAMINER, AND DECISION OF THE COMMISSION

This matter having come on to be heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner and upon the briefs and oral argument of counsel in support of and in opposition to said appeal; and

The Commission having duly considered said appeal and the record herein and being of the opinion, for the reasons stated in the written opinion of the Commission which is being issued simultaneously herewith, that the appeal should be denied and that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeal of counsel supporting the complaint from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner, a copy of which is attached, shall, on the 16th day of December, 1953, become the decision of the Commission.

ORDER DISMISSING AMENDED AND SUPPLEMENTAL COMPLAINT

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding came on to be considered by the above-named hearing examiner theretofore duly designated by the Commission, upon the