

IN THE MATTER OF
CARL DRATH TRADING AS BROADWAY GIFT COMPANY

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

Docket 6185. Complaint, Feb. 24, 1954—Decision, Feb. 16, 1956

Order requiring an individual in New York City to cease furnishing to members of the public who were prospective representatives and operators, push and pull cards and instructions for the sale of his watches, cameras, novelties, household articles, and other merchandise to the public by means of a lottery scheme.

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

Mr. Horace J. Donnelly, Jr., of Washington, D. C., for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges respondent with violation of the Federal Trade Commission Act through the use of lottery schemes or games of chance in the sale and distribution of his merchandise. After the filing of respondent's answer to the complaint, hearings were held at which testimony and other evidence were offered in support of the complaint (no evidence being offered by respondent), and such testimony and other evidence were duly recorded and filed in the office of the Commission. The matter is now before the hearing examiner for final consideration on the complaint, answer, evidence, oral argument of counsel and proposed findings and conclusions submitted by counsel. Having duly considered the matter, the examiner finds that the proceeding is in the interest of the public and makes the following findings as to the facts, conclusions drawn therefrom, and order.

2. Respondent Carl Drath is an individual trading as Broadway Gift Company, with his office and principal place of business at 121 East 24th Street, New York, New York. He is engaged in the sale and distribution in commerce, as that term is defined in the Federal Trade Commission Act, of numerous and varied items of merchandise including, among others, cameras, watches, jewelry, safety razors, and various household and toilet articles.

3. Most of respondent's sales are made through members of the public. Upon obtaining the names and addresses of individuals, members of the public, who are regarded by him as prospective distributors of his merchandise, respondent mails to such persons

certain advertising and sales material. One of the pieces of material employed by respondent is a circular describing and depicting certain articles of merchandise and containing a device commonly known as a pull card. This card contains a number of partially perforated tabs under each of which is a feminine or masculine name, together with the name of one of the articles described in the circular, and the price of the article. Persons pulling the tabs pay to the individual circulating the pull card the amount specified, and their names are noted on the circular in a place provided for that purpose. The information under the pull tabs is concealed from view, and persons pulling the tabs have no information as to the article they are to receive or the price to be paid therefor until the tab has been pulled or separated from the card.

4. The pull card also contains a master seal which conceals a name corresponding to one of the names beneath the tabs. The person who happens to pull the tab containing this name receives, in addition to the first article, a watch as a special prize.

5. After all of the tabs on the card have been pulled and the respective amounts paid by the several persons pulling the tabs, the individual circulating the card remits the total amount to respondent and receives from him the merchandise, including the watch. The respective articles are distributed by this individual to the persons entitled thereto, the master seal on the pull card is removed to ascertain which of the persons receives the watch, and the watch delivered to such person. For his compensation the individual circulating the pull card receives an article of merchandise selected by him from a designated group.

6. In addition to the circular and pull card just described, respondent has used a device known as a push card. This card contains 36 partially perforated discs, each of which bears a feminine name. Concealed within each disc is a number which is not revealed until the disc has been pushed or separated from the card. Legends on the card read: "No. 1 pays 1¢, No. 9 pays 9¢, No. 28 pays 28¢, all others pay 29¢—None Higher" and "No. 1 and No. 9 receive a handsome fountain pen." Persons pushing the discs pay in accordance with the first of these legends. The card also contains a master seal, concealed beneath which is the name corresponding to one of the names appearing on the discs. The master seal is not broken nor the name beneath it revealed until all of the discs have been pushed. The person who pushes the disc bearing the same name as that under the master seal receives a camera. The other persons pushing discs on the card receive nothing except the persons who push numbers 1 and 9, each of whom receives a

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fountain pen. As in the case of the circular and pull card described above, these push cards are mailed by respondent to members of the public. If a recipient elects to do so, he sells the pushes on the card to other members of the public, collects the money therefor, remits it to respondent, receives the camera and fountain pens and delivers them to the persons who pushed the lucky discs. For his compensation the individual circulating the card also receives a camera.

CONCLUSIONS

It is clear that each of these sales plans contemplates and involves the use of a lottery or game of chance, and that respondent supplies to and places in the hands of others lottery devices for use in the sale of his merchandise. The use by respondent of such sales plans or methods and the sale and distribution of his merchandise to the public through the use thereof is a practice which is violative of an established public policy of the Government of the United States, is to the prejudice of the public, and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Carl Drath, individually and trading as Broadway Gift Company, or trading under any other name, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any 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, push cards or any other devices which are designed or intended to be used in the sale or distribution of respondent's 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.

OPINION OF THE COMMISSION

By KERN, Commissioner:

This matter is before the Commission on consideration of an appeal from the initial decision of the hearing examiner, who has found that respondent has violated Section 5 of the Federal Trade Commission Act by supplying to others, through the channels of

interstate commerce, lottery devices for use in the sale of his merchandise, and has issued an appropriate order to cease and desist.

Respondent distributes two types of lottery device, "pull cards" and "push cards." Their construction and method of operation is fully described in the initial decision, and it will here suffice to say that each type is designed to be used in the sale of merchandise by paid chance. Commission orders condemning the interstate distribution of such devices have been universally sustained on judicial review. *Seymour Sales Co. v. FTC*, 216 F. 2d 633 (D.C. Cir. 1954) and cases cited, *cert. denied*, 348 U.S. 928 (1955); *Wolf v. FTC*, 135 F. 2d 564 (7th Cir. 1943); *Colon v. FTC*, 193 F. 2d 179 (2d Cir. 1952). It is thus well-settled that the practices in which respondent was found to have engaged violate the Federal Trade Commission Act. *United States v. Halseth*, 342 U.S. 277 (1952), which respondent insists holds that the Commission is without jurisdiction in these premises, arose under the postal statutes and did not purport to construe the Federal Trade Commission Act. This is clear from the decisions of those courts which have considered and rejected this same contention. *Seymour Sales Co. v. FTC*, 216 F. 2d 633, 635, footnote 2 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 928 (1955); *U. S. Printing & Novelty Co., Inc. v. FTC*, 204 F. 2d 737 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 830 (1953); *Halseth v. FTC*, not reported, No. 11022, 7th Cir., Sept. 15, 1954, *cert. denied*, 348 U.S. 928 (1955); *Maltz v. FTC*, not reported, No. 11399, 7th Cir., October 12, 1954. There is thus no basis for respondent's contention that the Commission is without jurisdiction over his practices.

Respondent points to Section 9 of the Federal Trade Commission Act which, *inter alia*, provides that—

no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the Commission in obedience to a subpoena issued by it * * *.

He argues that since he testified in response to a Commission subpoena concerning the matters which underlie this proceeding, the quoted statute saves him immune from the proposed order.

A Federal Trade Commission order to cease and desist is injunctive only, forbidding future violations of law but imposing no sanctions for past misconduct. Injunctive relief is not a "penalty" or a "forfeiture." *Bowles v. Misle*, 64 F. Supp. 835, 838 (Neb. 1946). Proceedings to collect civil penalties for the disobedience of Commission orders are brought in United States District Courts

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and must be based on independent evidence of misconduct occurring subsequently to issuance of the order to cease and desist. The immunity clause is therefore inapplicable to respondent. *Standard Distributors, Inc. v. FTC*, 211 F. 2d 7, 14 (2d Cir. 1954). *Lee v. CAB*, 225 F. 2d 950 (D.C. Cir. 1955), relied on by respondent in this regard, is not in point.

Upon consideration of the entire record herein we hold that the hearing examiner's findings are supported by substantial evidence and fully warrant the order that he has proposed. Accordingly, respondent's appeal is denied and the initial decision of the hearing examiner is affirmed. Appropriate order will be entered.

Commissioners Mason and Secrest did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having rendered its decision denying respondent's appeal and affirming the initial decision:

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Commissioners Mason and Secrest not participating.

Decision

IN THE MATTER OF

WILLIAM E. BROWN ET AL. DOING BUSINESS AS
THE DIOPTRON COMPANY ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6349. Complaint, May 6, 1955—Decision, Feb. 18, 1956*

Order—consented to by respondent distributors—requiring two individual manufacturers located in Milwaukee and the corporate seller which was their exclusive distributor in the New England area, to cease representing falsely in advertising matter of general circulation that their fly trap and baiting fluid designated respectively as "Big Stinky Fly Trap" would eliminate flies, prevent any possibility of disease caused by flies, and prevent polio; and

Dismissing the allegation that respondent manufacturers advertised falsely that the fly trap "was nationally approved for use for the Boy Scouts", since the representation was substantially true.

Mr. Michael J. Vitale for the Commission.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint against the above-named respondents on May 6, 1955, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act. Said complaint charges that respondents William E. Brown and John R. Seeger, copartners, doing business as The Dioptron Company, in Milwaukee, Wisconsin, for several years have been engaged in the manufacture and sale of a fly trap and baiting fluid designated respectively as "Big Stinky Fly Trap" and "Big Stinky Control Fluid" to distributors located throughout the several states, one of such distributors being the respondent Joseph Breck & Sons Corporation which had the exclusive distributorship for said products in the New England area. It is further alleged that in the course and conduct of its business, the respondent Joseph Breck & Sons Corporation made certain statements and claims in advertising matter which were alleged to be false, deceptive and misleading and that respondents William E. Brown and John R. Seeger furnished the material to said Joseph Breck & Sons Corporation which was used by said corporation in