

Findings

IN THE MATTER OF
NORTH SHORE PRODUCTS COMPANY, INC., ET AL.
ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 6154. Complaint, Dec. 23, 1953—Decision, Sept. 19, 1955

Order requiring sellers in Skokie, Ill., of electric coffee sets, wrist watches, and other articles, to cease selling such merchandise by means of a game of chance, and supplying push cards or lottery devices designed or intended to be used in the sale or distribution thereof to the public.

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

Mr. Arthur H. Schwab and Nash, Ahern & McNally, of Chicago, Ill., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 23, 1953, issued and subsequently served its complaint upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. Respondents filed their answer in due course whereupon hearings were held at which testimony and other evidence in support of the allegations of said complaint were received by the above-named Hearing Examiner theretofore designated by the Commission, said testimony and evidence being duly recorded and filed in the office of the Commission. Respondents, aside from cross-examination of the one witness heard in the proceeding, offered no testimony or other evidence in opposition to the complaint.

Thereafter the proceeding came on for final consideration by the Hearing Examiner on the complaint, the answer, testimony and other evidence, proposed findings as to the facts and conclusions not having been requested nor submitted by counsel on either side, and oral argument not having been requested; and the Hearing Examiner, having duly considered the record herein, finds that this proceeding is in the public interest and makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, North Shore Products Company, Inc., is a corporation organized and doing business under and by virtue of

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the laws of the State of Illinois since August 15, 1952, with its office and principal place of business located at 7916 Lincoln Avenue, in the city of Skokie, Illinois, and its mailing address P. O. Box 225, Skokie, Illinois. Respondent Harvey Gould is an individual and president of the corporate respondent, North Shore Products Company, Inc., with his office and place of business located at the same address. The individual respondent, Harvey Gould, owns, and has dominant control of the policies and sales activities of the corporate respondent, said corporation being a family affair, the officers being Harvey Gould, president as aforesaid, his mother-in-law, M. Schumacher, vice-president and his wife, Edna Gould, secretary-treasurer, neither of the two persons last mentioned participating in the conduct of the corporate affairs or otherwise engaged in any of the practices forming the basis for this proceeding. Both the said respondents have cooperated with each other and have acted in concert in doing the acts and things hereinafter found.

PAR. 2. Respondents are now, and since August 15, 1952 have been, engaged in the sale and distribution of wrist watches, electric coffee sets, electric food mixers, power tools, wallets and other articles of merchandise and have caused said merchandise, when sold, to be transported from their place of business in Skokie, Illinois, to purchasers thereof located in the various States of the United States other than the State of Illinois. There is now, and has been for the period above mentioned, a substantial course of trade by respondent in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, between and among the various States of the United States.

PAR. 3. In the course and conduct of their business, respondents, in soliciting the sale of, and in selling and distributing their merchandise, furnish and have furnished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is sold and distributed to the purchasing and consuming public. Among the methods and sales plans adopted and used by respondents, which is typical of the practices of respondents, is the following:

Respondents distribute, and have distributed, to operators and to members of the public, certain literature and instructions including, among other things, push cards, order blanks, circulars including thereon illustrations and descriptions of said merchandise, said circulars explaining respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said push cards and as prizes to members of the purchasing and consuming public who purchase chances or "pushes" on said cards.

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One of respondents' said push cards bears 37 names, with ruled columns on the back of said card for writing in the name of the purchaser of the "push" corresponding to the name selected. Said push card has 37 partially perforated discs. Each of said discs bears one of the names corresponding to those on the list. Concealed within each disc is the number which is disclosed only when the customer pushes or separates a disc from the card. The push card also has a larger master seal, and concealed within the master seal is one of the names appearing on the disc. The person selecting the name corresponding with the one hidden from view under the master seal receives a coffee set. The push card bears the following legend or instructions:

LUCKY NAME UNDER
SEAL RECEIVES THIS

Aluminum Electric		(Picture of Wallets)	by Enterprise Manufacturers of the World Famous Drip-O-Lator The Better Drip Coffee Maker Made in U.S.A. Guaranteed Pure Aluminum Reg. U.S. Patent Office
Coffee set			
by [Enterprise]			
(Picture of Electric Coffee Set)			
{ Master Seal }	No. 1 pays 1¢		
Push Out	No. 6 pays 6¢		
with	No. 12 pays 12¢		
Pencil	No. 19 pays 19¢		
All others pays 39¢—			
NONE HIGHER			

(Panels bearing seals and names)

Write Your Name on Reverse Side Opposite Name you Select

Sales of respondents' merchandise by means of said push cards are made in accordance with the above-described legend or instructions, and said prizes or premiums are allotted to the customers or purchasers from said card in accordance with the above legend or instructions. Whether a purchaser receives an article of merchandise, or nothing, for the amount of money paid, the amount to be paid for the merchandise, or the chance to receive said merchandise, are thus determined wholly by lot or chance. The articles of merchandise have a value substantially greater than the price for the individual chances or "pushes."

Respondents furnish and have furnished various other push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of their merchandise by means of games of chance, gift enterprises or lottery schemes. The sales plans or methods involved in the sale of all of said merchandise by means of said other push cards is similar to that hereinabove described, vary-

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ing only in detail as to the merchandise distributed and the prices of chances and the number of chances on each card.

PAR. 4. The persons to whom respondents furnish and have furnished said push cards use the same in selling and distributing respondents' merchandise in accordance with the aforesaid sales plans. Respondents thus supply to and place in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of their merchandise in accordance with the sales plans hereinabove set forth. The use by respondents of said sales plans or 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. 5. Respondent, Harvey Gould, called as a witness by the Commission testified that the business of respondents is conducted by means of the United States mails throughout the several States, the names of solicitees being secured from mailing lists especially purchased in furtherance of respondents' selling scheme; that respondents have caused the distribution of in excess of four hundred thousand sets of push cards and descriptive literature, effecting as a result thereof in excess of five thousand sales of merchandise, whereupon it was stipulated between counsel that the business transacted by respondents "has been substantial." Witness further testified in detail concerning the actual *modus operandi* of the push card device in effecting the sale of merchandise and admitted that such cards, and the descriptive literature disseminated in connection therewith, were designed and used for the express purpose of facilitating the sale of merchandise.

PAR. 6. The sale of merchandise to the purchasing public in the manner above found 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.

CONCLUSIONS

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 the acts and practices hereinabove found are all to the prejudice and injury of the public and therefore constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

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Appeal

ORDER

It is ordered, That respondents, North Shore Products Company, Inc., a corporation, and its officers, and respondent, Harvey Gould, individually, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of watches, electric coffee sets, electric food mixers, electric power tools, wallets or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease from:

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

ON APPEAL FROM INITIAL DECISION

Per Curiam:

The initial decision of the hearing examiner held that the respondents have been engaging in unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act, and respondents have appealed from that decision.

The complaint, under which this proceeding was instituted, alleges, among other things, that the respondents in soliciting sales for and selling their electric coffee sets, wrist watches and other articles of merchandise in commerce, have furnished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes, when such merchandise is sold and distributed to the purchasing public. Distributed and supplied by the respondents, the complaint additionally alleges in that connection, has been advertising literature including push cards containing instructions for distributing the merchandise by means of allotting it as premiums or prizes. After the filing of answer by the respondents, testimony and other evidence was received into the record during the course of a hearing before the hearing examiner. The initial decision held that the charges of the complaint were sustained by the greater weight of the evidence and its order, among other things, would forbid the respondents, in connection with their offering for sale and sale of merchandise in commerce, from supplying push cards or lottery devices designed or intended to be used in its sale or distribution to the public.

In contending that the record does not afford adequate support for findings of law violation, or sound basis for the initial decision's order, appellants assert, among other things, that there is no evidence that customers to whom the sales literature and push cards are mailed have used the cards in distributing the company's merchandise. Supplying the means of conducting lotteries in the sale of merchandise is a practice contrary to public policy, and judicial interpretations of the Federal Trade Commission Act have established that proof expressly showing instances of use of push cards furnished as a part of a merchandising program is unnecessary. *Jaffe v. Federal Trade Commission*, 139 F. 2d 112 (C.C.A. 7, 1943).

Respondents have distributed in excess of 350,000 sets of push cards and other sales promotional matter to prospective purchasers located throughout the several States and the testimony clearly shows that a substantial volume of merchandise has been sold. This proof affords adequate basis for the hearing examiner's finding that respondents have furnished others with the means of conducting lotteries in the sale of merchandise and amply supports the initial decision's order. *Seymour Sales Company, et al. v. Federal Trade Commission*, 216 F. 2d 633 (C.A.D.C. 1954). The push cards and other promotional matter supplied in connection therewith comprise respondents' only form of soliciting sales in commerce for their products. In the circumstances here, it would be absurd to assume that the respondents would continue to engage in the empty and financially wasteful practice of enclosing push cards with their various mailings of sales literature if such cards were not used in the manner intended by the respondents and counseled on the push cards. *In the Matter of Benmar Sales Company, et al.*, Docket No. 6128 (Decided December 17, 1954). We have considered the various exceptions and objections urged in support of this aspect of the appeal but concur in the hearing examiner's conclusions that the weight of the evidence clearly shows that the practices used in promoting the sales of respondents' merchandise constitute unfair acts and practices within the meaning of the Act. The appeal's contentions that the initial decision is erroneous in that respect and that the proceeding should be dismissed are, accordingly, rejected.

Joined in the complaint as parties to this proceeding were respondent North Shore Products Company, Inc., a corporation, and respondent Harvey Gould, an individual, and the appeal additionally objects to the latter's inclusion as a party to the initial decision's order to cease and desist. Excepted to as erroneous, among other things in this connection, is the hearing officer's finding that Mr. Gould has dominated the corporate respondent's policies and sales

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activities. Respondent Harvey Gould is president of the corporate respondent, all of the capital stock of which is owned by him and Edna Gould, his wife; and they, together with her mother, Mrs. Schumacher, are its officers and directors. According to his testimony, however, Mrs. Gould and her mother are inactive in the business. The corporate respondent was organized in August, 1952, and Mr. Gould further testified that he had engaged in a similar business prior to the formation of the respondent corporation, although not, however, to a substantial extent.

Since respondent Harvey Gould shares ownership of the capital stock of the respondent corporation with his wife and all managerial functions admittedly are exercised by him exclusively, the initial decision's reference to him as owner rather than as co-owner of the corporation, while technically inaccurate perhaps, cannot be considered as substantially erroneous. Furthermore, the facts of record fully support the initial decision's additional conclusions in reference to Mr. Gould's domination and control over the corporation's policies and sales activities, and attest to his role of cooperation and participation as a principal in the unfair acts and practices found to have been engaged in. In these circumstances, there is no valid basis in law for the appeal's contentions that respondent Harvey Gould is insulated in his individual capacity from legal responsibility under the Federal Trade Commission Act for the unlawful acts and practices. Not only is his inclusion as a party to the order in that capacity legally warranted, but such course is additionally appropriate, in the circumstances, for preventing future evasion of the order.

We have examined the matters additionally urged in support of the appeal and are of the view that the initial decision is free from substantial error. Respondents' appeal, accordingly, is denied and the initial decision is affirmed.

FINAL ORDER

The respondents having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having come on to be heard upon the record including the briefs of counsel, and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It is ordered, That the respondents 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 aforesaid initial decision.

IN THE MATTER OF
CARTER PRODUCTS, INC.

Docket 4970. Order and opinion, Sept. 20, 1955

Order denying respondent's motion for an order disqualifying hearing examiner from making report on additional evidence and vacating and terminating the proceedings.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depero* for the Commission.

Breed, Abbott & Morgan, of New York City, for respondent.

ORDER DENYING RESPONDENT'S MOTION FOR DISQUALIFICATION
OF THE HEARING EXAMINER

This matter having come on to be heard upon the motion and affidavit filed by counsel for the respondent on March 28, 1955, as supplemented by the motion and affidavit filed on April 18, 1955, requesting that the hearing examiner be disqualified for alleged bias and the proceedings terminated; and

The Commission having determined, for reasons set forth in the accompanying opinion, that said motion should be denied:

It is ordered, That respondent's motion be, and it hereby is, denied.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

Respondent's motion and supplement thereto, with accompanying affidavits is filed under the Commission Rules which permit such a procedure whenever any party shall deem the hearing examiner disqualified, for any reason, to continue to preside in any hearing. Respondent charges the hearing examiner with personal bias and animosity toward respondent and its counsel and with partiality and bias in the conduct of the rehearing. The motion asks that an order issue disqualifying the hearing examiner from making and filing his report upon the additional evidence in this case and vacating and terminating the proceedings.

Complaint was issued on May 28, 1943, and charged respondent with false and deceptive advertising of its product, Carter's Little Liver Pills. After extensive hearings involving over 10,000 pages of testimony and 2,200 exhibits, the hearing examiner on July 22, 1946, filed his report, as required by the procedure in effect at that time. In March, 1951 the Commission made findings and issued its order to