

Decision

IN THE MATTER OF
MORSE SALES, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 6613. Complaint, Aug. 20, 1956—Decision, Aug. 22, 1957

Order requiring sellers in Chicago to cease selling and distributing electrical appliances, housewares, and other articles of merchandise by means of push cards and supplying push cards for use in such sale.

Mr. William A. Somers for the Commission.

Berkson & Spitzer, by *Mr. Jerome Berkson*, of Chicago, Ill., for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

THE PROCEEDING

On August 20, 1956, complaint herein was issued against respondents charging them with unfair acts and practices in commerce in violation of the Federal Trade Commission Act by selling merchandise in commerce by means of games of chance, gift enterprises or lottery schemes. The individual respondent was alleged to control and direct the policies of the corporate respondent. The answers of the respondents admit corporate existence and description, the officer-ship of the individual respondent, deny his control or direction of the corporate respondent, admit the sale of merchandise in commerce, deny the same to be by chance or lottery, or that respondents have supplied others with the means of conducting games of chance in the sale of merchandise. Three hearings were held resulting in 64 pages of transcript and nine exhibits, all offered in support of the charges. At the first hearing, individual respondent appeared in response to a subpoena, but declined to answer any questions after stating his name and address because his counsel was not present and under the Fifth Amendment to the United States Constitution. Subsequently, at a hearing for the reception of respondents' evidence the individual respondent did appear and testify in his own defense. The taking of evidence was completed January 31, 1957, and subsequently proposed findings and conclusions were filed by counsel supporting the complaint on consideration of which, and the entire record herein, the hearing examiner finds that this proceeding is

brought in a clear and substantial public interest and makes the following.

FINDINGS OF FACT

1. Respondent Morse Sales, Inc., is a corporation organized in December 1955 under the laws of the State of Illinois, and doing business thereunder and since at 1222 West Morse Avenue, Chicago, Illinois. Respondent Leo R. Fox is an individual and president of the corporate respondent, and although he does not own a majority of the stock of the corporate respondent, he directs and controls its policies and sales activities, the remainder of its stock being owned by his niece and his sister.

2. Respondents are now and have been, since January 1956, engaged in the sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of electrical appliances, housewares, and other merchandise.

3. Some of this merchandise is sold over the counter at respondents' place of business and some by mail, pursuant to local advertisements. These sales are not involved in this proceeding.

4. However, to sell and distribute a substantial amount of their merchandise, respondents have had printed circular letters, order blanks, push cards and pictorial pieces which they send to a mailing service. The latter, for a fee, furnishes mailing lists and uses them to mail out broadside across the nation, respondents' mailing pieces, consisting of a circular letter describing respondents' selling plan, a push card, an order blank and a descriptive piece of the merchandise, such as an automatic electric frying pan, electric coffee set, or a "television electric clock lamp." Thus, in the first four months respondents were in business 120,000 mailings were made, from which 450 orders were received.

5. The push card, enclosed with the circulars, etc., in each mailing, which is the key, of course, to the "merchandising plan" and is the typical lottery device, has up to 75 partially perforated discs, each bearing a feminine given name. One of these names is the lucky one, the purchaser of the punch with that name getting the appliance merely by chance and for the price of his punch, which will vary from 1¢ to 39¢ or some other lower amount. The purchasers of the other punches are, of course, out of pocket the cost of their punch and receive nothing. The name of the lucky punch is concealed under a master disc which is not torn off until all the punches are sold. The recipient of respondents' mailing piece who chooses to enter into the plan, and peddles the punches on the push card,

remits the amount received from selling the punches to respondents and thereupon receives from them by parcel post the prize to be delivered to the lucky punch purchaser, and also the same article for himself as compensation for selling the punches.

6. The push card for the automatic electric fry pan, for instance, shows the following:

LUCKY NAME UNDER SEAL RECEIVES N E W <i>F r y a l l</i> [Depiction of Pan] AUTOMATIC ELECTRIC FRY PAN	
[Depiction of 3 ash trays] Nos. 7 and 19 each receive 3 beautiful ASH TRAYS No. 1 pays 1¢ No. 7 pays 7¢ No. 12 pays 12¢ No. 19 pays 19¢ No. 26 pays 26¢ All others pay 39¢ NONE HIGHER [Master Seal]	Nothing like it! You'll love your Fryall at first sight. Prepares an entire meal with ease—saves you loads of time and work! You cook and serve the most delicious meals right at your table with this amazing Fryall. 110-120 volt A.C. operation. Easy washing like any quality electrical appliance. Complete with High Dome, Self-basting cover and 6-foot heavy duty cord. FULL 1 YEAR GUARANTEE! PUSH OUT WITH PENCIL

The reverse side of the card bears the feminine name of each punch with a line to write in the name of the person purchasing the punch.

7. 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, and 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 paid for each chance or push.

8. 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

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sales plans or methods involved in the sale of all of said merchandise by means of said other push cards are the same as that hereinabove described, varying only in detail as to the merchandise distributed and the prices of chances and the number of chances on each card.

9. 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 plan hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their merchandise and the sales 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.

10. The sale of merchandise to the purchasing public in the manner above alleged 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.

11. 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 constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.

12. The aforesaid acts and practices of respondents as herein 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.

CONCLUSION

Respondents' sale of push cards contemplates and inevitably involves the use of a lottery or game of chance, and the placing by respondents in the hands of others, lottery devices for use in the sales of his merchandise. Such a merchandising operation is violative of the established public policy of the Government of the United States, is to the prejudice of the public and constitutes unfair acts or practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Morse Sales, Inc., a corporation, its officers, agents, employees or representatives, and Leo R. Fox, individually and as an officer thereof, his agents, employees or representatives, 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 lottery devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of respondents' 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 GWYNNE, Chairman:

The complaint, filed under the Federal Trade Commission Act, charges respondents with selling merchandise in commerce by means of games of chance, gift enterprises or lottery schemes. After a hearing, the initial decision and order was filed directing respondents to cease and desist from:

1. Supplying to, or placing in the hands of others pull cards, push cards, or any other lottery devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of respondents' 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.

The appeal of respondents was presented by written briefs without oral argument.

Respondent Morse Sales, Inc. is a corporation located in Chicago, Illinois, and engaged in the sale and distribution of electrical appliances, housewares and other merchandise. A portion thereof is distributed by means of push cards. The description of such cards and the method of operation is set out in Paragraph 5 of the initial decision as follows:

5. The push card, enclosed with the circulars, etc., in each mailing, which is the key, of course, to the "merchandising plan" and is the typical lottery device, has up to 75 partially perforated discs, each bearing a feminine given name. One of these names is the lucky one, the purchaser of the punch with that name getting the appliance merely by chance and for the price of his punch,

which will vary from 1¢ to 39¢ or some other lower amount. The purchasers of the other punches are, of course, out of pocket the cost of their punch and receive nothing. The name of the lucky punch is concealed under a master disc which is not torn off until all the punches are sold. The recipient of respondents' mailing piece who chooses to enter into the plan, and peddles the punches on the push card, remits the amount received from selling the punches to respondents and thereupon receives from them by parcel post the prize to be delivered to the lucky punch purchasers, and also the same article for himself as compensation for selling the punches.

Respondents employ a mailing service to distribute these push cards, order blanks and other explanatory and advertising materials to persons whose names and addresses have been secured from brokers who make a business of preparing such lists. The material is sent out on a nationwide basis. The first four months of respondents' operation, 120,000 mailings were made, from which 450 orders were received.

The hearing examiner found that respondents, by placing in the hands of others the means of conducting games of chance and lottery schemes in the sale of respondents' merchandise, were acting contrary to an established public policy of the Federal Government and in violation of the Federal Trade Commission Act. These findings and legal conclusions are clearly supported by the evidence and by many cases decided by the courts, which need not be cited here.

Respondents further argue that the evidence is insufficient to justify the order against Leo R. Fox, individually and as an officer of Morse Sales, Inc.

Respondent Fox was called as a witness by the Commission and refused to testify. Counsel supporting the complaint then introduced the testimony of an investigator for the Commission as to statements made to him by respondent Fox. From this and other evidence, it appears that: respondent Morse Sales, Inc. is a family corporation, of which respondent Fox is president; his niece is secretary and his sister is vice-president; the majority of the stock is held by the niece. Checks are signed by the respondent Fox and the auditor, Mr. Turner. In the early part of 1956, checks were signed by Fox as president and his niece as secretary-treasurer. The investigator for the Commission testified that respondent Fox told him that he (Fox) was the only active officer of the corporation,—a statement not denied by Mr. Fox when he later took the stand.

It seems clear from the evidence that respondent Fox is the dominant influence in the corporation and, in fact, controls its policies and sales activities as found by the hearing examiner.

The findings, conclusions and order of the hearing examiner are adopted as the findings, conclusions and order of the Commission.

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Order

The appeals of respondents are denied and it is directed that an order issue accordingly.

FINAL ORDER

Counsel for the respondents having filed appeal from the initial decision of the hearing examiner and the matter having been heard on briefs, no oral argument having been requested; and the Commission having rendered its decision denying the appeals of the respondents and adopting the initial decision as the decision of the Commission:

It is ordered, That respondents Morse Sales, Inc., a corporation, and Leo R. Fox, individually and as an officer thereof, 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 said initial decision.

IN THE MATTER OF
THE WARSON PRODUCTS CORPORATION ET AL.

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

Docket 6711. Complaint, Jan. 18, 1957—Decision, Aug. 22, 1957

Consent order requiring sellers in St. Louis, Mo., to cease disseminating advertising in newspapers and by radio and television broadcasts which represented falsely that their "Warsene Capsules" were an effective treatment for the pains and discomforts of arthritis, rheumatism, etc.; contained several active ingredients and were made like a doctor's prescription; and were a new and different treatment not theretofore available which would not cause stomach upset.

The individual respondents agreed to the same consent settlement on Jan. 22, 1958, *infra*, p. 949.

Mr. Harold A. Kennedy for the Commission.

Rogers, Hoge & Hills, by *Mr. Andrew J. Graham* and *Mr. William L. McGuire*, of New York, N.Y., and *Mr. Donald E. Fahey*, of St. Louis, Mo., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on January 18, 1957, charging Respondents with violation of the provisions of the Federal Trade Commission Act by the dissemination of false and misleading advertisements with respect to a drug preparation designated "Warsene Capsules," which Respondents sell and distribute in commerce.

On June 14, 1957, Respondent The Warson Products Corporation, by its president, Theodore E. Caruso; its counsel; and counsel supporting the complaint entered into an Agreement Containing Consent Order To Cease And Desist, which was approved by the Director and the Assistant Director of the Commission's Bureau of Litigation, and thereafter submitted to the Hearing Examiner for consideration.

Respondent The Warson Products Corporation is identified in the agreement as a Missouri corporation, with its office and principal place of business located at Room 1810, 314 North Broadway, St. Louis, Missouri, its location prior to September, 1956, having been 220 North Fourth Street, St. Louis, Missouri.

The agreement specifies that it does not dispose of this proceeding as to Respondents John J. Powers, George R. Williams and Donald E. Fahey individually, and that the order contained therein does