

The Commission having considered the hearing examiner's initial decision, filed on September 24, 1959, wherein the complaint in this proceeding was dismissed, and having determined that said initial decision is appropriate in all respects:

It is ordered. That the aforesaid initial decision be, and it hereby is, adopted as the decision of the Commission.

IN THE MATTER OF

MAX H. GOLDBERG TRADING AS NOVEL COMPANY

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

Docket 7360. Complaint, Jan. 14, 1959—Decision, Nov. 23, 1959

Order requiring a Chicago distributor of dolls, clocks, electric appliances, and other merchandise, to cease furnishing to operators and members of the public, push cards and instructions for their use in selling his merchandise.

Mr. William A. Somers for the Commission.

Frank E. & Arthur Gettleman, of Chicago, Ill., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on January 14, 1959, issued and subsequently served its complaint upon the respondent Max H. Goldberg, trading under the name of Novel Company, charging him with the use of unfair acts and practices in commerce in violation of the provisions of said Act. Respondent filed his answer in due course, whereupon hearings were held before the undersigned hearing examiner upon the issues presented by said complaint and answer. At the close of all evidence proposed findings of fact, conclusions of law, and order, together with reasons therefor, were filed by counsel for respondent and counsel supporting the complaint. Upon consideration of the entire record herein, the hearing examiner makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Max H. Goldberg is an individual trading as Novel Company, with his principal place of business located at 216 West Jackson Boulevard, Chicago, Illinois.

PAR. 2. Respondent is now, and for more than six months last past has been, engaged in the sale and distribution of dolls, clocks, electric appliances and other articles of merchandise and has caused said merchandise, when sold, to be transported from his place of business in Chicago, 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 more than six months last past, a substantial course of trade by respondent in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of his business as described in paragraph 2 hereof, respondent in soliciting the sale of, and in selling and distributing his merchandise, furnishes and has furnished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is offered for sale, sold and distributed to the purchasing public. Among the methods and sales plans adopted and used by respondent, and which is typical of the practices of respondent, is the following:

Respondent distributes, and has 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 and circulars explaining respondent's plan of selling and distributing his merchandise and of allotting it as premiums or prizes to the operators of said push cards, and as prizes to members of the purchasing public who purchase chances or pushes on said cards. One of respondent's said push cards bears 54 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 54 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 disc is pushed or separated 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 under the master seal receives a doll.

Findings

56 F.T.C.

The push card bears the following legend or instructions:

LUCKY NAME UNDER LARGE SEAL RECEIVES THIS

New, Exciting, Glamorous
Million Dollar Doll
Miss T.V. Queen

(Illustrated
by picture
on push card)

SHE IS THE T.V. TOAST
FROM COAST TO COAST

See How beautifully and completely
she is dressed with her attractive red
rayon satin dress. Saran hair can be
washed and set.

A NEW 20-INCH BEAUTY

- Rich, rayon satin dress
- Newest, blonde hair-do
- Soft, lifelike body
- Smart, high fashion shoes

(Illustrated by
picture on push card)

(Illustrated by

Picture on push card)
and her own 3 piece
Dresser Set (NOT A TOY)
Every little girl will love this beau-
tiful dresser set . . . all her own . . .
colorful and well made. Comb, brush
and mirror in smart shape like big
sisters.

She has her
own BRA,
PANTY and
NYLON HOSE

- No. 1 pays 1¢
- No. 9 pays 9¢
- No. 19 pays 19¢
- No. 21 pays 21¢
- No. 24 pays 24¢
- ALL others

pay only 29¢
NONE HIGHER

(Illustrated by
picture on
push card)
Nos. 50, 60, 70
EACH RECEIVE
BALL PEN

WRITE YOUR NAME ON
REVERSE SIDE OPPOSITE
NAME YOU SELECT

(Illustrated
by picture
on push card)
SIMULATED
PEARL
EARRINGS
BRACELET
NECKLACE
and RING

PAR. 4. Sales of respondent's merchandise by means of said push cards are made in accordance with the above described instructions. Said prizes or premiums are allotted to the customers or purchasers in accordance with the above described 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 the merchandise are thus determined wholly by lot or chance.

PAR. 5. Respondent furnishes and has furnished various other push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of his merchandise by means of a game of chance, gift enterprise or lottery scheme. The sales plan or method involved in the sale of said merchandise by means of said other push cards is the same as that hereinabove described, varying in detail only.

PAR. 6. The persons to whom respondent furnishes and has furnished said push cards use the same in selling and distributing respondent's merchandise in accordance with the aforesaid sales plans. Respondent thus supplies to and places in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of his merchandise in accordance with the sales plan hereinabove set forth. The use by respondent of said sales plans or methods in the sale of his 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. 7. 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 respondent and the element of chance involved therein and thereby are induced to buy and sell respondent's merchandise.

CONCLUSION

The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That Max H. Goldberg, individually and trading under the name of Novel Company, or under any other name or names, and his representatives, agents 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 other lottery devices, either with merchandise or sepa-

ately, 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 ANDERSON, *Commissioner*:

The complaint in this matter charges respondent with selling and distributing merchandise by means of lottery schemes in violation of Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondent to cease and desist from the practices found to be unlawful. Respondent has appealed from that decision.

Two arguments are presented in the appeal. The first is that the Commission does not have jurisdiction to prohibit the mailing of push cards in interstate commerce and the second is that the furnishing of push cards to be used in selling merchandise by means of lottery schemes is not contrary to the established public policy of the United States. Both of these arguments have been previously considered and rejected by the Commission and the courts. *Lichtenstein v. Federal Trade Commission*, 194 F. 2d 607 (9th Cir. 1952); *Gay Games v. Federal Trade Commission*, 204 F. 2d 197 (10th Cir. 1953); *Surf Sales Company v. Federal Trade Commission*, 259 F. 2d 744 (7th Cir. 1958); *Bernard Rosten v. Federal Trade Commission*, 263 F. 2d 620 (2nd Cir. 1959). As stated by the Court in *Surf Sales Company, supra*, "The law is now firmly established that the practice of selling goods by means which involve a game of chance, gift enterprise or lottery, including push cards such as we have here, is contrary to the established public policy of the United States and the sale and distribution, in interstate commerce of such devices designed for the purpose of selling merchandise by games of chance or lottery is violative of the Federal Trade Commission Act."

The evidence adduced in this matter establishes beyond question that respondent is engaged in a practice which the Commission and the courts have repeatedly and consistently held to be illegal. In view of the numerous decisions on this point, it is difficult to believe that a respondent can contend seriously that such a practice does not constitute a violation of the Federal Trade Commission Act.

Syllabus

It is noted that in the first paragraph of the initial decision the hearing examiner incorrectly refers to the complaint as charging respondent with the use of deceptive acts and practices in commerce. The initial decision will be modified, therefore, to correct this statement.

Respondent's appeal is denied, and the initial decision will be adopted, as modified, as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the initial decision of the hearing examiner and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and directing modification of the initial decision:

It is ordered, That the initial decision be modified by striking the words "and deceptive" from the fifth line of the first paragraph thereof.

It is further ordered, That the hearing examiner's initial decision as modified hereby be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, Max H. Goldberg, shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist contained in the aforesaid initial decision.