

Decision

IN THE MATTER OF
GARY SALES COMPANY, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6272. Complaint, Dec. 22, 1954—Decision, Nov. 8, 1955

Order requiring a distributor in New York City of Jewelry, novelties, household articles, cooking utensils, silverware, etc., to cease furnishing to members of the public and other salesmen sales circulars containing pull cards for the sale of the merchandise to purchasers by means of a game of chance, gift enterprise, or lottery scheme.

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

Mr. Leo Kotler and *Mr. Herbert Shiff*, of New York City, for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On December 22, 1954, the Federal Trade Commission issued its complaint against Gary Sales Company, Inc., a corporation, and Sam Frank, Norman Eisner, Henry Davis, and Eli Tockar, individually and as officers of said corporation, charging them with selling and distributing jewelry, novelties, household articles and other merchandise in commerce by means of a game of chance, gift enterprise or lottery scheme, contrary to the established public policy of the United States and in violation of the provisions of the Federal Trade Commission Act.

Respondents, in their answer to the complaint, denied that their method of distributing merchandise in commerce constitutes a game of chance, gift enterprise or lottery scheme. At the conclusion of the presentation of the case-in-chief in support of the complaint, Respondents moved that the complaint herein be dismissed for want of proof. The disposition of this motion was deferred until the issuance of the initial decision herein.

The evidence presented at the hearing in this proceeding warrants the following factual findings and conclusions:

1. Gary Sales Company, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 100 Fifth Avenue, in the city of New York, State of New York. Respondents Sam Frank, Norman Eisner, Henry Davis and Eli Tockar are individuals and officers of corporate respondent Gary Sales Company,

Inc., with their office and place of business located at the same address. The individual respondents Sam Frank, Norman Eisner, Henry Davis and Eli Tockar own and have dominant control of the policies and sales activities of the corporate respondent. All of said Respondents have cooperated with each other and have acted in concert in doing the acts and things hereinafter found.

2. The Respondents are now and for more than one year last past have been engaged in the sale of jewelry, novelties, household articles, cookware, silverware, and numerous other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia. Respondents cause and have caused said merchandise, when sold, to be shipped and transported from their place of business in the State of New York to purchasers thereof at their respective points of location in various States in the United States other than New York 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.

3. In the course and conduct of their business, as herein found, Respondents cause to be distributed to members of the public, representatives and salesmen, and prospective representatives and salesmen, certain advertising literature, including a sales circular, which contains a list of various items of merchandise with the prices thereof, and, contiguous to each item, a blank space for the entry of the name of the purchaser of that particular item. Adjacent to this list of items of merchandise is a pullcard consisting of 40 tabs, under each of which is concealed the name of one of the articles of merchandise described in the circular, and the selling price thereof. The prospective purchaser is expected to pull one of these tabs from the pullcard. Until the purchaser has detached the pull-tab from the card, he has no means of knowing, and does not know, which of the various articles of merchandise he is to receive.

4. Some of the articles of merchandise included in the list have purported and represented retail values greater than the prices at which they are intended to be, and are sold to the consumer who pulls the tab designating the particular article. Other articles are priced proportionately higher. The apparent greater values of some of such articles induces members of the purchasing public to pull the tabs on the chance and in the hope that they will receive thereby an opportunity to purchase articles of merchandise of greater value than the prices designated to be paid therefor. Whether a purchaser, having pulled one of said tabs from the pullcard, receives an article

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of greater or less value than the price designated thereon, which of the listed articles of merchandise the purchaser is to purchase, and the amount of money such purchaser is required to pay, are determined wholly by chance.

5. Immediately above the pullcard on Respondents' sales circular appears the following legend:

SIMPLE AS A. B. C.

A. Merely pull any of the tabs below.

B. Read the item and price printed on the back.

C. Pay your friend (the holder of this folder) the price printed on the tab. You are not obligated to buy this merchandise if you do not want to.

Immediately below the pullcard is printed the following notice:

POSTMASTER: Contains printed material.

May be opened for postal inspection.

READ: Every item is sold as represented herein or your money refunded. All merchandise sold on a money back guarantee. If, for any reason, you are dissatisfied with the article you have chosen, you need not purchase it. This sheet is given to you without cost as a sales sheet and is not, nor is it to be used as a punchboard or a gambling device.

The sales circular also contains instructions to Respondents' representative or salesman as follows:

IT'S EASY! JUST DO THIS

Simply show this folder to your friends and neighbors and let them buy one or as many of the practical bargain items listed on the back page. Behind each tear-tab, an article appears with its corresponding price. Collect the money for each purchase and write the name of the buyer next to the article bought. When all the spaces have been filled with your customers' names, you will have a total of \$27.99.

Mail your money order for this amount, together with the handy order form on Page 2. Indicate your choice of any Special Value Premium. Be sure to fill out the order form completely and mail it with your money order for \$27.99.

* * * We will give you a cash discount of 30% on any merchandise sold, should you be unable to fill a complete order. All you do is deduct 30% from the amount you send us. We will then ship you the amount of merchandise you have sold. * * *

6. Respondents contend that the fact that one is not obligated to buy the merchandise described under the tab pulled; the existence of a money-back guarantee; Respondents' promise to refund the purchaser's money if the purchaser is dissatisfied with the article purchased; and the fact that all the items need not be sold by the representative, for the purchasers to receive the items selected and for the salesman to receive compensation for his services, removes the element of chance from Respondents' selling practices and prevents such practices from violating the law as charged in the complaint.

7. The above contentions are without merit for several reasons. First, there is evidence that the notice on the circular, to the effect that one does not have to buy the article of merchandise indicated under the pull-tab, is not called to the attention of the prospective purchaser. Second, if it were, such fact would not change the character of the transaction. As stated by the court in *Wolf vs. Federal Trade Commission*, 135 F. 2d 564, such a notice " * * * is no more than a recognition of the common-law rule that a gambling transaction is unenforceable, * * *." The fact that a purchaser who pulls a tab, in every case, secures an item of merchandise and is given the privilege of returning it if dissatisfied therewith, does not eliminate the element of chance, which alone determines which item of merchandise the purchaser shall receive. In the above-cited decision, the court stated:

* * * we think there can be no serious doubt that a method of distribution which contemplates the offering to the purchaser of an opportunity to pull a chance to see which article of a list of 20 he may buy constitutes a game of chance, even though each purchaser does receive an article of value for his purchase (*Keller v. Federal Trade Commission*, 132 F. 2d 59 (35 F.T.C. 970)).

8. In view of the above facts and the principles of law and public policy applicable thereto, we must conclude that the sale of merchandise to the purchasing public in the manner and by the means employed by the Respondents as herein found involves a game of chance, and that Respondents thereby supply to and place in the hands of others the means of conducting the sale of merchandise by means of a game of chance, as hereinabove found, wherein there is sold a chance to procure an unknown selection from a number of articles of merchandise at a price less than the normal retail price therefor. This method of sale and distribution attracts prospective salesmen and purchasers by reason of the element of chance involved therein, and thereby induces the purchase and sale of Respondents' merchandise.

The aforesaid acts and practices of Respondents, as herein found, are contrary to the established public policy of the Government of the United States; 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. Therefore we conclude, and so find, that this proceeding is in the public interest; that Respondents' motion that the complaint herein be dismissed should be, and hereby is, denied; and that a cease-and-desist order should be issued in this proceeding. Accordingly,

It is ordered, That Respondent Gary Sales Company, Inc., a corporation, and its officers, Sam Frank, Norman Eisner, Henry Davis, and Eli Tockar, individually, and Respondents' agents, representa-

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

1. Supplying to or placing in the hands of others pull cards or any other device or devices which are designed or intended to be used in the sale and distribution of Respondents' merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.
2. Shipping, mailing and transporting to agents or distributors or to members of the public pull cards or any other device or devices which are designed or intended to be used in the sale and distribution of Respondents' merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.
3. 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:

This matter is before us for disposition of respondents' appeal from an initial decision wherein the hearing examiner made his findings as to the facts, conclusions drawn therefrom and order to cease and desist and denied the respondents' motion that the complaint herein be dismissed. Counsel for both sides filed briefs. Oral argument was not requested.

Respondents were found by the hearing examiner to be engaged in the sale and distribution of jewelry, novelties, household articles and other merchandise in commerce in a manner involving the use of a game of chance, gift enterprise, or lottery scheme, contrary to public policy and in violation of the Federal Trade Commission Act.

The hearing examiner found that the named individual respondents, through the corporate respondent, Gary Sales Company, Inc., caused to be distributed to members of the public, representatives and salesmen, certain advertising literature, including a sales circular or catalogue. This latter contains a list of merchandise, usually forty (40) items, and the prices thereof, ranging from sixteen (16) through eighty-nine (89) cents. Immediately adjacent to this list is set up and printed a so-called "pull-card" consisting of a number of tabs, under each of which is concealed the name of one of the listed merchandise items and its price. The ultimate purchaser is expected to detach a tab and learn only then the merchandise item he is to

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receive and the price to be paid. His name thereupon is to be written on the aforesaid list of merchandise opposite the particular item named under the tab.

The hearing examiner also found that some of the items of merchandise listed have a greater value than stated on the said list but are distributed for the lesser price disclosed under the tab. This apparent greater value of some of the items, the hearing examiner concluded, induces purchasers to buy the tabs, or chances, in the hope they will receive merchandise greater in value than the price designated under the pull tab they select. The article of merchandise, its value, and the price to be paid for it are determined wholly by chance.

In his findings the hearing examiner recognized that the sales circulars, or catalogues, contain the following notice:

READ: Every item is sold as represented herein or your money refunded. All merchandise sold on a money back guarantee. If, for any reason, you are dissatisfied with the article you have chosen, you need not purchase it. This sheet is given to you without cost as a sales sheet and is not, nor is it to be used as a punchboard or a gambling device.

When all 40 items of merchandise have been sold the customer has the right to select a premium gift or a \$10.00 cash allowance. The record discloses that about a million catalogues mailed produced a return of about 10,000 orders.

The hearing examiner also found that salesmen, or representatives, are not required to sell all forty (40) items listed and that, if they are unable so to do, they receive a cash discount of 30% on merchandise "sold." Respondents made an offer of proof in this latter regard which will be discussed hereinafter.

The foregoing sets out briefly the facts found in detail by the hearing examiner. Respondents filed exceptions to the findings that some of the merchandise items have a higher proportional value than others and thereby constitute prizes distributed by chance and that such practice constitutes lottery merchandising in violation of the Federal Trade Commission Act.

On the question of proof of value of the merchandise involved, respondents contend there is no testimony in the record to show retail prices of the various items. Sam Yackow, from whom respondents purchased the merchandise in packages of forty (40) items, prepared Commission's Exhibit 3, a list of the cost of the various items to him. This evidence as to wholesale value, we find, was properly received in evidence and was correctly considered by the hearing examiner in determining variations in retail values as disclosed by wholesale costs. Proof of specific retail prices is not necessary where, as here, there is a clear showing that, under respondents' plan of merchandis-

ing, different items are distributed to the purchasing public at identical prices, some even below wholesale cost, although they vary greatly in actual value. *Keller v. F.T.C.*, 132 F. 2d 59 (C.C.A. 7, 1942); *Colon v. F.T.C.*, 193 F. 2d 179, cert. denied 344 U. S. 823 (1953). Respondents appeal in this respect is denied.

As to whether the means employed by respondents in the distribution of their merchandise involved the use of a chance, lottery, or gift enterprise and, as such was contrary to the public interest constituting an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act, we find respondents' contentions to be without merit and contrary to the facts as found and to the law. Respondents contend here that the fact there is notice that there is no obligation to purchase the merchandise listed under the tab pulled; the existence of a money-back guarantee; promise of a refund of the article if the purchaser is dissatisfied; and the fact that all items on the card need not be sold by the representative for the purchasers to receive items selected and for the salesman to be compensated for his services, removes the element of chance in each transaction.

Respondents here in effect argue that the notice to purchasers that they need not buy, etc., removes one of essential elements of lottery (consideration, chance, and prize), namely, the element of chance. The hearing examiner found evidence to support his finding that the notice was not called to the attention of prospective purchasers. When questioned directly in this regard all four witnesses called, who were customers of respondents in disposing of pull cards, testified that they did not call the notice to the attention of prospective purchasers. One witness stated "No, I myself read it alone."¹ Another stated, "No. We was interested in the chance."² All customer witnesses characterized the pull tabs as chances.

The hearing examiner further concluded that, even if the notice were called to the attention of prospective purchasers, such fact would not change the nature of the transaction, citing *Wolf v. Federal Trade Commission*, 135 F. 2d 564 (C.C.A. 7, 1943) where the court said that such a notice "* * * is no more than a recognition of the common law rule that a gambling transaction is unenforceable * * *." In the *Wolf* case the court stated further on this point that:

* * * we think there can be no serious doubt that a method of distribution which contemplates the offering to the purchaser of an opportunity to pull a chance to see which article of a list of twenty he may buy constitutes a game of chance, even though each purchaser does receive an article of value for his purchase. *Keller v. F.T.C.* 132 F. 2d 59.

¹ R. 49.

² R. 38.

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We find that the examiner correctly concluded, as a matter of law, that the fact that a purchaser pulling a tab in every instance receives an item of merchandise with the privilege of returning it if dissatisfied does not remove the element of chance, which alone determines the item of merchandise to be received. We further find that respondents' method of distribution of merchandise involves the use of a game of chance, gift enterprise, or lottery scheme, with respondents supplying to and placing in the hands of others the means of conducting lotteries through the said sales plan of merchandising, and that said method is contrary to public policy and constitutes an unfair act and practice in commerce within the meaning of the Federal Trade Commission Act. *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934).

Respondent appellants also except to the failure of the hearing examiner to permit into evidence some 200 letters purporting to show partial orders received by Gary Sales Company, Inc., on which a 30% commission had been allowed. We agree with the hearing examiner that the letters tendered are immaterial and irrelevant to the issues in this proceeding and find no prejudicial error in their exclusion from evidence. Respondents' appeal in this regard is denied.

Respondents specifically except to Findings 4, 7, and 8 and to the conclusion of the hearing examiner as contained in his initial decision. They also specifically except to the failure of the hearing examiner to include a conclusion of law submitted by them to the effect that their acts and practices as described herein do not constitute unfair acts and practices. We think our rulings above adequately dispose of these exceptions without the necessity of our ruling on each separately.

On the basis of the whole record, for the reasons hereinabove stated, we conclude that the hearing examiner's initial decision and his rulings on respondents' offer of proof and motion to dismiss the complaint are correct. Accordingly, respondents' appeal from the initial decision, including their exception thereto, is hereby denied and the initial decision of the hearing examiner is affirmed. Appropriate order will be entered.

FINAL ORDER

This matter having come before the Commission upon respondents' appeal from the hearing examiner's initial decision and the matter having been heard on the whole record, including briefs (oral argument not having been requested); and the Commission having ren-

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dered its decision denying respondents' appeal and affirming the initial decision;

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 contained in said initial decision.

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IN THE MATTER OF
THE BEST FOODS, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6380. Complaint, June 29, 1955—Decision, Nov. 8, 1955

Consent order requiring a corporation doing a nation-wide business, with main office in New York City, to cease representing its "Nucoa" oleomargarine falsely in advertising as a dairy product and as richer in milk properties than butter, in violation of the Oleomargarine Amendment to the Federal Trade Commission Act.

Before *Mr. Everett F. Haycraft*, hearing examiner.
Mr. Morton Nesmith for the Commission.
Davis & Gilbert, of New York City, for respondent.

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 The Best Foods, Inc., a corporation, hereinafter referred to as respondent, has 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 The Best Foods, Inc., is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business located at 1 East 43rd Street, New York, New York, and factories located in Bayonne, New Jersey, Chicago, Illinois, San Francisco, California, and Dallas, Texas.

PAR. 2. Respondent The Best Foods, Inc., is now and for more than one year last past has been engaged, among other things, in the manufacture, sale, and distribution of oleomargarine, a food, using the trade name "Nucoa" for its product which it sells other distributors for resale and delivery to consumers. Respondent causes its said oleomargarine, when sold, to be transported from its factories located in the States of New Jersey, Illinois, California, and Texas to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce among and between the various States of the United States.